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Attorney Advice and the First Amendment

Renee Newman Knake

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Attorney Advice and the First Amendment

Renee Newman Knake*

Abstract

An attorney's advice for navigating and, when necessary, challenging the law is essential to American democracy. Yet the constitutional protection afforded to this category of speech is not clear; indeed, some question whether it should be protected at all. While legal ethics scholars have addressed attorney speech in other circumstances, none has focused exclusively on the First Amendment protection for attorney advice, particularly in light of the Supreme Court's recent attention to the matter. Nor have constitutional law scholars given this issue the attention it deserves, though they acknowledge that it presents an important and unresolved question within First Amendment jurisprudence.

This Article is the first to offer a detailed analysis of free speech protection for advice rendered by an attorney. Attention to this topic is especially timely given the Supreme Court's recent focus on advice bans in statutes that address bankruptcy abuse and antiterrorism. These cases illustrate important considerations regarding two previously unresolved questions in First Amendment jurisprudence: first, whether legal advice is protected under the First Amendment and second, if so, to what extent may the government constitutionally restrict legal advice.

Part II of the Article reviews the Court's recent opinions on the two advice bans, neither of which directly addressed the First Amendment's application, though both stand as stark examples of the important concerns

* Assistant Professor of Law, Michigan State University College of Law. J.D., The University of Chicago Law School (1999). This Article was presented at the 2010 Law and Society Annual Meeting as part of the Heintz Tribute Panel on the Professional Autonomy of Lawyers and the 2010 International Legal Ethics Conference IV held at Stanford Law School, and I wish to thank participants at both events for their helpful insights. The Article also benefited from comments received at a University of Illinois College of Law faculty workshop in August 2010 and the 2010 Michigan State University Junior Scholars Conference. I am especially grateful to Peter Margulies, Judith Maute, and Geof Stone for detailed comments and suggestions on an early draft as well as to Kristi Bowman, Robert Gordon, Michael Lawrence, Larry Solum, Glen Stasewski, and Ben Walther for thoughtful feedback on this project. Tyler Gaastra, Christopher Iannuzzi, and Carrie Waggoner provided excellent research assistance. Finally, I thank the Michigan State University College of Law for support, including the award of a generous summer research stipend.

at stake when the government legislatively constricts access to legal advice. Part III of the Article reframes attorney speech precedent from other contexts and assesses relevant constitutional theory to support the conclusion that attorney advice deserves strong protection. Part IV reflects on the circumstances in which an attorney's advice may be constitutionally constrained, and concludes with a summary of mechanisms preferable to advice bans for addressing concerns about problematic legal advice.

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I. Introduction

Is the advice an attorney gives to a client protected by the First Amendment?¹ If so, in what circumstances and for what reasons may the government constitutionally restrict legal advice? The Supreme Court has not directly addressed this issue, though legal ethics and First Amendment scholars recognize that these questions raise an important debate.² This Article explores these questions by examining Supreme Court precedent on attorney speech as well as underlying constitutional theory in light of two cases involving federal bans on legal advice taken up by the Court during the 2009 term.³ The Article concludes that the First Amendment protects

1. See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

2. See, e.g., Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 571 (2005) (using the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 to illustrate the constitutional issues that arise in prohibiting attorney advice); see also Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284, 1343 (2005) [hereinafter Volokh, *Speech*] (observing that the Supreme Court "has never squarely confronted" the First Amendment status of "professional advice to clients").

3. See *infra* Part II.A–B (discussing *Milavetz, Gallop & Milavetz, P.A. v. United*

advice rendered by attorneys to their clients, and that legal advice may be constitutionally restricted in only very limited circumstances. As to the precise contours of those circumstances, the Article's conclusion takes up some of the easier and more difficult cases in an effort to spark further discussion and analysis in this area.

Attorneys render advice.⁴ Without the ability to render independent and candid legal advice, attorneys and, importantly, their clients have nothing.⁵ As Professor Stephen Pepper wrote in his seminal article on the lawyer's counseling at the limits of the law:

Our legal system is premised on the assumption that law is intended to be known or knowable, that law is in its nature public information. The "rule of law" as we understand it requires promulgation. . . . And one fundamental, well-understood aspect of the lawyer's role is to be the conduit for that promulgation. In a complex legal environment much law cannot be known and acted upon, cannot function as law, without lawyers to make it accessible to those for whom it is relevant.⁶

An attorney's advice makes law accessible to the client. Yet even greater interests are jeopardized when an attorney's power to provide counsel is impaired by external regulation.⁷ The role of an attorney in navigating and,

States, 130 S. Ct. 1324 (2010), and *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), both involving issues of restrictions on attorney advice).

4. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.")

5. See *id.* (explaining the responsibilities); see also Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 688 (1997) [hereinafter Schauer, *The Speech*] ("As lawyers, speech is our stock in trade [Our speech] is not only central to what the legal system is all about, and not only the product of the law as we know it, but basically the only thing that lawyers and the legal system have."); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1391 (2004) [hereinafter Zacharias, *Lawyers as Gatekeepers*] ("At a minimum, lawyers owe clients information, including information that suggests that the clients' proposed or completed conduct is criminal (or wrongful in other respects). Especially when a client may initially be uninformed, lawyers owe it to the client to identify and explain all the ramifications of particular behavior"); *infra* notes 233–50 and accompanying text (discussing the ethical obligations of attorneys to advise their clients as required by professional conduct rules).

6. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1547–48 (1995).

7. The concept of external regulation includes state and federal legislative control over lawyer conduct. Internal regulation, by contrast, refers to professional conduct rules drafted by the American Bar Association for adoption and enforcement by state courts. For further discussion of the distinction between internal and external regulation of lawyers, see generally Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law*

when necessary, challenging the law is a critical component of American democratic government.⁸ The Supreme Court has long acknowledged the unique purpose of attorney advice where "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."⁹ A necessary predicate to meaningful, effective litigation is the attorney's advice to her client about the client's legal rights and the proposed course of action.

Consider further Alexis de Tocqueville's early observation that attorneys "are the most powerful existing security against the excesses of democracy" given "the authority . . . entrusted to members of the legal profession, and the influence that these individuals exercise in the government."¹⁰ Robert Gordon observes that the republican tradition or virtue "influenc[ing] Tocqueville's view of American lawyers," while now "rather out of fashion," remains a concept that "in fact we cannot do

Practice, 30 OKLA. CITY U. L. REV. 559 (2005).

8. See, e.g., Rakesh K. Anand, *The Role of the Lawyer in the American Democracy*, 77 FORDHAM L. REV. 1611, 1633 (2009) (noting that the lawyer facilitates the changing of beliefs that are no longer vibrant in society); David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 259 (1996) (arguing that "because lawyers are often better positioned than nonlawyers to realize the unfairness or unreasonableness of a law, lawyers often should be among the first . . . to counsel others that it is acceptable to violate or nullify it"); Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 FORDHAM INT'L L.J. 642, 643 (2007) (arguing in the context of national security that when certain conditions are met, "the lawyer for the executive should recommend the action, even if it appears inconsistent with the letter of existing law"); Geoffrey R. Stone, *A Lawyer's Responsibility: Protecting Civil Liberties in Wartime*, 22 WASH. U. J.L. & POL'Y 47, 55 (2006) ("It is the legal profession that is most fundamentally responsible for helping the nation strike the right balance [between national security and civil liberties] and for defending our freedoms."). But see David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 292 (1996) ("By the same token . . . noncompliance by lawyers is likely to have larger negative consequence Given their status as knowledgeable insiders, lawyers have a greater ability to avoid the kinds of checks and balances that either constrain or legitimate law breaking by ordinary citizens.").

9. NAACP v. Button, 371 U.S. 415, 430 (1963); see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 223–24 (1967) (reinforcing that the First Amendment protections established in *Button* extend beyond "political matters of acute social moment" and that "[g]reat secular causes, with small ones, are guarded") (citations omitted); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 185 (2008) ("One might say, then, that what democracy is to political legitimacy at wholesale, adjudication is to political legitimacy at retail.").

10. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 253–54 (Henry Reeve trans., 1838).

without."¹¹ Though Professor Gordon directs his arguments toward supporting a lawyer's independence from her client, this Article contends the same arguments reveal why an attorney's advice must be independent from control by the very institution creating the law.¹² The separation of powers so imperative to American democracy demands nothing less.

Monroe Freedman and Abbe Smith make a similar point about the significance of attorney advice, stating that "people with grievances against one another come to lawyers as an alternative to resorting to physical violence, and society, through the legal system, provides a socially controlled, nonviolent process of dispute resolution. Lawyers play an indispensable part in that constructive social process."¹³ Yet attorney advice informs and sustains the legal system in ways well beyond advocacy and dispute resolution. As Professor Gordon explains:

[L]aw also needs lawyers: agents who communicate the rules through advice to private clients and governments and enable them to organize their businesses and structure their transactions and comply with regulations and tax laws and constitutional limitations; and who can negotiate and if necessary litigate with the state and other private parties when their claims of rights are impaired or disputed.¹⁴

Furthermore, James Fischer concludes that the consequence of legislative control "over lawyer practice may come to erode the ability of lawyers to serve as a bulwark against the aggrandizement of government power vis à vis the individual."¹⁵

11. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 16–17 (1988) [hereinafter Gordon, *The Independence*].

12. See, e.g., *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (rejecting a federal statute that "exclude[d] from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider"); *Hill v. Colorado*, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting) ("Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against.").

13. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 22 (4th ed. 2010).

14. Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 448 (2010); see also FREEDMAN & SMITH, *supra* note 13, at 22 ("Legal regulations and procedures are complicated and rapidly changing; so that sophisticated, experienced agents who know their way around the rule-systems and the courts are generally essential to effective representation within and operation of the system.").

15. James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 97 (2006).

Given the important nature of attorney advice, it may come as a surprise to learn that the First Amendment protection afforded to this category of speech is not clear.¹⁶ Some question whether it should be protected at all.¹⁷ Indeed, most First Amendment doctrine addresses speech intended for public consumption, while legal advice by definition entails communication intended for private consumption by clients, who then control its public dissemination.¹⁸ The Supreme Court has not directly ruled on the matter.

This Article contends that attorney advice warrants First Amendment protection subject to government limitations only in limited circumstances.¹⁹ As even Justice O'Connor in writing for the majority in *Florida Bar v. Went For It, Inc.*²⁰ acknowledged, "[t]here are circumstances in which we will accord speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer."²¹ It is difficult to imagine a matter of legal representation more vital than the advice a lawyer provides to a client.

16. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 772 (1999) ("Despite the century-old recognition of the regulation of professions, we still have . . . no paradigm for the First Amendment rights of attorneys . . . when they communicate with their clients."); see also W. Bradley Wendel, *Free Speech for Lawyers*, 28 HASTINGS CONST. L.Q. 305, 305 (2001) [hereinafter Wendel, *Free Speech*] ("One of the most important unanswered questions in legal ethics is how the constitutional guarantee of freedom of expression ought to apply to the speech of attorneys . . .").

17. *Infra* notes 253–54 and accompanying text.

18. See *infra* Part III.C.3 (addressing the issue of attorney advice being confidential in nature). I credit Peter Margulies for his suggestion in reviewing an early draft of this article that this distinction be acknowledged at the outset, and for pointing out the counter-intuitive cast, at least at first glance, that this may lend to arguments advanced herein.

19. For a similar argument, see Robert Post, KNOWING WHAT WE TALK ABOUT: EXPERTISE, DEMOCRACY, AND THE FIRST AMENDMENT 71 (2010) (unpublished manuscript) (on file with the Washington and Lee Law Review). Robert Post observes that "the First Amendment is triggered because the value of democratic competence is at risk" when legislation "seeks to politically override relevant professional standards of knowledge . . . [or] when it requires professional experts to communicate knowledge that is professionally regarded as false, or when it prohibits professional experts from communicating knowledge that is professionally regarded as true." I am grateful to Robert Post for sharing his unpublished manuscript where he makes a similar argument for First Amendment protection of expert or professional knowledge based upon the value of what he terms "democratic competence," though he would not necessarily go so far as to require strict scrutiny protection.

20. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (upholding a thirty-day ban on attorney direct-mail solicitation targeted to accident victims under the *Central Hudson* test).

21. *Id.* at 634.

A number of legal ethics scholars have addressed attorneys' free speech rights in circumstances such as advertising/solicitation, licensing, statements to the press, and criticism of the judiciary, but none has focused exclusively on the First Amendment protection deserved by an attorney's advice and, correspondingly, a client's right to receive that advice. At most, ethics scholars reference attorney advice in the larger context of professional speech regulation, without a full exploration of the unique obligations attorneys owe their clients or of the special role legal advice plays in furthering the rule of law. Nor have academics in the field of constitutional law given this topic the attention it deserves, though they acknowledge that it presents an important and unresolved question within First Amendment jurisprudence.

Attorney advice largely has been ignored by the legal academy, at least in part, because advice is viewed as conduct—not speech—and because of its inherently private nature.²² It also has not been a primary focus for lawyer ethics or constitutional law scholars, perhaps, because legislative bans on otherwise lawful legal advice seemed unlikely until recent years,²³ particularly given the state courts' traditional role in regulating lawyers.²⁴ In the aftermath of recent congressional bans on legal advice as discussed in Part II, scholars and the public are beginning to take notice and raising questions about the First Amendment protection that attorney advice deserves.²⁵

22. See Volokh, *Speech*, *supra* note 2, at 1284 ("Most lawyers would likely agree that [professional advice] generally should be unprotected, or at least less protected. A common explanation for the Court's lack of attention to these speech restrictions is that the speech is actually conduct, which the First Amendment does not protect.").

23. See Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U. L. REV. 1499, 1560–63 (2010) [hereinafter Knake, *The Supreme Court's*] (noting increased federal and international regulation of attorneys in recent years as a possible reason for significant number of lawyering cases during Supreme Court's 2009 term); see also James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 97–98 (2006) (noting how general consumer protection laws are now being applied to the lawyer-client relationship); Schneyer, *supra* note 7, at 559 (endeavoring to depict the "shifting regulatory environment" of the legal profession); Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as "Service Providers,"* 2008 J. PROF'L LAWYER 189, 194 (2008) (discussing how viewing attorneys as "service providers" creates new opportunities for regulation); Zacharias, *Lawyers as Gatekeepers*, *supra* note 5, at 1389 (making note of reforms to the profession being proposed).

24. See Terry, *supra* note 23, at 205 (noting that the American Bar Association has recently reaffirmed the traditional view that lawyers should be regulated by states' judicial branches).

25. See, e.g., Chemerinsky, *supra* note 2, at 580 (arguing that "[p]reventing lawyers

Two cases taken up by the Court during the 2009 term involved questions about the level of First Amendment protection, if any, warranted for legal advice. The first case, *Milavetz, Gallop & Milavetz, P.A. v. United States (Milavetz)*,²⁶ questioned the constitutionality of a federal statute that prohibits attorneys from offering their clients legal advice regarding the accumulation of debt in contemplation of filing for bankruptcy.²⁷ The second case, *Holder v. Humanitarian Law Project (HLP)*,²⁸ involved federal law that criminalizes material support, including legal advice, given to foreign terrorist organizations even if for lawful, humanitarian purposes.²⁹ These cases offer striking instances of legislative limitations on legal advice as a mechanism for controlling the behavior of those most in need of a lawyer's assistance.

Part II of this Article opens with analysis of the attorney advice bans in *Milavetz* and *HLP*. These cases serve as keen examples for identifying the problematic consequences that potentially may flow from legislative limits on legal advice, though neither directly addressed the First Amendment's application to the advice of attorneys generally. Part III then turns to a reframing of attorney speech precedent from other contexts and an assessment of relevant constitutional theory to support the conclusion that attorney advice deserves strong protection.³⁰ This Part also includes a discussion of attorneys' ethical obligations and professional duties, in an effort to demonstrate that while it may be appropriate to regulate some forms of attorney speech, the narrow category of attorney advice is particularly deserving of protection from unnecessary and unjustified government constraint. Part IV concludes with reflections about the circumstances in which attorney advice may be constitutionally

from giving important, lawful information to their clients cannot be reconciled with the First Amendment").

26. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010).

27. *See id.* at 1329 ("[W]e must . . . consider whether the Act's provisions governing debt relief agencies' advice to clients . . . violate[s] the First Amendment rights of attorneys.").

28. *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2731 (2010).

29. *See id.* at 2717 (discussing the Antiterrorism and Effective Death Penalty Act of 1996).

30. This Article does not attempt a comprehensive review of relevant First Amendment theory, instead highlighting only those components related specifically to understanding whether and how attorney advice should be accorded free speech protection. It is notable, however, that articulating a functional, comprehensive theory of First Amendment protection for attorney speech has proven rather elusive for those who have attempted the endeavor, as they readily admit. *See supra* note 16 and accompanying text (noting how the issue of First Amendment rights of attorneys is still unresolved).

constrained. It is important, at the outset, to be clear about what this Article attempts and what it leaves for another day. The Article is intended to be primarily descriptive in nature. By this I mean that the Article lays out the landscape of constitutional protection for legal advice as it currently exists, at least to the extent such protection can be grounded in Supreme Court precedent. The conclusion, however, is both descriptive and normative, in that this Article reveals ways that the existing landscape indeed supports strong free speech protection for legal advice rendered by an attorney to her client.³¹

II. Recent Legislative Constraints on Attorney Advice

To fully appreciate the concerns raised by legislative constraints on legal advice, it is helpful to begin with recent examples. The *Milavetz* and *HLP* cases illustrate in compelling ways why attorney advice warrants strong First Amendment protection. Both cases involved federal laws—one a bankruptcy statute³² and the other an anti-terrorism statute³³—designed to restrict the nature of advice that attorneys render to their clients and to the public. Though neither opinion directly confronted the question of whether the First Amendment protects attorney advice, both decisions assist in understanding the problematic consequences of legislative limits on legal advice.

A. *Milavetz, Gallop & Milavetz, P.A. v. United States*

It is telling that the Supreme Court's first encounter with a federal ban on attorney advice appeared in a bankruptcy statute. Over fifteen years ago, in writing on the problems inherent in forbidding legal advice about activity prohibited by law while simultaneously expressly contemplated (if not encouraged) by way of the law's enforcement, Professor Pepper observed:

31. One important observation implicit in this Article's premise is the difference a lawyer makes when legal advice is rendered. In a work-in-progress companion piece, *The Difference a Lawyer Makes*, I explore the justifications for and consequences of treating advice about the law from a lawyer differently than from a layperson.

32. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1329 (2010) (involving issues surrounding the Bankruptcy Abuse Prevention and Consumer Protection Act).

33. See *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2731 (2010) (involving issues surrounding the Antiterrorism and Effective Death Penalty Act of 1996).

Perhaps the example of bankruptcy makes the point most forcefully. What is bankruptcy law other than an elaborate set of procedures dealing with both the enforcement and the extinguishment of debt? If discussion and explanation of these procedures and their consequences is out of bounds for the lawyer, bankruptcy law could not function as intended.³⁴

The Court took up this issue during the 2009 term in a case called *Milavetz, Gallop & Milavetz, P.A. v. United States*,³⁵ though the Court was not necessarily persuaded by Professor Pepper's position. The case involved an attorney's constitutional right to give advice and a client's right to receive that advice, and challenged a provision of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).³⁶ Congress enacted the BAPCPA in response to abuse and fraud within the bankruptcy system, targeting both debtors and attorneys in order to thwart such practices, though its enactment was controversial, largely due to the lobbying influences of national consumer credit providers.³⁷ Included in the many changes ushered in by the BAPCPA are regulations applicable to "debt relief agencies," a term that includes attorneys.³⁸ These regulations include a ban on legal guidance about incurring more debt before declaring bankruptcy.³⁹ The BAPCPA establishes significant penalties for attorneys

34. Pepper, *supra* note 6, at 1566.

35. See *Milavetz*, 130 S. Ct. at 1341 (declining to find the BAPCPA's restriction on attorney advice in violation of the First Amendment).

36. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified at 11 U.S.C. § 101 (2006)). The *Milavetz* plaintiffs also challenged a provision of the BAPCPA that required the following disclosure in any advertising by an attorney offering bankruptcy services: "We are a debt relief agency. We help people file for bankruptcy relief under the Bankruptcy Code." 11 U.S.C. § 528(a)(4). The Supreme Court upheld the mandatory disclosure. See *Milavetz*, 130 S. Ct. at 1341-42 (finding the mandatory disclosure appropriate).

37. According to the legislative record, a primary purpose of the BAPCPA is to address "misconduct by attorneys and other professionals" and "abusive practices by consumer debtors who, for example, knowingly load up with credit card purchases or recklessly obtain cash advances and then file for bankruptcy relief." H.R. Rep. No. 109-31, at 5, 15 (2005), reprinted in 2005 U.S.C.C.A.N. 92, 101. But see Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 688-89 (2008) (noting the influence of national consumer credit providers, including the investment of more than \$40 million in lobbying efforts).

38. The BAPCPA defines the term "debt relief agency" as "any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration." 11 U.S.C. § 101(12A).

39. The BAPCPA provides in pertinent part that "[a] debt relief agency shall not—advise an assisted person or prospective assisted person to incur more debt in contemplation of such person filing [for bankruptcy]." 11 U.S.C. § 526 (a)(4).

who violate this advice ban, including civil damages and enforcement actions by government officials.⁴⁰

The *Milavetz* plaintiffs, including two lawyers, their law firm, and two clients, argued that the BAPCPA ban prevents lawful advice, such as recommending the refinance of a home mortgage before filing for bankruptcy to take advantage of a lower interest rate or to extend the time period for paying off the loan.⁴¹ As a content-based limitation on speech, the plaintiffs maintained that the statutory restriction be struck down under the First Amendment.⁴² Moreover, they claimed that the congressional ban undermines an attorney's responsibility to render competent, independent, and candid advice.⁴³ In defense, the Government suggested that the regulation merely forbids unlawful advice, for example, counseling a client to take out new loans with the intent to abuse the process knowing that the debt soon will be wiped clean.⁴⁴ The only advice that Congress intended to ban, according to the Government, is advice designed to subvert the bankruptcy law.⁴⁵ A divided panel of the Eighth Circuit held that the advice ban was "unconstitutionally overbroad"⁴⁶ in that it prohibited not only unlawful advice (as the government maintained) but also "advice constituting prudent prebankruptcy planning that is not an attempt to

40. *See id.* § 526(c)(3) (listing various penalties for violations of the section).

41. *See Milavetz*, 130 S. Ct. at 1338 n.6 (mentioning a hypothetical posited by the plaintiffs regarding advice to refinance a mortgage or purchase a reliable car prior to filing for bankruptcy).

42. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 792 (8th Cir. 2008) ("Plaintiffs assert that the prohibition against advising an assisted person or prospective assisted person to incur more debt in contemplation of bankruptcy violates the First Amendment."). Plaintiffs argued that the restriction should be viewed under strict scrutiny, which requires the government to demonstrate a compelling interest in regulating the speech at issue and that the least restrictive means possible are employed. *Id.*

43. *Id.*

44. *See id.* at 793 (summarizing the Government's interpretation of the section). The court observed:

According to the government, [this section] should be interpreted as merely preventing an attorney from advising [a debtor-client] to take on more debt in contemplation of bankruptcy when the incurrence of such debt is done with the intent to manipulate the bankruptcy system, engage in abusive conduct, or take unfair advantage of the bankruptcy discharge.

Id.

45. *See id.* (summarizing the Government's position that the statute is only meant to cover advice to take on more debt in anticipation of bankruptcy, thereby taking advantage of the bankruptcy system).

46. *Id.* at 788.

circumvent, abuse, or undermine the bankruptcy laws."⁴⁷ The Eighth Circuit agreed with the plaintiffs' arguments about the advice ban's prohibition on prudent (and lawful) prebankruptcy planning, as well as the impact of the ban in "prevent[ing] attorneys from fulfilling their duty to clients to give them appropriate and beneficial advice."⁴⁸

A unanimous Supreme Court reversed the Eighth Circuit's finding of overbreadth with respect to the advice ban.⁴⁹ The Court chose a more limited construction of the statute, without "adopt[ing] precisely the view the Government advocates."⁵⁰ The Court read the statute to cover "a specific type of misconduct designed to manipulate the protections of the bankruptcy system" and concluded that the statute prohibits an attorney only from "advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose."⁵¹

To justify a narrowed construction of the bankruptcy advice ban, the Court referred to requirements of American Bar Association Model Rule of Professional Conduct (ABA Model Rule) 1.2(d), which prohibits an attorney from endorsing or participating in a client's crime or fraud, but at the same time allows an attorney to advise a client, when appropriate, about legal strategies for testing or challenging a law.⁵² In doing so, the Court in essence determined that the federal statute could not be construed to conflict with the Model Rule.⁵³ Not only did this narrowing construction give a rule promulgated by a private organization of lawyers an interesting amount of authority for ascertaining the meaning of a federal law enacted by Congress, but this construction renders the federal law largely

47. *Id.* at 793.

48. *Id.*

49. *See* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1334 (2010) ("Characterizing the statute as a broad, content-based restriction on attorney-client communications that is not adequately tailored . . . the Eighth Circuit found the rule substantially overbroad . . . [W]e reject that conclusion.").

50. *Id.* at 1335.

51. *Id.* at 1336.

52. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2010) ("A lawyer shall not counsel a client to engage . . . in conduct that the lawyer knows is criminal or fraudulent, but . . . may discuss the legal consequences of any proposed course of conduct . . . and may counsel or assist a client . . . to determine the validity, scope, meaning or application of the law.").

53. *See Milavetz*, 130 S. Ct. at 1337–38 (citing Model Rule 1.2(d) as support for its conclusion that § 526(a)(4) does not prohibit "frank discussion" between lawyers and clients about incurring additional debt).

unnecessary.⁵⁴ The Court declined, notably, to "consider whether the statute so construed withstands First Amendment scrutiny."⁵⁵

B. Holder v. Humanitarian Law Project

The Supreme Court considered another federal constraint on attorney advice in *Holder v. Humanitarian Law Project*.⁵⁶ The Antiterrorism and Effective Death Penalty Act (AEDPA)⁵⁷ and its amendment, the Intelligence Reform and Terrorism Prevention Act (IRTPA),⁵⁸ criminalize "expert advice or assistance"⁵⁹ provided to a group classified as "a foreign terrorist organization."⁶⁰ This is the case even if the expert advice or

54. See *id.* at 1337 ("In context, § 526(a)(4) is best understood to provide an *additional safeguard* against the practice of loading up on debt prior to filing." (emphasis added)). Indeed, Model Rule 1.2 has been the basis for attorney discipline in bankruptcy advice-giving. See, e.g., Attorney Grievance Comm'n v. Culver, 849 A.2d 423, 443–44 (Md. 2004) (disbarring attorney in part based upon Maryland Rule of Professional Conduct 1.2 violation for advising client to obtain credit card loans in order to pay legal fees with the intent of having the debt discharged in bankruptcy and giving the client a credit card application, assisting in the fraud). For further discussion of Model Rule 1.2, see *infra* notes 298–316 and accompanying text.

55. *Milavetz*, 130 S. Ct. at 1339. Justice Sotomayor noted, however, that "it is hard to see how a rule that narrowly prohibits an attorney from affirmatively advising a client to commit this type of abusive pre-filing conduct could chill attorney speech or inhibit the attorney-client relationship." *Id.* at 1338.

56. See *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2723 (2010) (rejecting plaintiffs' claims that a statute criminalizing the provision of "material support" to terrorist organizations was unconstitutionally vague or restrictive of plaintiffs' right of free speech and association).

57. See Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250 (1996) (codified as amended at 18 U.S.C. § 2339 (2006)) (criminalizing the knowing provision of "material support or resources" to foreign terrorist organizations); see also Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 805(a)(2)(b), 115 Stat. 272, 377 (adding "expert advice or assistance" to the list of acts criminalized by AEDPA).

58. See Intelligence Reform and Terrorism Prevention Act (IRTPA), Pub. L. No. 108-458, § 6603, 2004 Stat. 3762, 3763 (codified at 18 U.S.C. § 2339 (2006)) (amending AEDPA by including "services" in the definition of "material support or resources" and requiring that a person have knowledge that his or her support was going to a terrorist organization).

59. *Id.* § 2339(A)(b)(2)–(3).

60. See 8 U.S.C. § 1189 (2006) (authorizing the Secretary of State to designate a group as a foreign terrorist organization). At the time of this writing, forty-six organizations were designated as foreign terrorist organizations. See Terrorist Exclusion List, OFFICE FOR THE COORDINATOR OF COUNTERTERRORISM, U.S. DEP'T OF STATE, <http://www.>

assistance relates to activities that are lawful and nonviolent.⁶¹ The term "expert advice or assistance" is defined by statute as "scientific, technical, or other specialized knowledge,"⁶² and this is understood to include legal knowledge.⁶³

The AEDPA/IRTPA prohibition on "expert advice or assistance" was attacked by the human rights organization Humanitarian Law Project, retired administrative law judge Ralph Fertig,⁶⁴ physician Nagalingam Jeyalingam, and several nonprofit organizations serving persons of Tamil descent.⁶⁵ The plaintiffs desired to provide expert advice and assistance to the Kurdistan Workers' Party and the Liberation Tigers of Tamil Eelam for "only the lawful, nonviolent purposes of those groups."⁶⁶ This advice and assistance included "offer[ing] legal expertise in negotiating peace agreements,"⁶⁷ though, significantly, the plaintiffs sought the right to provide this support *outside* the lawyer-client relationship. Nevertheless, at oral argument before the Ninth Circuit, the Government contended that amicus curiae advocacy (and presumably advice) on behalf of a terrorist organization would violate the statute.⁶⁸ The Ninth Circuit held that the

state.gov/s/ct/rls/other/des/123085.htm (last visited Mar. 27, 2011) (identifying designated terrorist organizations) (on file with the Washington and Lee Law Review).

61. See *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 930 (9th Cir. 2009) (noting Government attorneys conceded at oral argument that filing an amicus brief on behalf of a terrorist organization would amount to giving "expert advice or assistance").

62. 8 U.S.C. § 2339A(b)(3) (2006).

63. See *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2720 (2010) ("Plaintiffs' activities [providing legal advice] fall comfortably within the scope of 'expert advice or assistance.'").

64. Judge Fertig was not seeking to provide legal advice in the context of an attorney-client relationship with a foreign terrorist organization. Rather, the plaintiffs sought a right to offer advice or assistance generally and, significantly, presented no argument related to the unique attributes of advice offered in the attorney-client relationship. See Brief for Plaintiffs-Appellees at 49, *Humanitarian Law Project v. Gonzales*, 552 F.3d 916 (9th Cir. 2006) (Nos. 05-56753, 05-56846), 2006 WL 2427533 ("Plaintiffs seek to provide advice and assistance on tsunami relief work, human rights advocacy, peacemaking, economic development, Tamil language, literature, cultural heritage, and history, among other things.").

65. See *HLP*, 130 S. Ct. at 2712 (listing the plaintiffs in *HLP*).

66. *Id.* The plaintiffs challenged several additional provisions of the AEDPA/IRTPA not relevant here, and also raised due process concerns under the Fifth Amendment—all important aspects of the case but beyond the scope of this article. *Id.* at 2718–22.

67. *Humanitarian Law Project v. Mukasey*, 552 F.3d 916, 921 n.1 (9th Cir. 2009).

68. See *id.* at 930 ("At oral argument, the government stated that filing an amicus brief in support of a foreign terrorist organization would violate [the] prohibition against providing 'expert advice or assistance.'"). It should be noted that others argued such activity would not fall within the AEDPA/IRTPA prohibition's ambit. See, e.g., Brief of Amicus

"other specialized knowledge" portion of the prohibition on "expert advice or assistance" language was void for vagueness as applied because it "cover[s] constitutionally protected advocacy."⁶⁹ The court did not directly address the question of the statute's application to legal advice.

The Supreme Court reversed the Ninth Circuit's finding of vagueness in a 6-3 decision authored by Chief Justice Roberts.⁷⁰ The Court declined, however, to adopt "the extreme positions" taken by both sides.⁷¹ Attorney General Holder had argued that the provisions are not vague and, "in any event . . . regulate[] conduct, not speech, and do[] not violate the First Amendment."⁷² The Humanitarian Law Project plaintiffs had argued that the proposed assistance involved political speech—for example, speech "to lobby Congress, to teach and advise on human rights, to promote peaceful resolution of political disputes, and to advocate for the human rights of minority populations"—that deserves "the First Amendment's highest

Curiae Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues In Support of Petitioners at 26 n.9, *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 5070069 ("The government was incorrect in arguing below that submitting an amicus brief on a DFTO's behalf would be prohibited as 'expert advice or assistance' under the statute."). The amici curiae also took the position that legal advice is allowed under federal regulations implementing the statute. *See id.* at 26 ("Regulations [under 31 C.F.R. § 597.505 (a) (2010)] allow an attorney to provide advice to a DFTO on compliance with applicable United States law."). Nevertheless, at oral argument before the Supreme Court, Solicitor General Elena Kagan maintained the Government's position that the statute bars advocacy such as the filing of an amicus brief, though she did observe that "to the extent there is any constitutional claim that they would be entitled to representation, . . . the government believes that the statute should be read so as not to include that." Transcript of Oral Argument at 46–47, 51, *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89). Presumably, the related legal advice rendered to the amicus client also would be barred. This article leaves for another day a detailed analysis of the constitutionality of 31 C.F.R. § 597.50. For a discussion of federal regulations requiring attorneys to obtain a license before assisting a client, see generally Jill M. Troxel, Note, *Office of Foreign Assets Control Regulations: Making Attorneys Choose Between Compliance and the Attorney-Client Relationship*, 24 REV. LITIG. 637 (2009).

69. *Mukasey*, 522 F.3d at 930. The court observed that "[w]hile due process does not require impossible standards of clarity, the requirement for clarity is enhanced when criminal sanctions are at issue or when the statute abuts upon sensitive areas of basic First Amendment freedoms." *Id.* at 928 (citations omitted) (internal quotation marks omitted).

70. *See Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2720 (2010) (rejecting plaintiffs' claims that the language in AEDPA was unconstitutionally vague because "the statutory terms are clear in their application to plaintiffs' proposed conduct," even under the "heightened standard" applied by the Ninth Circuit).

71. *Id.* at 2722.

72. Petition for Writ of Certiorari at 10, *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705 (2010) (Nos. 08-1498, 09-89), 2009 WL 1567496.

protection."⁷³ Instead, Justice Roberts explained, "[t]he law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message."⁷⁴

Applying what Justice Roberts called a "more demanding standard"⁷⁵ of scrutiny—though not necessarily strict scrutiny, as noted by the dissent⁷⁶—the majority upheld the ban as applied to plaintiffs in two narrow circumstances. First, Congress may bar training about the use of humanitarian and international law to facilitate peaceful dispute resolution.⁷⁷ Second, Congress may bar teaching about how to petition various representative bodies like the United Nations.⁷⁸ The Court cloaked the decision in terms of national security,⁷⁹ citing Congress's "specific findings regarding the serious threat posed by international terrorism" and the Executive Branch's conclusion in an affidavit that "the experience and analysis of the U.S. government agencies charged with combating terrorism

73. Opening Brief of Humanitarian Law Project at 23, *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705 (2010) (Nos. 8-1498, 09-89), 2009 WL 3865433.

74. *HLP*, 130 S. Ct. at 2724.

75. *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)).

76. The dissent would have applied strict scrutiny and noted that the majority's formulation appeared to stop short of that standard. *See HLP*, 130 S. Ct. at 2734 (Breyer, J., dissenting) (arguing a proper review would "determine whether the prohibition is justified by a compelling need that cannot be less restrictively accommodated"). Commentators have speculated on whether the majority intended to create a new level of scrutiny when national security or war-on-terrorism concerns are involved. *See, e.g., Eugene Volokh, Humanitarian Law Project and Strict Scrutiny, THE VOLOKH CONSPIRACY*, (June 21, 2010, 1:28 PM), <http://volokh.com/2010/06/21/humanitarian-law-project-and-strict-scrutiny/> (last visited Mar. 27, 2011) (suggesting the Court will uphold as a "compelling interest" under strict scrutiny many content-based restrictions on speech directly or indirectly aiding terrorist organizations, so long as the restriction does not go so far as to criminalize independent advocacy) (on file with the Washington and Lee Law Review).

77. *See HLP*, 130 S. Ct. at 2724 (majority opinion) (concluding § 2339B bars individuals from lending "special skills" or "specialized knowledge" to a DFTO's international legal and diplomatic efforts). It is also possible that engaging in political advocacy on behalf of groups like the Kurds and the Tamil Tigers would violate the law as well, but the majority found that the proposed advocacy was "phrased at such a high level of generality that [the plaintiffs] cannot prevail in this preenforcement challenge." *Id.* at 2722.

78. *See id.* ("[A]dvice on petitioning the United Nations . . . is barred."). The Court found, however, that plaintiffs themselves "may advocate before the United Nations." *Id.* at 2723.

79. *See id.* at 2711 ("Given the sensitive interests in national security and foreign affairs at stake, the political branches have adequately substantiated their determination that prohibiting material support . . . serves the Government's interest in preventing terrorism, even if . . . the support promote[s] only the groups' nonviolent ends.").

strongly support Congress's finding that all contributions to foreign terrorist organizations further their terrorism."⁸⁰ In dicta, the Chief Justice observed that the outcome of *HLP* should not be read as holding that "any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny."⁸¹ He forecasted that "more difficult cases . . . may arise under the statute in the future."⁸² The application of the statute to the advice rendered by an attorney to her client certainly presents one of Chief Justice Roberts's "more difficult cases," and Justice Sotomayor's express reservation in *Milavetz* of any First Amendment application to the bankruptcy ban⁸³ may very well have been made with this in mind.⁸⁴

So it may be that when confronted with the specific question about the degree to which an attorney's legal advice to a foreign terrorist organization is constitutionally banned, the Court will reach a different conclusion. Indeed, under the reasoning of *Milavetz*, the ban in *HLP* must be read consistent with ABA Model Rule 1.2(d), which would permit an attorney's advice about the use of humanitarian and international law to peacefully resolve disputes and advice about how to petition representative bodies like the United Nations.⁸⁵ Until the Court directly addresses the statute's application in the context of the attorney-client relationship, however, the outcome of *HLP* is likely to have a chilling effect on attorney advice, particularly to the extent it relates to facilitating peaceful dispute resolution or petitioning representative bodies like the United Nations.⁸⁶

Like *Milavetz*, the outcome of *HLP* does not provide definitive guidance on the First Amendment's application to attorney advice. But both cases illustrate the serious concerns presented when Congress

80. *Id.* at 2710 (citations omitted).

81. *Id.* at 2730.

82. *Id.*

83. *See* *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1339 (2010) (declining to conduct a full analysis of whether § 526(a)(4) of BAPCPA would "withstand[] First Amendment scrutiny").

84. *See HLP*, 130 S. Ct. at 2716–17 (clarifying that the Court's review did not include legal advice).

85. For further discussion of ABA Model Rule 1.2(d), see *infra* notes 294–312 and accompanying text.

86. *See HLP*, 130 S. Ct. at 2736 (Breyer, J., dissenting) ("It is inordinately difficult to distinguish when speech activity will and when it will not initiate the chain of causation the Court suggests Even were we to find some such line of distinction, its application would seem so inherently uncertain that it would often, perhaps always, 'chill' protected speech").

responds to controversial and high-profile matters (such as bankruptcy abuse and terrorism prevention) with piecemeal bans on legal advice that largely appear to be political responses.⁸⁷ As the Supreme Court observed in an early attorney speech case,

[w]e have . . . repeatedly held that laws which actually affect the exercise of [free speech] rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the [legislature's] competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.⁸⁸

C. Other Constraints on Advice

The outcomes of *Milavetz* and *HLP* hold significant implications not only for individuals and groups seeking guidance about bankruptcy or peace-making activities, but also for those desiring advice about any other area of law where Congress may decide to legislate away the attorney's ability to advise her client and the client's right to receive that advice.⁸⁹ Allowing the bans on attorney advice in the bankruptcy and anti-terrorism statutes to stand makes it more probable that legislative interference in the advice attorneys give to their clients will continue.⁹⁰ In the wake of

87. See, e.g., Geoffrey R. Stone, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 538 (2004) (observing that during wartime "[t]oo often . . . [Congress] has either failed to exercise a check on public hysteria or, in some instances, moved far beyond anything the public demanded").

88. *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

89. See, e.g., Carolyn B. Lamm, *Memo to Washington: Hands Off Lawyers, Piecemeal Federal Laws and Rules Threaten to Undermine State Judicial Branch Regulation of the Profession*, NAT'L L.J., Sept. 21, 2009, at 62 (discussing the consequences of congressional involvement in lawyer regulation and criticizing federal laws that "incorrectly identify lawyers and other professionals" as "creditors" or "debt relief agencies" or "providers of financial products or services" as "interfer[ing] with the states' rights to regulate lawyers and protect consumers of legal services").

90. See, e.g., David L. Hudson, Jr., *A Debt-Defying Act: Courts Say Part of Embattled Bankruptcy Law Violates First Amendment*, J. AMER. BAR ASS'N, Jan. 2009 (explaining the ban). This article quotes Joseph R. Prochaska, immediate-past chair of the Consumer Bankruptcy Committee in the ABA Section of Business Law, as stating that cases like *Milavetz* "could have a spillover outside the bankruptcy context. . . . For example, Congress could apply the same rationale to the tax arena and start to regulate the content of advice that tax attorneys give to clients about lawful ways to minimize tax liabilities." *Id.*; see also Judith L. Maute, *Scrutinizing Lawyer Advertising and Solicitation Rules Under Commercial Speech and Antitrust Doctrine*, 13 HASTINGS CONST. L.Q. 487, 487 (1986) (observing that, until the mid-1980s, "federal intrusions on autonomous self-regulation by state bar associations were rare" and attributing the intervention of federal regulation to "[t]he

Milavetz and *HLP*, future Congressional and state legislative restraint of attorney advice is foreseeable (if not a foregone certainty).⁹¹ Consider, as just one example, the National Defense Authorization for FY2011,⁹² which requires the Department of Defense to "conduct an investigation of the conduct and the practices of lawyers" who represented detainees held at Guantanamo Bay, Cuba and "interfered with the operations of the Department of Defense," among other things.⁹³ Though not an outright advice ban, this provision is likely to have a chilling effect on attorney advice.⁹⁴ Other examples of federal legislative efforts potentially impacting the attorney-client relationship include the Sarbanes-Oxley Act,⁹⁵ federal anti-money laundering statutes,⁹⁶ and the Wall Street Reform and Consumer Protection Act passed by the House of Representatives in December 2009 (though subsequently modified to exclude lawyers, in large part due to efforts by the American Bar Association).⁹⁷ Similar concerns are raised where federal and state law

Supreme Court's decision in *Goldfarb v. Virginia State Bar* . . . [as] signal[ing] the end of this unbridled, autonomous self-regulation").

91. See, e.g., James M. Fischer, *External Control Over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 97 (2006) (discussing increased state and federal legislative control over lawyers and observing that while "[t]o date, legislatures have yet to consistently or significantly intrude into the field of lawyer regulation[,] [i]nroads are . . . visible and once the path is established it becomes ever easier to take the path again").

92. H.R. Res. 5136, 111th Cong. (2010) (enacted).

93. *Id.* § 1037(A).

94. See Steve Vladeck, *The War on Lawyers, Continued* . . . , BALKINIZATION (May 25, 2010), <http://balkin.blogspot.com/2010/05/war-on-lawyers-continued.html> (last visited Mar. 27, 2011) ("Even if this provision doesn't directly constrain the ability of Guantanamo lawyers to advocate on behalf of their clients, the serious chilling effect that it likely will have, especially at the margins, seems to raise the same concerns identified by the *Velazquez* Court.") (on file with the Washington and Lee Law Review).

95. For a discussion of the ways Congress controls lawyers under the Sarbanes-Oxley Act, see Lewis D. Lowenfels et al., *Attorneys as Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. TOL. L. REV. 877, 878, 929 (2006) (observing that "[t]he ushering in of what appears to be a new era of the SEC as an active and enthusiastic proponent of the attorney's 'gatekeeping' role raises serious questions"). Lowenfels also cites evidence that "the sheer number of SEC actions against lawyers" in the wake of the new regulation "has increased dramatically." *Id.*

96. See, e.g., Howard W. Goldstein, *Debate Over Lawyers' Role in Anti-Money Laundering Enforcement*, CORP. COUNS., June 6, 2008, available at <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202421954660> (discussing criminal liability for lawyers compliant in money laundering schemes and attempts to implement reporting requirements for lawyers who suspect their clients of money laundering).

97. See H.R. 4173, 111th Cong. (1st Sess. 2009) (providing the Act); see also Carolyn B. Lamm, *ABA President Lamm Statement re: "Exclusion for the Practice of Law" in "Dodd-Frank Act of 2010,"* (June 26, 2010), <http://www.abanow.org/2010/06/aba-president->

conflict, for example in the case of states authorizing distribution of marijuana for medical purposes while the practice remains illegal under federal law.⁹⁸ Again, while these examples are not explicit bans on legal advice as seen in *Milavetz* or *HLP*, the practical effect of these federal and state laws is to constrain legal advice. Constitutional concerns about these kinds of constraints are addressed more fully below in Part IV.

III. Why Attorney Advice Warrants First Amendment Protection

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁹⁹ This protection is made applicable to the states by the Fourteenth Amendment. The speech of attorneys presents a conundrum for the First Amendment.¹⁰⁰ Kathleen Sullivan identified this dilemma more than a decade ago, yet her description remains apt today:

On the one hand, lawyers are sometimes perceived as classic speakers in public discourse, free of state control and entitled to all the ordinary protections of speech and association available to other speakers. Indeed,

lamm-statement-re-exclusion-for-the-practice-of-law-in-dodd-frank-act-of-2010/ (last visited Mar. 27, 2011) (explaining the new Consumer Financial Protection Bureau established by the Dodd-Frank Act of Wall Street Reform and Consumer Protection Act of 2010 and its effect on attorneys) (on file with the Washington and Lee Law Review). President Lamm notes that the bill creating the Consumer Financial Protection Bureau states that the bureau "may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law." *Id.* For an example of an earlier federal statutory constraint on legal advice, see J. Matthew Miller, Note, *Balancing the Budget on the Backs of America's Elderly—Section 4734 of the Balanced Budget Act: Criminalization of the Attorney's Role as Advisor and Counselor*, 29 U. MEM. L. REV. 165, 197 (1998) (arguing that § 4734 of the Balanced Budget Act of 1997 unconstitutionally prohibited attorneys from counseling elderly clients about legal actions regarding Medicaid issues); see also *Magee v. United States*, 93 F. Supp. 2d 161, 162 (D.R.I. 2000) (recognizing unconstitutionality of Medicaid statute prohibiting certain legal advice); *N.Y. State Bar Ass'n v. Reno*, 999 F. Supp. 710, 716 (N.D.N.Y. 1998) (issuing preliminary injunction based on arguments that Medicaid statute violated attorneys' First Amendment rights to render legal advice).

98. See *infra* notes 308–11 and accompanying text (discussing the example of attorney advice on the issue of medical marijuana).

99. U.S. CONST. amend. I.

100. See, e.g., Note, *Attorneys' Rights Under the Code of Professional Responsibility: Free Speech, Right to Know, and Freedom of Association*, 1977 WASH. U. L.Q. 687, 694–705 (1977) (discussing conflicts between free speech rights and professional obligations of attorneys).

in light of their frequent role as representatives of underdogs and challengers to the state and the status quo, lawyers may be perceived to be entitled to extraordinary speech protections. On the other hand, lawyers are sometimes 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.¹⁰¹

The dichotomy of interests has led, as Brad Wendel concludes, to a body of "decisions by courts considering free speech arguments by lawyers [that] are surprisingly out of touch with the mainstream of constitutional law."¹⁰² Over the years, the Supreme Court has addressed the intersections between attorney regulation and the First Amendment in a number of circumstances such as advertising,¹⁰³ solicitation,¹⁰⁴ statements to the press,¹⁰⁵ bar admission

101. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 569 (1998).

102. Wendel, *Free Speech*, *supra* note 16, at 312. *See generally* Maute, *supra* note 91 (discussing the significance of the Supreme Court's decision to scrutinize anticompetitive regulation of attorney advertising and solicitation under the commercial speech doctrine rather than under antitrust laws). Professor Maute notes that the Court's "case-by-case adjudication" of the post-*Bates* lawyer advertising and solicitation cases, while "allow[ing] the Court to carefully delineate permissible types of regulation, . . . does little to create a cogent system of evaluating all types of commercial speech" and that "this ad hoc approach is creating doctrinal confusion and multiple tiers of scrutiny for commercial and other forms of protected speech." *Id.* at 501–02.

103. *See Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (applying First Amendment commercial speech protection to lawyer advertising); *In re R.M.J.*, 455 U.S. 191, 203–04 (1982) (same); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 100 (1990) (same); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 627 (1985) (holding that disciplinary rules could mandate disclosure regarding payment of costs in advertisement, but that First Amendment protected attorneys so long as the advertisement is truthful and nondeceptive); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1340–41 (2010) (applying *Zauderer* to uphold mandated disclosure in advertising by lawyers for bankruptcy-related services).

104. *See NAACP v. Button*, 371 U.S. 415, 429 (1963) (holding that activities of NAACP were modes of expression and association which were protected by First and Fourteenth Amendments, and Virginia could not prohibit under its power to regulate legal profession as improper solicitation of legal business in violation of Virginia statute and canons of professional ethics); *Bhd. of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 6 (1964) (holding that an injunction restraining brotherhood from maintaining and carrying out plan for advising injured workers to obtain legal advice and for recommending specific lawyers denied members rights guaranteed by First and Fourteenth Amendments); *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (same); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (same); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (same); *In re Primus*, 436 U.S. 412, 434 (1978) (same); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988) (holding that categorical ban on direct-mail solicitation targeting potential clients with specific legal claims violates First Amendment); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (holding that a thirty-day prohibition on direct mail solicitation by lawyers of personal injury or wrongful death clients withstood First Amendment scrutiny).

105. *See Garrison v. Louisiana*, 379 U.S. 64, 73 (1964) (invalidating a Louisiana statute

and licensing,¹⁰⁶ government attorneys,¹⁰⁷ and fee limits.¹⁰⁸ Academics and commentators have taken up these¹⁰⁹ and other free speech

imposing criminal liability for criticism of official conduct of public officials); *see also* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1058 (1991) (extending First Amendment protections to extrajudicial speech by an attorney).

106. *See In re Sawyer*, 360 U.S. 622, 636 (1959) (reversing a suspension order based upon protected speech); *Konigsberg v. State Bar of Ca.*, 366 U.S. 36, 49–52 (1961) (employing a "balancing test" to weigh First Amendment interests against state interests in denying bar membership to applicant for refusing to answer questions about Communist Party affiliation); *In re Anastaplo*, 366 U.S. 82, 89–90 (1961) (same); *Keller v. State Bar*, 496 U.S. 1, 14 (1990) (requiring California state bar to show challenged expenditures made with bar dues "necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal service"); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 166 (1971) (upholding a New York character and fitness questionnaire as constitutionally valid).

107. *See Connick v. Myers*, 461 U.S. 138, 147–48 (1983) (using a balancing test in determining a public employee's rights of free speech); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (same).

108. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 334–35 (1985) (finding no First Amendment violation in federal statute capping fee paid to an attorney representing a veteran before the Veterans Administration).

109. *See, e.g.*, Ben C. Adams, Edward H. Benton, David A. Beyer & Charles H. Coffin, Special Project, *Admission to the Bar: A Constitutional Analysis*, 34 VAND. L. REV. 655, 683–92 (1981) (discussing First Amendment concerns inherent in moral character requirement for bar admission); Stephen A. Bailey, *Fooling Ourselves? An Ethical and Constitutional Analysis of Lawyer-to-Lawyer Advertising*, 10 FLA. COASTAL L. REV. 385, 382–92 (2009) (discussing changes to Florida regulations tightening restrictions on speech between attorneys); Ralph H. Brock, *"This Court Took a Wrong Turn with Bates:" Why the Supreme Court Should Revisit Lawyer Advertising*, 7 FIRST AMENDMENT L. REV. 145, 148 (2009) (discussing how legal advertising may be regulated consistent with the First Amendment); Lonnie T. Brown, Jr., *"May It Please the Camera, . . . I Mean the Court"—an Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83, 94–122 (2004) (discussing First Amendment rights of attorneys in relation to statements to the media); R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, LAW & CONTEMP. PROBS., Autumn 2008, at 67, 71–79 (discussing First Amendment rights of attorneys relating to statements to the media); Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 859–87 (1998) (discussing First Amendment and attorney statements to the press); Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1084–87 (1983) (discussing First Amendment's application to lawyer advertising); Robert Kry, *The Watchman for Truth: Professional Licensing and the First Amendment*, 23 SEATTLE U.L. REV. 885, 891–97 (2002) (discussing constitutional objections to restraints on professional speech based on free speech); Maute, *supra* note 91, at 515–20 (discussing First Amendment's application to lawyer advertising); Ronald D. Rotunda, *Lawyer Advertising and the Philosophical Origins of Commercial Speech Doctrine*, 36 U. RICH. L. REV. 91, 97–99 (2002) (describing the interplay between electronic media regulation relating to advertisements for legal services and First Amendment protections of lawyers' speech); Carla Pratt, *Should a Klansman be a Lawyer? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 867–77 (2003) (discussing First Amendment concerns in moral character requirement for bar admission); Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v.*

considerations for attorneys, some attempting a comprehensive treatment¹¹⁰ with others focusing on narrow topics like criticism of the judiciary,¹¹¹ racist/hate speech,¹¹² whistle-blowing,¹¹³ judicial speech,¹¹⁴

Went For It, Inc., 49 ARK. L. REV. 703, 732–36 (1997) (discussing the implications of free speech restrictions designed to maintain the professionalism of attorneys); Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L. J. 491, 566–70 (1985) (discussing First Amendment concerns in moral character requirement for bar admission); Victor Streib, *Media Misuse: Criminal Lawyer Advertising and Prosecutor Campaigning Under the Guise of the Public's Need to Know*, 34 OHIO N.U. L. REV. 703, 703–04 (2008) (noting several scholars have addressed the issue of free speech in relation to attorneys' statements to the press); John J. Watkins, *Lawyer Advertising, the Electronic Media, and the First Amendment*, 49 ARK. L. REV. 739, 749–61 (1997) (describing the interplay between electronic media regulation relating to advertisements for legal services and First Amendment protections of lawyers' speech); see also Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1637–47 (1996) (discussing the regulation of attorneys' extrajudicial speech to the press without reaching the First Amendment issues).

110. See, e.g., Schauer, *The Speech*, *supra* note 5, at 688 (describing law as a "speech-constituted activity"); Sullivan, *supra* note 101, at 570–80 (discussing the multifarious restrictions on lawyers' speech); Wendel, *Free Speech*, *supra* note 16, at 307 (offering a thorough study of "how the regulation of lawyers' speech fits within the various doctrinal complexities that characterize First Amendment law and within the ethical norms that govern the practice of law").

111. See, e.g., Terri R. Day, *Speak No Evil: Legal Ethics v. the First Amendment*, 32 J. LEGAL PROF. 161, 161 (2008) (noting that "[t]he extent that attorneys may enter the debate [about the role of judges] is controversial"); Lawrence A. Dubin, *Fieger, Civility and the First Amendment: Should the Mouth That Roared Be Silenced?*, 82 U. DET. MERCY L. REV. 377, 396 (2005) (advocating for greater protection of speech criticizing the judiciary); Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L. J. 1567, 1575 (2009) (discussing First Amendment concerns and criticism of the judiciary); Note, *Attorney Discipline and the First Amendment*, 49 N.Y.U. L. REV. 922, 922 (1974) (describing the conflict between an attorney's right of free speech and the judicial interpretation of ethical standards).

112. See, e.g., Andrew Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 785 (1996) (favoring an ethical rule restricting lawyers' speech).

113. See, e.g., Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1250–63 (2009) (discussing concerns present when public and private sector attorneys are not protected for whistleblowing).

114. See, e.g., Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases are Pending*, 28 LOY. L.A. L. REV. 831, 844 (1995) (discussing restraints on judicial speech regarding cases before the court); Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 304 (2003) (noting the First Amendment implications of restricting speech relating to judicial elections but not other elections); Stephen Gillers, "If Elected, I Promise [___]"—*What Should Judicial Candidates Be Allowed to Say*, 35 IND. L. REV. 725, 725 (2002) (discussing First Amendment and judicial speech restraints); Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 730–40 (2003) (discussing the advisability of restricting speech of judicial candidates); Tobin Sparling, *Keeping up Appearances: The Constitutionality of the Model Code of Judicial*

online speech,¹¹⁵ and other related issues.¹¹⁶

Conversely, scant attention has been devoted to the degree of First Amendment protection warranted by the advice from an attorney to her client.¹¹⁷

Conduct's Prohibition of Extrajudicial Speech Creating the Appearance of Bias, 19 GEO. J. LEGAL ETHICS 441, 466–74 (2006) (discussing how restrictions on judicial speech may withstand constitutional scrutiny).

115. See, e.g., Cynthia L. Fountaine, *When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 147, 158–68 (2002) (describing First Amendment limitations on enforcement of bar regulations); James B. Lake, *Speaking Legally and Freely: Lawyers, Web Sites, and the First Amendment*, 58 S.C. L. REV. 871, 879–81 (2007) (concluding the First Amendment protects online speech from onerous regulations); Anthony Ciolli, Note, *Are Blogs Commercial Speech?*, 58 S.C. L. REV. 725, 727–34 (2007) (discussing the difficulty in classifying, and thus regulating, attorney online speech); Justin Krypel, Note, *A New Frontier or Merely a New Medium? An Analysis of the Ethics of Blawgs*, 14 MICH. TELECOMM. & TECH. L. REV. 457, 484–86 (2008) (discussing the propriety of ethical restraints on attorney speech); Rachel C. Lee, Note, *Ex Parte Blogging: The Legal Ethics of Supreme Court Advocacy in the Internet Era*, 61 STAN. L. REV. 1535, 1569–70 (2009) (advocating for greater regulation of online speech by attorneys).

116. See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS 857–909 (8th ed. 2009) (discussing the free speech rights of lawyers and judicial candidates); Jona Goldschmidt, *Constitutional Issues in Courtroom Decorum*, 31 HAM. L. REV. 1, 37–52 (2008) (describing constitutional issues implicated by courtroom restrictions on speech); Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 S.C. L. REV. 253, 256–57 (2003) (discussing whether attorneys have a right in exceptional cases to reveal confidential information); Gary A. Muenneke, *Dances with Wolves: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 585–614 (1992) (examining the legality of state bar association rules that prohibit law firm diversification under the federal antitrust laws and the First Amendment); Christopher J. Peters, *Adjudicative Speech and the First Amendment*, 51 UCLA L. REV. 705, 707–12 (2004) (discussing the constitutionality of restrictions on adjudicative speech, i.e. "speech intended to influence court decisions"); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 62 (1981) ("Unauthorized practice prohibitions plainly implicate first amendment values by restricting both the lay speaker's ability to convey information and the public's opportunities to receive it."); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1053–56 (1995) (discussing ethical implications of speaking out against one's client); Fred Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 644–50 (1990) [hereinafter Zacharias, *Rethinking*] (discussing whether attorneys have a right in exceptional cases to reveal confidential information); Maria Brooke Tusk, Note, *No-Citation Rules as a Prior Restraint on Attorney Speech*, 103 COLUM. L. REV. 1202, 1234 (2003) (concluding no-citation rules are an impermissible restraint on attorney speech).

117. A notable exception is a compelling treatment of constitutional protection for commercial and professional speech by Daniel Halberstam. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 777 (1999) (discussing "the common thread between the Court's approaches to commercial and professional speech in the hope of developing a viable theory for the constitutional analysis of each" and "elaborat[ing] a constitutional approach to both commercial and professional speech based on the social relationship

To be clear, this Article is concerned solely with the advice that is protected by attorney-client privilege (i.e. "a communication made between privileged persons in confidence for the purpose of obtaining or providing legal assistance for the client"¹¹⁸). The Article's coverage also includes advice that might not be privileged but is still within the scope of ABA Model Rule 1.6's protection for confidential information (i.e. "a lawyer shall not reveal information relating to the representation of a client"¹¹⁹).

The Court has not squarely confronted the First Amendment protection for speech of attorneys when they render advice. In the handful of cases where the Court has examined the advice given by professionals, such as physicians and financial advisors, none of the decisions appreciate the special role of attorneys in the American legal system. Those cases do, at least in part, lay the foundation for recognizing legal advice as protected speech (an assumption that seems reasonable not only in light of the discussion below but also given the Roberts Court's recent treatment of bans on advice, as explained above in the discussion of *Milavetz* and *HLP*¹²⁰).

Yet, we should not assume that the Court will necessarily conclude that attorney advice is subject to free speech protection. The questions that necessarily follow, then, are whether legal advice is protected under the First Amendment and, if so, under what circumstances may the government constitutionally restrict advice rendered by an attorney? To answer these questions, the relevant Supreme Court precedent involving attorney speech as well as the free speech value of attorney advice must be assessed.

A. Existing Attorney Speech Precedent Supports Strong Protection for Attorney Advice

A re-examination of existing Supreme Court precedent on attorney speech viewed through the lens of the attorney's advice-giving role

between the interlocutors"). Another developed exploration of limitations on the tax advice from attorneys is found in David Moldenhauer's *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 844 (2006) (examining "First Amendment limitations on the regulation of professional speech in the context of . . . regulations which govern the content and presentation of opinions and other written tax advice").

118. RESTATEMENT OF THE LAW GOVERNING LAWYERS (Third) § 68 (2000).

119. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

120. *See supra* Part III.A–B (discussing recent cases involving attacks on restrictions on attorney advice).

provides strong support for First Amendment protection. Generally speaking, in the situations where the Supreme Court has applied the First Amendment to attorney regulation, strict scrutiny has not been the test utilized. Three notable exceptions are *NAACP v. Button*,¹²¹ *In re Primus*,¹²² and *Legal Services Corp. v. Velazquez*.¹²³ Though none of these cases involved attorney advice overtly, all bear directly on how the Court should apply the First Amendment to legislative restraints on attorney advice.

I. NAACP v. Button

NAACP v. Button is usually thought of as an association or solicitation case, but the case also is about attorney advice.¹²⁴ The Court ruled on only one ground of many named by the NAACP in challenging the Commonwealth of Virginia's restrictions on law practice: "[T]he right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights."¹²⁵ While framed in the context of the First Amendment's protections for association and petition of the government, much of the Court's opinion also implicitly rests upon the free speech clause. The majority held that that the First Amendment protects advice from NAACP attorneys to prospective litigants about seeking legal assistance, notwithstanding Virginia's power to regulate the legal profession and improper solicitation of legal business.¹²⁶

121. See *NAACP v. Button*, 377 U.S. 415, 428–29 (1963) (holding that the legal aid activities of the NAACP were protected by the First and Fourteenth Amendments, and thus Virginia could not prohibit them).

122. See *In re Primus*, 436 U.S. 412, 439 (1978) (holding that the state could not punish solicitation of litigants by letter on behalf of a non-profit organization because the activity was protected by the First Amendment).

123. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (holding that the restriction prohibiting recipients of LSC funds from engaging in representation involving effort to amend or otherwise challenge the validity of existing welfare laws was unconstitutional).

124. See *Button*, 377 U.S. at 429 (addressing First Amendment protection of legal solicitation meant to further political or social good).

125. *Id.* at 428.

126. See *id.* at 438 ("[O]nly a compelling state interest in regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

The dominant concern for the Court was the criminalization of an attorney "who advises [a person] that his legal rights have been infringed."¹²⁷ The statutory restriction at issue risked "the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority."¹²⁸ In making this observation, it made "no difference" to the Court whether a lawyer might actually be prosecuted under the statute: "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes."¹²⁹

The Court also established that legal advice, itself, serves a political function, for "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."¹³⁰ Legal advice is a necessary component of litigation. Finally, the Court dismissed the government's interest in regulating attorney misconduct through such a measure, observing that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."¹³¹

The Court extended the holding of *Button* to situations beyond the civil rights context in *Brotherhood of Railroad Trainmen v. Virginia State Bar*.¹³² There, the Court declared that an injunction prohibiting the Brotherhood from advising injured workers to obtain legal advice violated the First Amendment.¹³³ In *United Mine Workers of America, Dist. 12 v. Illinois State Bar Association*,¹³⁴ the Court again clarified that *Button* was not meant to be limited solely to political litigation, and struck another injunction brought by a state bar organization to prohibit a union from hiring an attorney to advise members in processing workers' compensation

127. *Id.* at 434.

128. *Id.*

129. *Id.* at 435.

130. *Id.* at 429–30 (citations omitted).

131. *Id.* at 439 (citations omitted).

132. *See* *Bhd. of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1, 7 (1964) (holding that a state cannot bar unions from referring injured employees to local attorneys).

133. *See id.* at 7 ("A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest.").

134. *See* *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 221–22 (1967) (holding that a state cannot bar unions from hiring attorneys "on a salary basis to assist its members").

claims.¹³⁵ The Court held "that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights."¹³⁶ Several years later the Court reaffirmed *Button* in *United Transportation Union v. State Bar of Michigan*,¹³⁷ observing that "meaningful access to the courts is a fundamental right within the protection of the First Amendment."¹³⁸ Only by protecting the free speech of attorneys to render advice is "meaningful access" attained.¹³⁹

Button and the union trilogy of cases have been read predominantly in light of their guidance on solicitation of clients by lawyers and their references to the right of association. Monroe Freedman and Abbe Smith extend this reading, observing that the cases "recognized the right of individuals to be represented in lawsuits and to obtain meaningful access to the courts."¹⁴⁰ In particular, they explain, "the Supreme Court has held that the underlying concern of *Button* and the union cases was that the aggrieved receive information regarding their legal rights and the means of effectuating them."¹⁴¹

Button also recognized the important First Amendment free speech values inherent in attorney advice. This is evidenced in the opinion itself, as highlighted above, and also in the way the Court applied *Button* in subsequent opinions both in the union cases and in cases on attorney speech from other contexts. While the First Amendment protection for attorney

135. *See id.* at 223 ("The litigation in question is, of course, not bound up with political matters of acute social moment, as in *Button*, but the First Amendment does not protect speech . . . only to the extent it can be characterized as political."). The Court goes on to state:

Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest.

Id. (citations omitted).

136. *Id.* at 221–22.

137. *See* *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585–86 (1971) (holding that a state cannot restrict unions from assisting their members in obtaining legal services).

138. *Id.* at 585.

139. *See id.* at 585–86 ("[Meaningful access] would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.").

140. *See* FREEDMAN & SMITH, *supra* note 13, at 348 (citations omitted).

141. *Id.* (citations omitted).

advice was not directly at issue in these cases, like *Button*, they offer compelling support.

2. *In re Primus* and *Ohralik v. Ohio State Bar Association*

*In re Primus*¹⁴² and *Ohralik v. Ohio State Bar Association*¹⁴³ are also typically categorized as solicitation cases, but the pair offers substantial insight into the treatment of attorney advice. In *Primus*, the Court struck a state disciplinary rule that infringed on an American Civil Liberties Union lawyer's First Amendment right to "advise[] a layperson of her legal rights and disclose[] in a subsequent letter that free legal assistance is available."¹⁴⁴ The Court held that the state rule did not "withstand the exacting scrutiny applicable to limitations on core First Amendment rights."¹⁴⁵ The very same day, however, the Court upheld a ban on in-person solicitation of accident victims in *Ohralik v. Ohio State Bar Association* notwithstanding similar First Amendment concerns being raised.¹⁴⁶

Seeking to reconcile these decisions, the majority focused on the unique concerns presented by in-person solicitation, i.e., where "the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy."¹⁴⁷ Yet the *Primus* majority glossed over the in-person contact that occurred in that case, i.e., "[a]t the meeting, [the lawyer] advised those present . . . who had been sterilized by Dr. Pierce, of their legal rights and

142. See *In re Primus*, 436 U.S. 412, 439 (1978) (holding that the use of a state disciplinary rule to bar the solicitation of a client by a political association attempting to effectuate political change is an unconstitutional infringement of that organization's First and Fourteenth Amendment rights).

143. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (holding that states "may discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent").

144. *Primus*, 436 U.S. at 414.

145. *Id.* at 432 (quoting *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976)).

146. See *Ohralik*, 436 U.S. at 455–59 (explaining that in-person solicitation deserves a lower "level of appropriate judicial scrutiny" than other forms of speech).

147. *Id.* at 465. Commentators also focus on the pecuniary interests in an effort to reconcile these cases. See, e.g., Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 304–05 (2001) ("The *Button* distinction between protected attorney conduct engaged in to further political interests worthy of First Amendment protection and unprotected conduct of the same type engaged in for pecuniary aims continues to drive the Supreme Court's legal ethics jurisprudence.").

suggested the possibility of a lawsuit."¹⁴⁸ A close comparison of the cases' factual details undermines the in-person solicitation rationale as the basis for the disparate outcomes. Rather, it appears that the Court's focus is less about the physical proximity of solicitation by the lawyer and more about the lawyer's financial interest in the communication. The in-person communication in *Ohralik* clearly involved a business transaction, and any legal advice offered was only incidental to the goal of securing a new client at best, if not mere bait to enable the transaction. The in-person communication in *Primus*, by contrast, involved pure legal advice without the attachment of the lawyer's financial interest (though the dissent suggested that the result turned more on a preference for "civil liberties lawyers" over "ambulance chasers"¹⁴⁹).

Another way to square the cases is to consider what they have to say about attorney advice. On the one hand, the majority in *Primus* drew upon the holding of *Button* to reach its result: "Whatever the precise limits of the holding in *Button*, the Court at least found constitutionally protected the activities of . . . lawyers in advising [about] constitutional rights . . ." ¹⁵⁰ (And we know from the Court's holding in *United Mine Workers* that this extends to attorney advice beyond the enforcement of constitutional rights.¹⁵¹) On the other hand, the focus in *Ohralik* was on the lawyer's financial interest in obtaining a new client, an activity that according to the Court "has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant harm to the prospective client."¹⁵²

The Court viewed *Ohralik*'s speech as "a business transaction" whereby the lawyer solicits remunerative employment, not the offering of advice about potential legal rights,¹⁵³ and rejected *Ohralik*'s contention that his solicitation should be protected because he also provided "the solicited individual with information about his or her legal rights and remedies."¹⁵⁴

148. *In re Primus*, 436 U.S. 412, 416 (1978).

149. *Id.* at 440 (Rehnquist, J., dissenting).

150. *Id.* at 425 n.6 (majority opinion) (citations omitted).

151. *See supra* notes 132–39 and accompanying text (discussing the Court's extension of *Button*).

152. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 454 (1978). A financial interest in the delivery of legal services ought not, however, in and of itself render the speech unprotected by the First Amendment. *See generally* MARTIN H. REDISH, *MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY* (2001).

153. *See id.* at 457 ("In-person solicitation by a lawyer of remunerative employment is a business transaction . . .").

154. *Id.* at 458.

Notably, the disciplinary rule at issue in *Ohralik* did not prohibit a lawyer from offering unsolicited legal advice; instead, it "merely prohibited him from using the information as bait with which to obtain an agreement to represent [clients] for a fee."¹⁵⁵ Thus the divergent outcomes can be reconciled by viewing *Primus* as a case about the free speech value of rendering advice (warranting a high level of protection) and *Ohralik* as a case about the free speech value of landing a new client (warranting lesser protection in the Court's view).¹⁵⁶

3. Legal Services Corp. v. Velazquez

Like *Button* and *Primus*, *Legal Services Corp. v. Velazquez* is not commonly understood as an attorney advice case, but the holding goes to the very heart of First Amendment protection for legal advice.¹⁵⁷ Here, a 5-4 majority struck a federal restriction—in essence a ban on legal advice—that prevented attorneys for the Legal Services Corporation (LSC) (a congressionally created nonprofit organization providing legal assistance in civil matters) from challenging the validity of a state or federal statute.¹⁵⁸

155. *Id.*

156. One might question whether the Court's view of *Ohralik*'s speech as a business transaction justifies lesser free speech protection. *See, e.g., REDISH, supra* note 152, at 232 ("To restrict the expressive use of money, or the use of expression for the purpose of making money, dramatically reduces the flow of information and opinion that forms the lifeblood of democracy. Hence, such restriction contravenes core values served by the First Amendment's guarantee of free expression."). I offer this reading of *Primus* and *Ohralik* here to emphasize the Court's protection of advice in *Primus* even when it involves concerns that might be associated with in-person solicitation. Elsewhere I argue, however, that the delivery of legal services should not lose strong constitutional protection simply because the delivery is attached to a financial transaction. *See* Renee Newman Knake, *Democratizing the Delivery of Legal Services: On the First Amendment Rights of Corporations and Individuals* (MSU Legal Studies Research Paper No. 09-08), available at <http://ssrn.com/abstract=1800258>.

157. *See* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (holding that the federal government's prohibition against challenging the validity of welfare laws, by attorneys working for a congressionally-created legal aid organization, is an unconstitutional violation of the First Amendment).

158. *See id.* at 536-37 ("[T]he restriction . . . prohibits legal representation funded by recipients of LSC moneys if the representation involves an effort to amend or otherwise challenge existing welfare law."). Justices Kennedy, Breyer, Ginsburg, Stevens, and Souter formed the majority. *Id.* at 536. Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justices O'Connor and Thomas joined. *Id.* at 549. The particular restriction under dispute "prevent[ed] an attorney from arguing to a court that a . . . state or federal statute by its terms or in its application is violative of the United States Constitution." *Id.* at 537. Other Legal Services Corporation restrictions on lobbying, class actions, attorney's fees, and solicitation have been upheld in the lower courts. *Cf.* *Legal Aid Servs.*

Under the challenged restriction, the LSC attorneys were required to cease representation immediately if a question about a statute's validity arose, whether "during initial attorney-client consultations or in the midst of litigation proceedings."¹⁵⁹

Justice Kennedy's majority opinion raised several concerns about this predicament. First, he observed that the legislative restriction prevented attorneys not only from advising clients, but also from advising the court about "serious questions of statutory validity."¹⁶⁰ Such an arrangement, he wrote, "is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case."¹⁶¹ Second, a ban on "the analysis of certain legal issues" in effect "prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."¹⁶² Third, the arrangement, he observed, "insulate[s] the Government's laws from judicial inquiry."¹⁶³

Finally, Justice Kennedy expressed concern that, if the legislative restriction was validated by the Court, "there would be lingering doubt whether the truncated representation had resulted in . . . full advice to the client."¹⁶⁴ As a consequence both "[t]he courts and the public" would be left "to question the adequacy and fairness of professional representations when the attorney . . . avoided all reference to questions of [the banned advice]."¹⁶⁵ In recognizing the importance of "an informed, independent bar,"¹⁶⁶ he further noted that "[w]e must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."¹⁶⁷ Legislative restrictions on attorney advice risk doing exactly that.¹⁶⁸

of *Or. v. Legal Servs. Corp.*, 608 F.3d 1084, 1087 (9th Cir. 2010) (upholding "restrictions on lobbying, soliciting clients, and participating in class actions").

159. *Velazquez*, 531 U.S. at 545.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 546.

164. *Id.*

165. *Id.*

166. *Id.* at 545.

167. *Id.* at 548; *see also* *Hill v. Colorado*, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting) ("Laws punishing speech which protests the lawfulness or morality of the government's own policy are the essence of the tyrannical power the First Amendment guards against.").

168. *See supra* Part III.A–B for a discussion of the *Milavetz* and *HLP* cases.

Reading *Button*, *Primus*, and *Velazquez* together, some commentators suggest that the Court robustly protected the speech at issue in these cases because it was political in nature,¹⁶⁹ others emphasize the individual right to hear information.¹⁷⁰ Yet each of these justifications has counterpoints among the Court's jurisprudence. For example, there are cases involving attorney speech where the Court has denied strict protection for what several members of the Court considered political speech¹⁷¹ and elevated other interests over the individual's right to hear.¹⁷²

A unifying characteristic among these cases that has not been explored in the literature, however, is the degree of advice-giving involved. As this Article documents, when an attorney's advice was at risk of being silenced, the Court consistently chose an outcome to avoid suppression of the advice. The foregoing discussion demonstrates how past precedent offers ample support for strong First Amendment protection of legal advice.

B. The Right to Petition and Other Constitutional Protections

While not a focus of this Article, it is important to note briefly that the Free Speech Clause of the First Amendment is not the only source for constitutional protection of legal advice. Indeed, in the earlier discussion of *Button* and other cases we see how the right to assemble as well as due process concerns conflate to support access to legal advice.¹⁷³ Further, as

169. See, e.g., FREEDMAN & SMITH, *supra* note 13, at 350 (suggesting that the Court gives "the highest level of constitutional protection for advertisement or solicitation where the lawyer is using litigation as a form of political expression").

170. See, e.g., Moldenhauer, *supra* note 117, at 894 (identifying a "hearer-centered" approach to analyzing professional speech in First Amendment theory which seeks to ensure the recipient "receives information that enhances his ability to make an informed and autonomous choice").

171. See *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that the First Amendment rights of assistant district attorney discharged for circulation of questionnaire regarding office conditions to co-workers were not violated); see also *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (holding that First Amendment rights of district attorney retaliated against for pointing out misrepresentations in a court affidavit were not violated).

172. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (upholding ban on in-person solicitation for pecuniary gain); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995) (holding that the Florida Bar's thirty-day prohibition on direct mail solicitation by lawyers of personal injury or wrongful death clients does not violate the First Amendment's protection of commercial speech).

173. I am grateful to Robert Gordon and Peter Margulies for their suggestions that I consider the due process concerns when access is denied to legal advice, a topic beyond the

noted at the outset of Part III, the First Amendment protects more than speech; it protects "the right to petition Government for a redress of grievances."¹⁷⁴ This component of the First Amendment offers additional authority for constitutional protection of legal advice. An attorney's advice and assistance in petitioning for a redress of grievances is imperative, if not essential. As the Supreme Court held in *Thomas v. Collins*,¹⁷⁵ the "grievances for redress of which the right of petition was insured . . . are not solely religious or political ones. And the right[] of free speech . . . [is] not confined to any field of human interest."¹⁷⁶ These additional components of the First Amendment endorse a broad free speech protection for legal advice.

Beyond the First Amendment, fundamental separation-of-powers principles are threatened when the legislature prohibits a lawyer from offering advice about a law that the legislature itself enacts.¹⁷⁷ This is particularly problematic where a minority is unable to obtain redress through the ballot box (as in *Button*¹⁷⁸), where a statutory challenge is a necessary component of obtaining the client's objectives (as in *Velazquez*¹⁷⁹), or in the context of resistance litigation,¹⁸⁰ cause

scope of this Article but one deserving of attention that I intend to explore in future work. For further discussion, see *infra* notes 184–85 and accompanying text (noting due process concerns when legal advice is restricted).

174. U.S. CONST. amend. I.

175. See *Thomas v. Collins*, 323 U.S. 516, 531 (1945) (holding that a Texas statute violated the United Auto Workers Union president's rights to free speech and free assembly when it placed restrictions on his right to solicit membership).

176. *Id.* It is worth noting the importance of attorney advice in this case: "Upon receiving [a restraining order], Thomas consulted his attorneys and determined to go ahead with the meeting [in Texas] as planned. He did so because he regarded the law and the citation as a restraint upon free speech . . ." *Id.* at 522. Thomas was arrested for speaking at the meeting, but ultimately vindicated before the Supreme Court. *Id.* at 523.

177. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546 (2001) (finding a statute that would "insulate the Government's laws from judicial inquiry" to be "inconsistent with accepted separation-of-powers principles").

178. See *NAACP v. Button*, 371 U.S. 415, 434 (1963) (finding that the statute at issue risked committing "the gravest danger of smothering all discussion looking to the eventual institution of litigation on behalf of the rights of members of an unpopular minority").

179. See *Velazquez*, 531 U.S. at 546 (finding that prohibiting attorneys from questioning the validity of a statute would lead to "lingering doubt whether the truncated representation had resulted in complete analysis of the case, full advice to the client, and proper presentation to the court").

180. See generally Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725 (2010) (addressing the lawyer's role in a manifestly unjust procedural regime).

lawyering,¹⁸¹ and civil disobedience.¹⁸² Likewise, federalism issues are raised when Congress regulates lawyer advice, an area traditionally left to state court control.¹⁸³ Due process concerns also are compromised:

More than 40 years ago the Court recognized a due process right to retained counsel in civil proceedings It requires no expansion of this well-established principle to hold that just as [the government] may not arbitrarily prohibit retained counsel's presence in a courtroom, so too *it may not arbitrarily prohibit or punish good-faith advice given by retained counsel.* The "right to be heard by counsel" is frustrated . . . by preventing counsel . . . from giving good-faith professional advice to his client.¹⁸⁴

These constitutional grounds establish additional important sources of protection for legal advice while simultaneously buttressing the free speech interests in legal advice, as explored more fully below.¹⁸⁵

C. The Free Speech Value of Advice

Sources of free speech value often are found in the autonomy of the speaker or the marketplace of ideas.¹⁸⁶ The value of attorney advice, however, lies beyond the autonomy of the attorney and beyond the marketplace of ideas (at least directly, since attorney advice is inherently

181. See generally John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space and Poverty*, 67 *FORDHAM L. REV.* 1927, 1931 (1999) (examining the nature of representing inner-city poor, or cause lawyering, and arguing that "effective representation must collaborate with these clients not only to represent them, but also to represent their place and communities").

182. See generally Judith A. McMorrow, *Civil Disobedience and the Lawyer's Obligation to the Law*, 48 *WASH. & LEE L. REV.* 139, 139 (1991) ("Because the lawyer plays a significant role in the shaping of the law and benefits materially from and has special knowledge of the law, . . . the lawyer has special obligations both to uphold the law and to strive to make the law just.").

183. See, e.g., Schneyer, *supra* note 7, at 569 ("Although the recent growth in federal regulation reflects deep skepticism in some quarters about the efficacy of state regulation, they are not readily ceding authority to Washington, either. [States] continue, often with ABA support, to resist federal 'intrusion.'" (citations omitted)).

184. *Maness v. Meyers*, 419 U.S. 449, 471–72 (1975) (Stewart, J., concurring) (emphasis added).

185. These additional constitutional protections for legal advice deserve further attention, and I hope to take up their bearing on the advice rendered by attorneys in a subsequent article.

186. See, e.g., Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 *U. ILL. L. REV.* 939, 973–74 (2007) (discussing sources of First Amendment values).

private in nature until it manifests in advocacy for the client or is made public by the client, at which point the advice may very well impact the marketplace of ideas or public deliberation¹⁸⁷). Thus for similar reasons that Robert Post cites to dismiss these sources in ascribing First Amendment value to the speech of physicians, these justifications, alone, seem inadequate to support special protection of attorney advice.¹⁸⁸ Instead, the free speech value of legal advice can be located in at least three distinct yet overlapping sources: (1) the inherently political function of advice about the law; (2) the professional identity of an attorney and the rights of a client; and (3) the unique relationship formed between an attorney and her client. Each of these sources is taken up in turn below.

1. Political, Democratic, and Public Interests

One way to think about free speech protection for attorney advice is to consider the political or democratic attributes. Interpreted broadly, advice about the law is political speech because the law is necessarily the result of a political process, whether legislative or at common law.¹⁸⁹ To the extent advice leads to adjudication, it is similarly valuable as political speech.¹⁹⁰ This conception of political speech, of course, may be well beyond that contemplated by philosopher Alexander Meikeljohn, credited with establishing the modern understanding of First Amendment political speech, even after he expanded his classification to include speech about

187. See, e.g., Frederick Schauer, "Private" Speech and the "Private" Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 238 (1979) [hereinafter Schauer, "Private"] ("One of the values of freedom of speech is its function in helping to correct and challenge accepted beliefs. This is a value that obtains under both the self-government and market-place-of-ideas arguments." (citations omitted)).

188. Post, *supra* note 186, at 973–74.

189. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931) ("The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to . . . security of the Republic, is a fundamental principle of our constitutional system."); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (noting that a major purpose of the First Amendment is to protect the free discussion of governmental affairs).

190. See, e.g., Peters, *supra* note 116, at 712 (observing that "[a]djudication and politics are alike in at least two obvious ways: both produce decisions that bind people, and both, at least paradigmatically, are processes of government" and noting that "both adjudication and political decisionmaking in our democracy rely on the same democratic value—participation—to provide legitimacy").

education, philosophy, social science, literature, and the arts.¹⁹¹ Under Cass Sunstein's approach, speech is to be treated as political "when it is both intended and received as a contribution to public deliberation about some issue."¹⁹² He acknowledges, however, that this definition "leaves many questions unanswered."¹⁹³

One of Professor Sunstein's unanswered questions, it seems, is whether attorney advice necessarily must be excluded from his political speech theory simply because it does not immediately contribute to public deliberation.¹⁹⁴ Inevitably legal advice leads to matters of public interest, whether in the form of something as limited as a negotiated contract between private parties or as sweeping as a civil rights enforcement decree. That it does not occur instantly ought not to devalue the ultimate political contribution made by an attorney's advice about the law. Indeed, Professor Sunstein goes on to argue, in grounding his approach "for the Madisonian conception of free speech," that "[g]overnment is rightly distrusted when it is regulating speech that might harm its own interests."¹⁹⁵ Legislative bans on attorney advice about laws the government enacts warrant a similar kind of distrust. Similarly, Vincent Blasi's "checking value" offers another rationale for protecting legal advice, at least to the extent such advice can "serve in checking the abuse of power by public officials."¹⁹⁶

Criticizing both Alexander Meiklejohn's and Robert Post's theories of democratic free speech, Martin Redish and Abby Mollen propose that "a valid democratic theory of the First Amendment must protect all speech that allows individuals to discover their personal needs, interests and goals—in government and society at large—and to advocate and vote accordingly."¹⁹⁷ While they do not focus specifically on the role of attorney

191. See generally ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (The Law Book Exch. 2004) (1948) (considering the freedom of speech which is guaranteed by the Constitution).

192. Sunstein, *supra* note 168, at 130 (emphasis omitted).

193. *Id.* at 132.

194. See *id.* (noting that "political speech was thought to form the core of the free speech principle" but that "[t]his does not mean that all other speech was entirely excluded; but it does mean that the framers' principal fear was government censorship of political speech").

195. *Id.* at 132, 134.

196. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. 521, 527.

197. Martin H. Redish & Abby 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, 1307 (2009).

advice within their theory, Redish and Mollen do contend that the First Amendment must protect "all lawful advocacy."¹⁹⁸ Yet, an attorney's advice surely is the very kind of speech they contemplate that "allows individuals to discover their personal needs, interests and goals."¹⁹⁹

In addition to finding sources of political value in attorney advice from First Amendment doctrine, the political and democratic value of attorney advice also is a recurrent theme found in the Supreme Court's attorney speech precedent. For example, as mentioned in the earlier discussion of *Button* and its progeny, the Court has long recognized the political function of attorney advice where "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts."²⁰⁰

The Preamble to the Model Rules further elucidates the political attributes of attorney advice. For example, the Preamble explains that "[t]he legal profession is largely self-governing . . . [and] is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement."²⁰¹ As such, "self-regulation also helps maintain the legal profession's independence from government domination."²⁰² This is critical because "[a]n independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice."²⁰³

The political or democratic value of advice rendered by attorneys is reflected in First Amendment theory,²⁰⁴ Supreme Court precedent,²⁰⁵ and professional conduct rules.²⁰⁶ Another important source of free speech

198. *Id.* at 1367.

199. *Id.* at 1307.

200. *NAACP v. Button*, 371 U.S. 415, 429 (1963) (citations omitted); *see also* DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 171–211 (2008) (discussing lawyerly fidelity and political legitimacy). Markovits remarks: "One might say, then, that what democracy is to political legitimacy at wholesale, adjudication is to political legitimacy at retail." *Id.* at 185.

201. MODEL RULES OF PROF'L CONDUCT, pmb1. 10 (2010).

202. *Id.* at pmb1. 11.

203. *Id.*

204. *See supra* notes 189–96 and accompanying text (discussing Alexander Micklejohn's, Cass Sunstein's, and Vincent Blasi's theories of political speech).

205. *See supra* Part IV.A (discussing three Supreme Court cases: *NAACP v. Button*, *In re Primus*, and *Legal Services Corporation v. Velazquez*).

206. *See supra* note 201 and accompanying text (discussing the Preamble to the ABA Model Rules of Professional Conduct).

value for legal advice is located in the professional identity of the attorney and the rights of the client.

2. *Professional Identity of the Attorney and Rights of the Client*

The First Amendment value in an attorney's professional identity is more than just the individual autonomy of the attorney as a speaker or public citizen, though these values must be acknowledged. An attorney's identity as a member of the legal profession also holds First Amendment significance.²⁰⁷ The rights of clients must be taken into account as well, under what some commentators label the "hearer-centered" theory.²⁰⁸ The Court has observed that under the First Amendment, "the protection afforded is to the communication, to its source and to its recipients both."²⁰⁹ This includes a constitutional "right to receive information and ideas."²¹⁰ In other words, "[t]he First Amendment injury to a lawyer that stems from [an advice ban] directly translates into a First Amendment injury to her client."²¹¹ For example, in the attorney advertising line of cases, the Court repeatedly recognized the legal rights of the targeted recipients of the

207. See, e.g., Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers and the Separation of Powers*, 68 MD. L. REV. 1, 67 (2008) [hereinafter Margulies, *True Believers*] (acknowledging "the lawyer's freedom under the First Amendment to forge a professional identity").

208. See Moldenhauer, *supra* note 117, at 843 & n.2 (noting that there is no consensus among academics on the proper approach to regulating professional speech and citing several advocates of a "hearer-centered" First Amendment theory).

209. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (holding that statutory ban on advertising drug prices for prescription drugs violated the First and Fourteenth Amendments).

210. *Id.* at 757 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972)) (internal quotation marks omitted); see also *State ex rel. Okla. Bar Ass'n v. Porter*, 766 P.2d 958, 967 (Okla. 1988) ("The right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences is crucial, for it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

211. Tusk, *supra* note 116, at 1229. Tusk further remarks:

An attorney speaks at trial or oral argument only for the client When the lawyer speaks in this setting, it is as if the client has spoken the words herself [Thus,] the First Amendment harm is suffered not only by the individual who would have spoken the words, but by the individual for whose benefit the words would have been spoken.

Id. at 1229–30.

speech, the potential clients.²¹² This is true, said the Court, even if the recipient's choice ultimately is undesirable:

To be sure, some citizens, accurately informed of their legal rights, may file lawsuits that ultimately turn out not to be meritorious. But the State is not entitled to prejudge the merits of its citizens' claims by choking off access to information that may be useful to its citizens in deciding whether to press those claims in court.²¹³

Such protection is all the more important when "the regulation would directly inhibit the public's right to receive this information from those who under ordinary circumstances are most calculated to be intimately familiar with this aspect of the government process."²¹⁴ Indeed, attorneys are "most calculated to be intimately familiar" with advice about the law and how it is to be applied to their clients' circumstances.²¹⁵

To consider the value of advice from another angle, as Professor Pepper explains, "law is a public good that is intended to be available for individuals to use in leading their lives This means that a client has a clear interest in, and perhaps even an entitlement to, knowledge of the law that governs her."²¹⁶ He goes so far as to connect the client's interest in legal advice directly with the political and democratic values articulated above:

212. See, e.g., *Va. State Bd. of Pharmacy*, 425 U.S. at 770 (holding unconstitutional a state statute prohibiting pharmacists from advertising prescription drug prices, thus opening the door to First Amendment protection for professional commercial speech). To justify establishing this new protected category, the Court explained: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. Following this case, the Court took up a number of cases extending protection to the commercial speech of attorneys. See *supra* note 104 (listing cases).

213. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 645 n.12 (1985); see also Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 209 (1972) (advancing an approach that would protect the listener—in this case the client—by prohibiting government from banning speech—in this case an attorney's advice—because it might influence the listener). But see *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 334 (1985) (rejecting First Amendment challenge to a cap on attorneys' fees in veterans' benefit cases). In *Walters*, the Court held that a federal law limiting attorneys' fees in veterans' benefit cases to a maximum of ten dollars did not violate the First Amendment because other alternatives were available for "a claimant to make a meaningful presentation" in the claims process. *Id.* at 335. Justice Stevens, dissenting, disagreed noting that in prior cases the Court "necessarily assumed that the individual's right to ask for, and to receive, legal advice from the lawyer of his choice was fully protected by the First Amendment." *Id.* at 368 n.16.

214. *Okla. Bar Ass'n*, 766 P.2d at 967.

215. *Id.*

216. Pepper, *supra* note 6, at 1598–99.

[O]ur democratic constitutional order presumes that persons do have something approaching a "right" to know "the law" that purports to govern them. (The notion of keeping the knowledge from them implies, disturbingly, someone or some institution on high deciding who is to know what about the law.)²¹⁷

The First Amendment value in an attorney's professional identity and the client's right to information about the law is compounded further when one is considering the professional bond formed through the attorney-client relationship.

3. *The Unique Relationship Between the Attorney and the Client*

Another source of free speech value is found in the relationship between the attorney and the client. In noting that the "definition of professional speech is undoubtedly incomplete," Robert Post observes that, in the case of medical professionals, the "First Amendment may apply differently to state regulation of professional speech compared with state regulation of physicians' speech that does not form part of the practice of medicine."²¹⁸ This observation certainly is true for the legal profession as well. Daniel Halberstam defines professional advice as "advice that is sought by a client pertain[ing] to a predefined understanding between the interlocutors about the nature of the ensuing communicative interaction."²¹⁹ He asserts that "[t]he professional is understood to be acting under a commitment to the ethical and intellectual principles governing the profession"²²⁰

For the attorney, these principles are embodied in the ABA Model Rules of Professional Conduct, adopted in some form by every state except California, which follows its own similar set of professional guides.²²¹ Accordingly, says Halberstam, the professional "is not thought of as free to challenge the mode of discourse or the norms of the profession while

217. *Id.* at 1599.

218. Post, *supra* note 186, at 952.

219. Halbertstam, *supra* note 16, at 834.

220. *Id.*

221. See Am. Bar Ass'n, *Model Rules of Professional Conduct Dates of Adoption*, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 27, 2011) (listing the states that have adopted the ABA Model Rules) (on file with the Washington and Lee Law Review).

remaining within the parameters of the professional discussion."²²² He maintains:

[W]hether the relationships are ones of trust, such as those between lawyer and client or doctor and patient, or are merely common material enterprises, such as those between buyers and sellers, their presence triggers a contextual First Amendment review that is specifically centered around the social relation, as opposed to an abstract review such as that traditionally applied to the street-corner speaker.²²³

So it is in more than the attorney's professional identity or the client's free speech rights, alone, where protection for legal advice can be found. Important First Amendment rights are triggered by the attorney-client relationship itself.

A component of this relationship value is revealed in the line of Supreme Court cases on professional speech. The few cases where the Court has considered restrictions on professional speech signal the First Amendment value in the attorney-client relationship, but also reveal important distinctions between the advice of attorneys and the advice of other professionals like pharmacists, financial advisors, and physicians. For example, in *Rust v. Sullivan*,²²⁴ the Court suggested that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation" but declined to resolve the issue. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²²⁵ however, the Court upheld a state statute requiring that doctors provide certain state-mandated information to patients seeking an abortion prior to obtaining their consent.²²⁶ While the Court acknowledged that a physician holds "First Amendment rights not to speak," those rights exist "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."²²⁷

222. Halbertstam, *supra* note 14, at 834.

223. *Id.*

224. *See Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (ruling that a regulation limiting the application of Title X funds to abortion services did not violate the First or Fifth Amendment).

225. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992) (ruling that a state may regulate abortion so long as the regulations do not place an undue burden on the woman's decision).

226. *See id.* at 881–83 (validating that a state requirement of informed consent for an abortion is not an undue burden and falls within a state's health and welfare powers).

227. *Id.* at 884.

Rust and *Casey* have since been read by at least one commentator to support the protection of free speech value in physician advice.²²⁸ Thus in *Conant v. Walters*,²²⁹ the Ninth Circuit upheld a physician's right under the First Amendment to advise seriously ill patients about the use of medical marijuana.²³⁰ To reach this result, the court cited both *Casey* and *Rust* for the principle that "[t]he Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship."²³¹ The Court also noted that "[a]ttorneys have rights to speak freely subject only to the government regulating with 'narrow specificity.'"²³²

Yet, the unique attributes of the attorney-client relationship demand even stronger protection than for other professionals. As the Supreme Court has acknowledged, "[u]nlike a lawyer, [a physician] owes no duty of 'undivided loyalty' to his patients."²³³ The special duties compelled by the attorney-client relationship impart considerable justifications for First Amendment protection. While professional conduct standards do not establish the contours of the First Amendment or, on their own, create a constitutional entitlement, the Supreme Court has looked to rules and guidelines promulgated by the ABA and similar professional organizations when assessing the scope of constitutional rights in other contexts.²³⁴ For

228. See, e.g., Halberstam, *supra* note 16, at 775 (discussing *Rust* and *Casey*). Halberstam notes that:

The *Rust* majority's recognition, at least in principle, of the protected status of physician-patient communications, comports with the Court's judgment elsewhere in the legal and medical contexts that professionals play a special role in assisting individuals in the exercise of personal autonomy and the vindication of basic rights. This conclusion, however, counsels against the simple deduction from the lead opinion in *Casey* that professional speech is generally entitled to only "minimal" or "reduced" protection under the First Amendment. Reading *Rust* and *Casey* together, then, suggests that professional speech is subject to a more complicated balance of First Amendment protection.

Id.

229. See *Conant v. Walters*, 309 F.3d 629, 639 (2002) (ruling that a federal policy prohibiting a physician from discussing marijuana as a treatment was not sufficiently narrow to survive First Amendment scrutiny), *cert. denied*, 540 U.S. 946 (2003).

230. *Id.* at 632 (affirming the lower court's injunction against enforcing the federal policy because it was a violation of the First Amendment).

231. *Id.* at 636 (citations omitted).

232. *Id.* at 637 (citing *NAACP v. Button*, 371 U.S. 415, 433, 438-39 (1963)).

233. *Polk Cnty. v. Dodson*, 454 U.S. 312, 320 (1981).

234. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (referencing the ABA standards as a guide to what is reasonable representation in the context of a challenge to effective assistance of counsel under the Sixth Amendment); *cf. Nix v. Whiteside*, 475 U.S.

example, recently in *Padilla v. Kentucky*,²³⁵ the Supreme Court relied upon guidelines from the ABA and others to rule in a 7-2 decision that a criminal defendant has a Sixth Amendment right to be advised by her attorney about the deportation consequences of a guilty plea.²³⁶ Applying the first prong of *Strickland v. Washington*'s²³⁷ test for ineffective assistance of counsel—"whether counsel's representation fell below an objective standard of reasonableness"²³⁸—Justice Stevens explained that this inquiry "is necessarily linked to the practice and expectations of the legal community" or "prevailing professional norms."²³⁹

To determine the norms entitled to constitutional protection, the *Padilla* Court relied upon ABA standards.²⁴⁰ Likewise, in the *Milavetz* opinion, the Court found that the bankruptcy advice ban's validity hinged upon interpreting it narrowly in conformance with Model Rule 1.2(d).²⁴¹ Thus, an appreciation of the ABA standards is important not only because

157, 165 (1986) (looking to the Model Rules for guidance but cautioning that "[w]hen examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct . . ."); see also Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 146 (2002) (explaining how *Button* extended First Amendment protection to "test case litigation strategies that the NAACP's first national legal committee had handled half a century before as a matter of an implicitly shared, scarcely articulated, informal professional norm").

235. See *Padilla*, 130 S. Ct. at 1478 (concluding that "constitutionally competent counsel would have advised [Padilla] that his conviction for drug distribution made him subject to automatic deportation").

236. *Id.* at 1482. Commentators have called this decision "an extraordinary expansion of the Sixth Amendment rights of criminal defendants." Gabriel J. Chin & Margaret Colgate Love, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction* 1 (Ariz. Legal Studies, Discussion Paper No. 10-16, 2010), available at <http://www.ssrn.com/abstract=1591264>.

237. See *Strickland v. Washington*, 466 U.S. 668, 700 (1984) (ruling that a defendant who has not proven either the "prejudice or performance components of an ineffectiveness inquiry" will fail to succeed on an ineffective assistance of counsel claim).

238. *Id.* at 688.

239. *Padilla*, 130 S. Ct. at 1482 (citations omitted).

240. As Justice Stevens explained: "We long have recognized that prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable Although they are only guides, and not inexorable commands, these standards may be valuable measures of the prevailing professional norms of effective representation." *Id.* at 1482 (citations omitted).

241. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1337–38 (2010) (finding that the ban on attorney advice in the BAPCPA was in line with the requirements of Model Rule 1.2(d)). See *supra* notes 49–55 and accompanying text (explaining the ban and the Court's view that a narrow interpretation was essential to upholding it).

they reveal how legislative advice bans compromise the duties and obligations demanded by the attorney-client relationship, but because those standards can offer a meaningful measure of constitutional rights.

Several of the ABA Model Rules bear on the lawyer's obligations when rendering advice to the client. For example, the Model Rules require that an attorney "provide competent representation,"²⁴² "exercise independent professional judgment,"²⁴³ "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation,"²⁴⁴ and "render candid advice."²⁴⁵ The Model Rules also permit a lawyer to "discuss the legal consequences of any proposed course of conduct" and to "counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."²⁴⁶ To fulfill these responsibilities an attorney must explain to a client all potential alternatives and consequences associated with a particular situation. This may demand, in some cases, advice about a course of action designed to challenge the law or government action.²⁴⁷ Finally, the notion that an attorney's advice can be constitutionally criminalized or otherwise banned raises serious concerns within the relationship beyond duties derived from the Model Rules—enforcement would necessitate a breach of attorney-client privilege protections.²⁴⁸

The attorney-client relationship also manifests in a greater social good, in that the private advice ultimately leads to some sort of public action.²⁴⁹

242. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010).

243. *Id.* R. 2.1.

244. *Id.* R. 1.4(b).

245. *Id.* R. 2.1; *see also* Deborah Rhode, *Moral Counseling*, 75 *FORDHAM L. REV.* 1317, 1319 (2006) (stating that "lawyers, as fiduciaries for clients, have a moral obligation to provide informed, independent, and disinterested legal advice" and "as officers of the court and fiduciaries for the legal system, [l]awyers should counsel clients to comply with the purposes and letter of the law").

246. MODEL RULES OF PROF'L CONDUCT R. 1.2.

247. *See, e.g., id.* pmb1. 5 ("While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.").

248. *See, e.g.,* Margulies, *True Believers*, *supra* note 207, at 54 (suggesting that "[t]he threat of criminal prosecution may erect a barrier between lawyer and client, making communication more difficult"). It should also be recognized, however, that if an attorney's advice is in furtherance of an illegal activity, the evidentiary crime-fraud exception may remove the protection for those communications. *See* Peter J. Henning, *Targeting Legal Advice*, 54 *AM. U. L. REV.* 669, 673 (2005) ("[T]he government cannot compel disclosure of privileged communications absent proof that they were made to further a crime or fraud.").

249. *See supra* notes 13–15 and accompanying text (describing the function and effect of attorney advice within larger society).

This is yet another source of free speech value, for "the First Amendment frequently and properly provide[s] protection to other-regarding . . . acts," a quality that Frederick Schauer calls "a surprising feature for a truly individual right," but notes that "a large number of the widely accepted justifications for freedom of speech are about the social and not individual value of granting to individuals an instrumental right to freedom of speech."²⁵⁰ There is free speech value in the professional interaction inherent in the attorney-client relationship. In some ways the political or democratic value of attorney advice is bound up with the individual rights of the attorney and client as well as the value found in the attorney-client relationship itself, but as this discussion has shown, it is important to consider each of these components individually in order to fully appreciate the reasons why the First Amendment should be applied to protect legal advice.

D. Arguments Against Protection Do Not Hold Up

Some may question First Amendment protection for attorney advice even in the face of (and perhaps because of) the arguments advanced thus far in this Article, but on close examination the arguments against protection simply do not hold up. This section addresses the strongest arguments against protection for legal advice and shows how these contentions actually endorse protection rather than undermine it. The arguments include treatment of advice as mere communication incidental to the conduct of practicing law, the private nature of advice, the financial compensation of attorneys for rendering advice, and the notion that law practice is a privilege with special obligations for lawyers as officers of the court.

1. Advice as Communication Incidental to the Practice of Law

A more conservative approach would not extend First Amendment protection to attorney advice, viewing it as communication incidental to the conduct of practicing law. The fact that advice involves speaking, so the argument goes, does not automatically make it protected speech under the First Amendment. This concept of differentiating between speech as

250. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1268 (2005).

speech versus speech as conduct was articulated by the Court in *Giboney v. Empire Storage & Ice Co.*²⁵¹ There the Court observed that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."²⁵²

Justice White's concurrence in *Lowe v. SEC*²⁵³ is often used to support this point related to the legal profession:

These ideas help to locate the point where regulation of a profession leaves off and prohibitions on speech begin. One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession.²⁵⁴

Marginalizing legal advice in this way, however, ignores the attorney-client relationship's unique obligations both to the individual participants but also to the public as a whole when advice manifests into transactions, advocacy, and the like. To use the words of Chief Justice Roberts in writing for the *HLP* majority, categorizing attorney advice as conduct is an "extreme position" that fails to account for the complexities of the situation.²⁵⁵ To

251. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 503 (1949) (holding that a state is not compelled to apply or not apply anti-trade restraint laws to specific groups by the First Amendment).

252. *Id.* at 502.

253. See *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (concluding that the publishers of an investment newsletter fit a statutory exception for "bona fide" publications and thus the publishers did not need to be registered "investment advisors").

254. *Id.* at 232 (White, J., concurring); see also *NAACP v. Button*, 371 U.S. 415, 455 (1963) (Harlan, J., dissenting) ("But litigation, whether or not associated with the attempt to vindicate constitutional rights, is conduct; it is speech plus."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 9 (2000) ("[S]ocial life is full of communicative processes that are routinely regulated without the benefit of First Amendment analysis. . . . [First Amendment] scrutiny is brought to bear only when the regulation of communication affects a constitutional value specifically protected by the First Amendment." (citation omitted)). *But cf.* Post, *supra* note 19, at 40–79 (identifying the constitutional value of democratic competence as trigger for First Amendment scrutiny of regulations on professional expertise or discipline).

255. See *Holder v. Humanitarian Law Project (HLP)*, 130 S. Ct. 2705, 2723 (2010) (specifying that the Government went too far in arguing that advice given to terrorist organizations was "conduct" and thus should not fall under free speech protections). One might also contend that if "political speech does not lose First Amendment protection simply because its source is a corporation," it follows that political speech does not lose First

the extent an attorney's advice is conduct, it also "consists of communicating a message"²⁵⁶ that warrants some level of First Amendment protection, a point on which it seems the entire Roberts Court may very well agree.

As Eugene Volokh writes, "[m]any professional-client relationships—lawyer-client, psychotherapist-patient, accountant-client, even often doctor-patient—mostly consist of speech . . . one asking questions and the other giving advice."²⁵⁷ Yet these relationships are governed by "speech restrictions and speech compulsions that would generally be forbidden in other contexts."²⁵⁸ Professor Volokh contends that "[s]uch restrictions and compulsions may in fact be properly upheld[, as t]here may be something in a professional-client relationship that would justify such extra regulation."²⁵⁹ The question remains, of course, about the level of protection to be applied, a point taken up in Part IV.²⁶⁰ But first a few additional arguments against protection for attorney advice must be resolved.

2. *The Private Nature of Advice*

Another argument against finding free speech value in attorney advice might be based in the inherently private nature of advice. For example, Justice White also observed in *Lowe* that a restriction on advice to the general public might not survive First Amendment scrutiny, but private advice may be regulated.²⁶¹ There are different layers to the public-private divide, including the physical space or location where the speech occurs

Amendment protection simply because it is advice from an attorney. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 900 (2010) (noting that "[t]he identity of the speaker is not decisive in determining whether speech is protected" and that "corporations . . . should [not] be treated differently under the First Amendment simply because such associations are not natural persons" (citations omitted)).

256. *HLP*, 130 S. Ct. at 2724.

257. Eugene Volokh, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS* 306 (3d ed. 2008).

258. *Id.*

259. *Id.* at 307. Volokh also notes: "[T]he Court has never explained (1) exactly what speech restrictions and speech compulsions would be allowed in such a situation, or (2) exactly when this reduced protection would be triggered." *Id.*

260. See *infra* Part IV (arguing that strict scrutiny or a similar test is necessary).

261. See *Lowe v. SEC*, 472 U.S. 181, 228–30 (1985) (White, J., concurring) (noting that regulation of speech is often permissible even if a complete restriction of speech would violate the First Amendment).

(e.g. behind a closed office door versus on a street corner soapbox), the interests involved (e.g. personal interests of the speaker/listener versus public interests), and the audience proximity (e.g. face-to-face between two individuals versus a crowd of people).²⁶² Legal advice, especially if covered by attorney-client privilege, is by definition private on all three fronts—location, interests, and proximity. Attorneys give advice face-to-face, behind a closed office door (figuratively and literally), related to the client's immediate interest.

To dismiss attorney advice from protection because it is private in these ways, however, neglects to account for the ways that private advice ultimately may manifest in the enforcement of rights or interests for the public good (or at least produce valuable public information). This is seen in the earlier discussion about how advice contributes to political life.²⁶³ Moreover, such a position neglects to account for the very text of the First Amendment. On this point the writing of Frederick Schauer is instructive.²⁶⁴ Examining the case *Givhan v. Western Line Consolidated School District*,²⁶⁵ he observed that "the distinction between public speech and private speech is indeed not suggested by the words 'freedom of speech.'"²⁶⁶ As the *Givhan* Court explained:

The First Amendment forbids abridgment of the freedom of speech. Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate

262. Frederick Schauer discusses the "several senses of the public-private distinction" and includes a fourth consideration, the citizen versus the public employee. Schauer, "Private," *supra* note 187, at 242.

263. See *supra* Part III.C.1 (discussing the political, democratic, and public interests served by advice).

264. I am grateful to Geof Stone for his suggestion to consider Frederick Schauer's analysis of *Givhan v. Western Line School District* in developing this argument.

265. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979) (holding that First Amendment "freedom is [not] lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public").

266. Schauer, "Private," *supra* note 187, at 226. Schauer explains:

What the Court did hold in *Givhan* is that private speech is not for that reason alone excluded from either the coverage or the protection of the First Amendment. . . . This implies that the distinction between public speech and private speech is never relevant in First Amendment adjudication, an implication that derives much support from the unqualified nature of the Court's opinion as well as from the Court's statement that the lack of such a distinction is derived directly from the text of the First Amendment.

Id. at 230.

privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.²⁶⁷

Building on the *Givhan* opinion, Professor Schauer maintains that "[t]he public forum is indeed the catalyst for much discussion of public matters. But the public forum is not the end of the process. The culmination of the process is to be found in the discussion among people in much more cloistered settings."²⁶⁸ Applying his argument in this context, one might say that attorney advice is the catalyst for the result that culminates in the public forum, whether in the formation of a contract or the delivery of a court opinion.

Professor Schauer further argues that "[i]t may be one sign of a totalitarian society that people are imprisoned for what they say in public But the ultimate affront to the notion of a free society occurs when people are imprisoned for what they say in their living rooms."²⁶⁹ His point is all the more compelling where attorneys are criminalized or otherwise penalized for their advice: "We are in danger when the informer is one member of a large audience, but we are in greater danger when the informer is our next-door neighbor."²⁷⁰ Perhaps the gravest danger is when the informer is an attorney, the only one who fully understands the legal process.

Justice O'Connor expressed a related but different concern associated with the private-public distinction when evaluating attorney-advertising restrictions, focusing instead on the vulnerabilities of a potential client "when an attorney offers unsolicited advice . . . in a personal encounter."²⁷¹ In her concurrence in *Zauderer*, she writes: "[T]he legal advice accompanying an attorney's pitch for business is not merely apt to be complex and colored by the attorney's personal interest. The advice is also offered outside of public view, and in a setting in which the prospective client's judgment may be more easily intimidated or overpowered."²⁷² It may be that Justice O'Connor is correct about the vulnerable nature of potential clients, at least in some instances, but once the attorney-client relationship is established these concerns presumably are addressed by the

267. *Givhan*, 439 U.S. at 415–16.

268. Schauer, "Private," *supra* note 187, at 236.

269. *Id.*

270. *Id.*

271. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 674 (1985) (O'Connor, J., concurring in part dissenting in part).

272. *Id.*

attorney's professional obligations and duties to her client.²⁷³ O'Connor's concerns stem from what she calls "the exigencies of the marketplace" and her fear that "a rule permitting the use of legal advice in advertisements will encourage lawyers to present that advice most likely to bring potential clients into the office, rather than that advice which it is most in the interest of potential clients to hear."²⁷⁴ Perhaps this concern remains even after the attorney-client relationship is formed, especially to the extent a client's work comprises a large component of the attorney's practice. But professional discipline rules and ethical obligations, rather than a ban on advice, are the most appropriate vehicle for addressing these potential conflicts.²⁷⁵

3. Financial Compensation

Some might dismiss the free speech value of attorney advice because it is a service given to the client in exchange for compensation. But the Court has made "clear . . . that speech does not lose its First Amendment protection because money is spent to project it."²⁷⁶ It is well established that the safeguards for free speech may be applied to "business or economic activity."²⁷⁷ As the Court has explained, "it does not resolve where the line shall be drawn in a particular case merely to urge . . . that an organization for which the rights of free speech and free assembly are claimed is one engaged in business activities or that the individual who leads it in exercising these rights receives compensation for doing so."²⁷⁸ Thus the lawyer's advice, "even though it is . . . sold for profit," remains subject to free speech protection.²⁷⁹

273. See *infra* Part IV.C and accompanying text (discussing solutions other than bans on attorney advice and noting the protection offered by the professional duties required of attorneys).

274. *Zauderer*, 471 U.S. at 678.

275. See *infra* Part IV (discussing the circumstances in which an attorney's advice may be constitutionally constrained and suggesting mechanisms preferable to advice bans for addressing concerns about problematic legal advice).

276. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (citations omitted).

277. *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

278. *Id.* (internal quotations omitted).

279. *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

4. *The Privilege of the Practice and Officers of the Court*

A final argument challenging the free speech value inherent in attorney advice might rest on the notion that attorneys give up certain speech rights in exchange for the privilege of practice, or because of their duties to the court and the public. For example, the Supreme Court has long recognized that "[a] state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar [so long as] any qualification [has] a rational connection with the applicant's fitness or capacity to practice law."²⁸⁰ Lawyers are also "called officers of the court . . . and swear allegiance to support and defend the Constitution of the United States."²⁸¹ Consequently, some commentators suggest that in exchange for the privilege of law practice or due to the obligations as an officer of the court, attorneys surrender certain free speech rights. There are aspects of legal practice where this surrender makes sense and fulfills important duties of the lawyer to her client and to the legal system. For example, professional conduct rules subject attorneys to discipline for revealing client confidences²⁸² or for making prejudicial statements to the press during a judicial proceeding,²⁸³ whereas an ordinary citizen's speech in these circumstances could not be similarly constitutionally constrained. The privilege of practice or officer of the court justifications do not apply in the same fashion, however, when an attorney renders advice. When an attorney offers her client advice, professional independence from the state demands speech autonomy for the attorney in ways that do not apply in the context of licensing, confidentiality, or statements to the press.²⁸⁴

280. *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 239 (1957).

281. *McMorrow*, *supra* note 182, at 139 (citations omitted).

282. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010) (detailing the lawyer's duty of confidentiality and noting the narrow, specific exceptions to confidentiality). For a discussion of confidentiality and free speech concerns, see *Zacharias*, *Rethinking*, *supra* note 116.

283. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6 ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication . . ."). For a discussion of statements to the press and free speech concerns, see *Chermerinsky*, *supra* note 109.

284. *See, e.g., Polk Cnty. v. Dodson*, 454 U.S. 312, 321–22 (1981) ("[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. . . . Implicit in the concept of a guiding hand is the assumption that counsel will be free of state control." (citing *Gideon v. Wainwright*, 372 U.S. 335, 345

In the end, the arguments against protection for legal advice because it is conduct, private, and compensated, or because an attorney surrenders certain speech rights as a condition of practice or officer of the court, fail to deliver a meaningful rationale for denying First Amendment protection to legal advice rendered by attorneys.

Part III answers the first question posed at the outset of this article in the affirmative. The advice from an attorney to her client deserves First Amendment protection, a conclusion supported by Supreme Court precedent on attorney speech and by free speech values found in attorney advice. Part IV turns to the second question, reflecting on when the government may constitutionally limit an attorney's advice to her client. This discussion necessarily demands an inquiry into the content of the advice, especially when legal advice leads to illegal activity.

IV. (Un)Constitutional Restrictions on Attorney Advice

To be sure, the role of attorney advice in questionable or outright illegal client behavior is well-documented and, in fact, is the subject of an entire "subgenre of legal ethics scholarship."²⁸⁵ There is no dispute that sometimes lawyers deliver mistaken,²⁸⁶ immoral,²⁸⁷ or

(1963))).

285. See, e.g., W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1172 (2005) [hereinafter Wendel, *Professionalism*] (noting the "subgenre of legal ethics scholarship that examines the lawyer's responsibilities as a law-interpreter and private law-giver"). See generally Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981); Sanford Levison, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1986). See also articles cited *supra* notes 6, 8, 14, and *infra* notes 287, 288, 324, 326, 339.

286. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that lawyer's misadvice about deportation consequences of guilty plea may be a constitutional violation).

287. See, e.g., Stephen Gillers, *Is Law (Still) an Honorable Profession?*, 19 No. 2 PROF. LAW. 23, 24 (2009) [hereinafter Gillers, *Honorable Profession*] (observing that "Big Tobacco's success in hiding the science that showed that tobacco kills was accomplished with the highly creative help of clever lawyers who managed to bury the information by concocting a theory that the laboratory results were protected by the attorney-client privilege" (citation omitted)); Stephen Gillers, *More About Us: Another Take on the Abusive Use of Legal Ethics Rules*, 11 GEO. J. LEGAL ETHICS 843, 847 (1998) ("Making a farfetched, and I believe legally incorrect, but nonfrivolous claim of attorney-client privilege is not an offense under professional conduct norms. . . . A broader question is whether the tobacco lawyers act unacceptably as human beings. . . ."); see also Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 249 (2006) (discussing the advice of

illegal²⁸⁸ advice. Deborah Rhode and others note that "[l]awyers have been implicated in almost all of the major health, safety, and financial scandals of recent decades."²⁸⁹ Yet a glaring omission exists within the legal advice literature—the question of free speech protection for that advice.

This Article represents one modest endeavor to fill the breach. In light of the values established in Part III and the relevant Supreme Court precedent identified in support of those values, it seems reasonable that restraints on advice should be reviewed under strict scrutiny or a similarly protective test.²⁹⁰ In other words, any constraint must be necessary to further a compelling government interest and narrowly tailored to do so

attorneys in the Catholic Church abuse scandal). Vischer quotes one bishop as observing: "We made terrible mistakes. Because the attorneys said over and over 'Don't talk to the victims, don't go near them,' and here they were victims. I heard victims say 'We would not have taken it to plaintiffs' attorneys had someone just come to us and said 'I'm sorry.'" *Id.*

288. See, e.g., William Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1556 (2008) (describing the bad and sometimes illegal advice given to clients by attorneys in recent years). Simon notes:

On several notorious occasions in recent years, lawyers gave clients bad legal advice because the clients wanted it. Lawyers . . . gave opinions to Enron that . . . were either plainly wrong or plainly irrelevant to the circumstances they addressed. Lawyers . . . gave hundreds of opinions to taxpayers . . . [that] were virtually copies of transactions that the IRS had specifically condemned. John Yoo, Jay Bybee, and other lawyers at the Department of Justice gave opinions to federal officials . . . [that] exaggerated the authority for the conclusions and omitted inconsistent arguments and precedent.

Id. (citations omitted); see also Peter Margulies, *Lawyers' Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism, and Organized Crime*, 58 RUTGERS L. REV. 939, 952–53 (2006) [hereinafter Margulies, *Lawyers' Independence*] (observing that "[l]awyers who knowingly give advice that facilitates client wrongdoing violate a basic rule of legal ethics" and referencing examples of Lynne Stewart's "conviction on charges for lending material support to terrorist activity" and the collusion of tobacco industry lawyers with cigarette manufacturers to conceal adverse health studies).

289. Rhode, *supra* note 245, at 1320. To be clear, this Article's support for strong First Amendment protection of attorney advice is not meant to suggest that lawyers do not have an obligation to follow the law. For a compelling exchange on the lawyer's duty to obey the law, see generally William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255 (1996); David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996). The role of lawyers in client wrongdoing is well-documented by other scholars and thus not a primary focus here.

290. See *supra* notes 75, 126 and accompanying text (noting the test articulated in *Button*, "compelling state interest," as compared to the "more demanding review" required in *HLP*).

using the least restrictive means possible.²⁹¹ The question that follows, of course, is when, if ever, may the government constitutionally restrain legal advice? The remainder of this Article offers a response. To do so, identified below are some of the easier cases and some of the more difficult cases followed by a list of alternatives to advice bans that accomplish a ban's goals without compromising the free speech interests identified in Part III.²⁹²

A. The Easier Cases

Having established the political and other free speech values of legal advice in Supreme Court precedent and First Amendment doctrine, this Article assumes that a strict-scrutiny type of review must be applied to any government constraint on legal advice.²⁹³ Under this assumption, there are at least two restrictions that seem to be clearly constitutional (though debate might exist as to the practical merits of such restrictions, a topic not addressed here²⁹⁴). It should be relatively uncontroversial that the government may enact a ban on attorney advice if it satisfies the standards articulated by the Supreme Court in *Brandenburg v. Ohio*, and that the government may enact a ban on attorney advice directing a client to engage in criminal or fraudulent activity (but not advice *about* criminal or fraudulent activity, an important distinction), provided the ban contains an exception for good faith challenges to the law.

291. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

292. As William H. Simon notes:

Some cases are easy. (Although not everyone will have the same list of easy cases, each person will have some list of cases she finds easy, and some cases will appear on most people's lists). Advice that facilitates violence and large-scale property crime will usually seem clearly inappropriate. Advice that facilitates moderate speeding, misprision of felony, and consensual fornication will usually seem proper, or at least tolerable. Other cases are harder.

Simon, *supra* note 289, at 250.

293. See *supra* note 290 and accompanying text (articulating the standard of review required).

294. See, e.g., Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 U. RICH. L. REV. 287, 289 (1994) (arguing that "lawyer advice should be regulated only by the substantive law and not by the lawyer ethics laws" but not addressing First Amendment issues).

1. Constitutional Restrictions: Ban on Advice to Engage in Brandenburg-Type Activity or to Engage in Criminal or Fraudulent Activity, Provided an Exception Exists for Good Faith Challenges to Law

Under *Brandenburg v. Ohio*²⁹⁵ a ban on legal advice "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" would survive First Amendment scrutiny.²⁹⁶ Similarly, a ban on advice to engage in criminal or fraudulent activity like that found in ABA Model Rule 1.2(d) ought to withstand First Amendment scrutiny provided that an exception exists for good faith challenges to the law.²⁹⁷ Indeed, a version of this restriction currently exists in every state, based on ABA Model Rule 1.2(d),²⁹⁸ which provides:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.²⁹⁹

This rule satisfies the government's concern that an attorney not endorse or participate in a client's crime or fraud. At the same time, the rule allows an attorney to advise a client, when appropriate, about legal strategies for testing or challenging a law.³⁰⁰ The rule also allows an attorney to advise a

295. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that speech can be prohibited if it is "directed at inciting or producing imminent lawless action" and it is "likely to incite or produce such action").

296. *Id.* at 447 (citations omitted).

297. My research resulted in no cases where Model Rule 1.2 was successfully challenged under the First Amendment, and this is confirmed by others engaging in the endeavor. See, e.g., *Hersh v. U.S. ex rel Mukasey*, 553 F.3d 743, 756 (5th Cir. 2008) ("The parties do not cite and this court could not find any case in which [Model Rule 1.2], as adopted by a state, has been challenged as a violation of the First Amendment right to freedom of speech."). This, perhaps, is because others agree that the Rule is constitutional and would survive strict scrutiny. It may also be due to the difficulties of raising such a challenge, as it inevitably would require a waiver of the attorney-client privilege.

298. California is the only exception, though it has adopted a similar provision as part of its professional conduct rules:

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

CAL. RULES OF PROF'L CONDUCT R. 3-210 (1989).

299. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010).

300. See *McMorrow*, *supra* note 182, at 159–61 (explaining how Model Rule 1.2(d)

client *about* any proposed course of conduct, whether criminal, fraudulent, or otherwise.³⁰¹ The Comments³⁰² to the rule recognize that "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."³⁰³ The Comments acknowledge that at times, "determining the validity of interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities."³⁰⁴ In expanding on the allowance for advice about challenging the law under Model Rule 1.2(d), the Comments further provide:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action.³⁰⁵

Professor Pepper explains that, "[t]he line drawn in Rule 1.2(d) is between directing, suggesting, or assisting in criminal or fraudulent conduct, on the one hand, and providing information about the law ('legal consequences') on the other."³⁰⁶ There is a much broader allowance for advice about noncriminal or nonfraudulent activity.³⁰⁷

As an example of the application of Model Rule 1.2, consider the dilemma of medical marijuana.³⁰⁸ A number of states have legalized the

allows for an attorney to counsel a client about engaging in civil disobedience).

301. *See id.* at 160 (stating that "Model Rule 1.2 . . . emphasize[s] the full range of information to which the client is entitled" and that "[t]he fact that the client uses the advice to commit an illegal act" is not enough to make a lawyer complicit).

302. While not authoritative, the "Comments are intended as guides to interpretation" for the Model Rules. MODEL RULES OF PROF'L CONDUCT pmb1. 21.

303. *Id.* R. 1.2 cmt. ¶ 9.

304. *Id.*

305. *Id.*

306. Pepper, *supra* note 6, at 1588.

307. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2010) (stating that, generally, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

308. I am grateful to Michael Traynor, Co-Chair of the American Bar Association Commission on Ethics 20/20, for suggesting this example and including me in discussions about legal advice on medical marijuana, as well as to Allan Hopper, Litigation Director, ACLU Drug Law Reform Project, for sharing his materials presented at the American Bar Association 2010 Annual Meeting.

distribution of marijuana for medicinal purposes, though the practice remains illegal under federal law.³⁰⁹ This raises an important question recently considered by Maine's Professional Ethics Commission: "[W]hether and how an attorney might act in regard to a client whose intention is to engage in conduct which is permitted by state law and which might not, currently, be prosecuted under federal law, but which nonetheless is a federal crime."³¹⁰ Model Rule 1.2(d) bans a lawyer from counseling a client to engage in conduct the lawyer knows is criminal, and in this example, if the Model Rule stopped there, a lawyer would be unable to advise a client to distribute marijuana because it is a federal crime. But the Model Rule does not stop there; it allows advice *about* any proposed course of conduct, and the Rule allows a lawyer to counsel or assist, indeed to give advice to engage, in good faith efforts to determine the validity, scope, meaning, or application of the law that may require disobedience of a statute or regulation.³¹¹ As such, it allows for a broad range of legal advice in the medical marijuana example.

Consider also the advice ban in *Milavetz*.³¹² Given the Supreme Court's narrowed construction and requirement that the ban be read consistent with Model Rule 1.2,³¹³ one might argue that it should withstand First Amendment scrutiny. The Court says as much in the *Milavetz*

309. See Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency*, 15 BERKELEY J. CRIM. L. 163, 163 (2010) ("California . . . became the first state to legalize the medical use of marijuana. Since then fourteen other states have followed suit.").

310. See Maine Board of Overseers of the Bar, Maine Professional Ethics Commission Opinions, *Advising Clients Concerning Maine's Medical Marijuana Act* (July 7, 2010), http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=110134&v=article (last visited Mar. 27, 2011) (urging "case by case" evaluation of whether an attorney's advice on establishing a medical marijuana distribution business constitutes a permitted or forbidden activity based upon Rule 1.2(d), and advising that "participation in this endeavor by an attorney involves a significant degree of risk") (on file with the Washington and Lee Law Review).

311. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 9 (pointing out that in certain circumstances, a lawyer is allowed to advise a client to engage in civil disobedience); see also *Werme's Case*, 839 A.2d 1, 2 (N.H. 2003) (holding that attorney violated 1.2(d) and rejecting First Amendment argument because attorney failed to exercise "good faith options readily available" to challenge a disputed statute and instead counseled the client to violate the statute directly).

312. See *supra* notes 49–52 and accompanying text (describing how the *Milavetz* Court upheld the BAPCPA ban on attorney advice).

313. See *supra* notes 52–55 and accompanying text (stating that the Court used and justified a narrow reading of the BAPCPA ban by implicitly requiring that the ban be read consistent with Model Rule 1.2).

opinion.³¹⁴ The problem, however, is that on the statute's face, there is no reference to Model Rule 1.2 or a similarly explicit allowance for advice about good-faith challenges to the statute.³¹⁵ Without that explicit language, the *Milavetz* ban remains troubling.³¹⁶ Such a statutory ban must be narrowly tailored on its face; a lawyer should not be left to hope that a Court will interpret the ban in light of the ABA Model Rules.

2. *Unconstitutional Restrictions: Ban on Advice to Engage in Legal Activity or to Exercise Political Rights*

Just as it is fairly easy to identify two constitutional restrictions on legal advice, two unconstitutional restrictions seem equally obvious: A ban on advice to engage in legal activity or to exercise political rights. Under the precedent of *Button* and subsequent cases, it is clear that legislative restrictions on an attorney's advice to a client about engaging in lawful activities or exercising political rights cannot withstand First Amendment strict scrutiny.³¹⁷ Thus, the ban at issue in *HLP* should be found unconstitutional to the extent it applies to legal advice from an attorney, especially if the legal advice relates to lawful, political activity.³¹⁸ This is not to say, however, that subjecting attorneys who advise foreign terrorist organizations to a content-neutral licensing scheme is necessarily unconstitutional under the free speech clause, though such a licensing scheme may raise other concerns.³¹⁹

314. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 (2010) ("[B]ecause *Milavetz* challenges the constitutionality of the statute, as narrowed, only on vagueness grounds, we need not further consider whether the statute so construed withstands First Amendment scrutiny.").

315. See generally Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

316. This is the case at least to the extent a question exists about what constitutes the "specific type of misconduct designed to manipulate the protections of the bankruptcy system" that the Court says BAPCPA was intended to target. *Milavetz*, 130 S. Ct. at 1336.

317. See *supra* Part IV.A (describing how *Button* and subsequent Supreme Court cases have indicated that under First Amendment strict scrutiny, bans on attorney advice to clients concerning legal activity or the exercise of political rights will not be upheld).

318. That the ban applies only to those groups designated as foreign terrorist organizations should not make a difference for First Amendment purposes. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. ¶ 5 (2010) ("Legal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval.").

319. For an argument that such a licensing scheme is constitutional and would allow for the delivery of legal advice in the *HLP* case, see Brief of Amicus Curiae Scholars, Attorneys, and Former Public Officials with Experience in Terrorism-Related Issues in

*B. The More Difficult Cases**1. Questionable Advice*

The more difficult cases occur when a lawyer delivers questionably illegal advice. The reality is that such advice is delivered not infrequently. As Peter Henning notes, "legal advice involves the very possibility that the conduct at issue will be illegal; otherwise, there would be no need to consult a lawyer."³²⁰ In some cases, advice to break the law is expressly anticipated (and even invited) by the law, whereas in other cases such advice might render the lawyer criminally complicit. Professor Pepper describes this as a continuum, where at one end is "advice about conduct that most lawyers would not categorize as 'unlawful,' but to which the law applies a sanction," for example "[a]dvice about breach of contract."³²¹ He explains that our "modern understanding of contract law is that one is free to breach a contract, but may thereafter be required to pay compensatory damages. Absent very unusual circumstances, there will be no punishment."³²² For Pepper, at the other end of the spectrum "is legal advice the client may use for clearly criminal conduct involving concrete harm to third parties. The classic example is the client who asks which South American countries have no extradition treaty with the United States covering armed robbery or murder."³²³ Professor Gordon similarly notes a variety of questionable lawyering examples. He acknowledges that "[l]awyers can and do help plaintiffs to pursue frivolous and unjust claims to extort settlements, and they help defendants resist valid and just claims through delay and discovery abuse."³²⁴ Even worse, "[l]awyers can and do lobby for bad laws and rulings that promote special interests over any

Support of Petitioners, *supra* note 68. Other concerns may be presented by the licensing requirement, such as client confidentiality and access to counsel. *See, e.g.*, Troxel, *supra* note 68, at 643 ("The problem with licensing legal services is that it may require attorneys to violate client confidences.").

320. Henning, *supra* note 248, at 687.

321. Pepper, *supra* note 6, at 1550.

322. *Id.*

323. *Id.*

324. Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1170 (2009) (citations omitted). On the other hand, Gordon also recognizes that "lawyers are also the principal instrumentalities for producing the public goods sought from the effective operation of the legal system—the protection of individual rights, equal justice between persons, security and public order, and the implementation of policies designed to promote the common welfare." *Id.* (citations omitted).

plausible view of the general welfare, and by means of procedural tactics or strained interpretations effectively resist and even nullify good laws."³²⁵ Putting it another way, Colin Marks and Nancy Rapoport find that the problem frequently is one of "line-drawing" when delivering legal advice. They note that clients "may want to 'test' the line or urge that the line be moved in some way."³²⁶ Or it may be that the line is ill-defined. They also concede that "some clients (and some lawyers) couldn't locate the line between right and wrong with a map and a divining rod."³²⁷

On the other hand, William Simon points out that many would "feel strongly" that clients have an entitlement to know whether certain laws are unenforced, or unlikely to be enforced, such as "laws against fornication, sodomy, misprision of felony (failing to report someone else's criminal activity), small stakes gambling, marijuana possession, and non-payment of employment taxes for part-time domestic workers."³²⁸ Rob Vischer cautions that "an attorney's moral perspective often determines the advice she gives" and he calls upon the "legal profession to recognize that . . . clients will be better off if that perspective is articulated openly and deliberately."³²⁹ This is especially critical, he argues, in situations where attorneys become "so enmeshed in [a client's] culture that their legal advice" ultimately is tailored to immoral and illegal ends.³³⁰ However, restricting an attorney's ability to advise her client about the various courses of action to pursue, or prohibiting an attorney from offering lawful advice to a particular client, ultimately does not solve the problem of line-drawing or questionable advice.³³¹ Nor do advice bans necessarily address

325. *Id.*

326. Colin Marks & Nancy Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 *FORDHAM L. REV.* 1269, 1290–91 (2009). As Robert Gordon has pointed out to me, while we might all be able to agree that clients should not be deprived of information about breaking a law, the difficult problem lies in recognizing that an attorney's advice that a client probably can get away with breaking the law is giving information and at the same time is a form of tacit encouragement of law-breaking. Comment Nine to ABA Model Rule 1.2 addresses this tension by recognizing that "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." *MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. ¶ 9* (2010).

327. Marks & Rapoport, *supra* note 326, at 1291.

328. Simon, *supra* note 289, at 249–50.

329. Vischer, *supra* note 287, at 229.

330. *See id.* (citing the example of lawyers involved in the demise of Enron).

331. For example, none of the suggestions from Professor Vischer for addressing the problem of amoral lawyering that occurred in situations like "the prisoner abuse at Abu Ghraib, the demise of Enron, or the crippling institutional impact of the priest sex abuse

the concerns regulators might have with the underlying conduct of the clients.

2. Attorney as Advocate Versus Attorney as Advisor

Another difficulty in legislating restrictions on legal advice lies in distinguishing the lawyer's role as an advocate from the lawyer's role as an advisor. Kathleen Clark's discussion about the ethical issues raised by the Office of Legal Counsel torture memorandum (a subject of major controversy regarding an attorney's advice-giving duties³³²) offers an important example of the various obligations a lawyer might face depending upon the particular role assumed. Professor Clark separates a lawyer's obligations when acting as a legal advisor (to a client) from acting as a legal advocate (before a tribunal or court).³³³ She explains:

When a lawyer gives legal advice . . . she has a professional obligation of candor toward her client [not owed to the tribunal]. One finds this obligation in [Model] Rule 2.1, which states that in representing a client, "a lawyer shall . . . render candid advice." In advising a client, the lawyer's role is not simply to spin out creative legal arguments. It is to offer her assessment of the law as objectively as possible. The lawyer must not simply tell the client what the client wants to hear, but instead must tell the client her honest assessment of what the law requires or allows. Similarly, [Model] Rule 1.4(b) requires a lawyer to explain the law adequately to her client, so that the client can make informed decisions about the representation.³³⁴

scandal" contemplate federal bans on the scope of advice a lawyer may offer her client. *Id.* at 273.

332. See, e.g., Margulies, *Lawyers' Independence*, *supra* note 288, at 943 (discussing Office of Legal Counsel attorney John Yoo's "opinion rendered in the so-called 'torture memos'"); Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 *BUFF. L. REV.* 347, 409–13 (2009) (addressing the civil lawsuit against John Yoo regarding the torture memos filed on behalf of Jose Padilla by the Yale National Litigation Project).

333. Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 *J. NAT'L SECURITY L. & POL'Y* 455, 456 (2005) (observing that "[w]henver a lawyer offers a legal opinion, there is always a possibility that other legal actors will take a contrary view"). For further discussion on the differences between the adversary lawyering and transactional lawyering, see Wendel, *Professionalism*, *supra* note 285, at 1182 ("[T]ransactional lawyering . . . is so different from adversarial litigation that one wonders why anyone has ever thought to analogize the role of lawyer from one context to the other." (citations omitted)).

334. Clark, *supra* note 333, at 465–66.

The professional conduct rules allow, even require, a lawyer to "provide advice that is contrary to the weight of authority, spinning out imaginative, even 'forward-leaning' legal theories for the client to use."³³⁵ That said, as Professor Clark further explains, "the candor obligation requires the lawyer to inform the client that the weight of authority is contrary to that advice, and that other legal actors may come to the opposite conclusion."³³⁶ It may be that government constraint is perhaps more justifiable when it covers an attorney's advice in an advisor role and less justifiable if it applies to advice that goes to advocacy.

Robert Gordon has described, on one side of the dilemma, the notion that "[w]ithin a normative framework of liberal advocacy, the vindication of individual rights, especially as against the state, requires that lawyers be able to assert and pursue client interests free of external controls, especially controls imposed by state officials."³³⁷ In contrast, he writes, "[o]thers vehemently disagree, arguing that the duties of loyalty to client interests must be balanced against and sometimes overridden by broad, more amorphous obligations, such as the lawyer's duties as 'officer of the court,' member of a public profession, and citizen with a responsibility to uphold the rule of law."³³⁸ He concludes then that "disputes over the advocate's proper role cannot really be disputes over freedom versus regulation, but rather over . . . the form and content of regulation."³³⁹ This debate "is

335. *Id.* at 467; *see also* Jack Goldsmith, THE TERROR PRESIDENCY 203 (2007) ("Because the law is not always designed for or up to the task of the crisis, successful leadership sometimes requires bending or breaking the law."). Eugene Volokh makes a similar point related to advice provided by physicians: "[I]t's far from clear that the government should be completely free to regulate professionals' speech to their clients. . . . I'm fairly certain that doctors at least have the constitutional right to inform their patients of the medical benefits of marijuana, and to urge the patients to lobby their legislators to enact a medical marijuana exception." Volokh, *Speech*, *supra* note 2, at 1344; *see also* Norman Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1938 (2008) (examining the "relationship between counseling lawlessness and assisting law reform" in the Office of the Attorney General).

336. Clark, *supra* note 333, at 467 (citations omitted). Clark further notes: "A lawyer who fails to warn a client about the possible illegality of proposed conduct has violated her professional obligations." *Id.*

337. Gordon, *The Independence*, *supra* note 11, at 10 ("In its usual formulations, this argument tends toward vacuity. Everyone concedes that even the most zealous advocate must remain within the framework of professional ethical rules and the law.")

338. *Id.* at 11–12 ("Again, this description of the dispute tends toward the vacuous, because the most zealous advocates know they must follow some rules and obey official instructions given to those rules."); *see also* Gillers, *Honorable Profession*, *supra* note 287, at 24–25 (describing how, outside the narrow context of litigation, professional ethics often become too flexible when lawyers ignore duties other than those to their clients).

339. Gordon, *The Independence*, *supra* note 11, at 12; *see also* David B. Wilkins, *Who*

implicated not only in such staple issues of ethics reform debates as that of whether lawyers must or may reveal clients' lies or frauds to adversaries or regulators, but also in the great (and greatly contested) issue of the extent to which lawyers should help or resist their clients' attempts to evade or nullify regulation."³⁴⁰

It is in the latter debate described by Professor Gordon that recent federal legislation and regulatory efforts have intervened. Rather than regulating (or in addition to regulating) the behavior of clients perceived by Congress as undesirable, Congress and federal agencies have taken to regulating legal advice, with bans on both the content and the recipients of the advice.³⁴¹ These bans may result in consequences well beyond the deterrence or control of client misdeeds, consequences that compromise the validity of legal representation and threaten the legal system's integrity.³⁴² To the extent Congress desires to control evasion (or nullification) of its laws, other mechanisms exist that are more narrowly tailored to accomplish this purpose than a ban on attorney advice.³⁴³

Should Regulate Lawyers?, 105 HARV. L. REV. 799, 887 (1992) ("Duties to the legal framework require different kinds of maintenance than obligations owed to clients. . . . [T]he question to be asked is not who should regulate lawyers, but rather how should policymakers . . . increase the likelihood that all segments of society can benefit from a competent and independent legal profession.").

340. Gordon, *The Independence*, *supra* note 11, at 12.

341. In addition to the federal statutes at issue in *Milavetz* and *HLP*, consider the efforts by the Department of Justice to discourage legal advice for business organizations subject to federal prosecution. As Peter Henning explains, "[t]he recent spate of misconduct in large, publicly traded corporations has led to what can be viewed as a new form of overcriminalization—the targeting of legal advice as an obstacle in pursuing the investigation of corporate wrongdoing." Henning, *supra* note 248, at 671. Henning cites as an example the 2003 *Principles of Federal Prosecution of Business Organizations* issued by the Department of Justice that "announced a set of principles to guide federal prosecutors in deciding whether to charge a corporation with a crime" including factors such as waiver of corporate attorney-client privilege and work product protection, the advance of attorneys' fees, and information sharing under a joint defense agreement. *Id.* at 672–73.

342. See *supra* Part II and Part III.A (discussing legal precedent on advice bans and illustrating the consequences of advice bans for the practice of law and the American legal system).

343. *Infra* Part IV.C; see also Tony Mauro, *Court to Hear Case on Material Support for Terrorists*, NAT'L L.J., Oct. 1, 2009 (quoting Georgetown University Law Center professor David Cole: "We don't make the country safer by criminalizing those who advocate nonviolent means for resolving disputes").

3. Government Lawyers

While the Court has not specifically addressed the free speech rights of government lawyers when rendering legal advice, two of the Court's opinions on government employee speech involved lawyers, and deserve attention here. The Court refused to find First Amendment protection for the speech at issue in these cases. Both involved government lawyers raising workplace-related concerns and suffering adverse employment consequences, but neither addressed legal advice rendered by the lawyers. In *Connick v. Myers*,³⁴⁴ the Court held 5–4 that the termination of an assistant district attorney's employment based on her circulation of a questionnaire that addressed workplace concerns did not violate the First Amendment.³⁴⁵ *Connick* is distinguishable from the concerns of this Article in that it involved an employee grievance, not legal advice.³⁴⁶ The advice an attorney delivers to her employer is not the same as a complaint concerning office policy or an office dispute.³⁴⁷ As Justice Brennan, writing for the dissent, explained, "[t]he First Amendment affords special protection to speech that may inform public debate about how our society is to be governed—regardless of whether it actually becomes the subject of a public controversy."³⁴⁸ Attorney advice falls under this protection.

In *Garcetti v. Ceballos*,³⁴⁹ the Court again held 5–4 that the First Amendment rights of a government employee (who happened to be a deputy district attorney) were not violated when he suffered adverse employment actions in retaliation for whistleblowing.³⁵⁰ But this opinion,

344. *Connick v. Myers*, 461 U.S. 138, 154 (1983) (holding that First Amendment rights of assistant district attorney discharged for circulation of questionnaire regarding office conditions to co-workers were not violated).

345. *See id.* at 154 ("The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships.").

346. *Id.* at 141.

347. *Id.* at 153 ("When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given the supervisor's view that the employee has threatened the authority of the employer to run the office.").

348. *Id.* at 160 (Brennan, J., dissenting).

349. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not apply to speech of public employees made "pursuant to their official duties").

350. *See id.* ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

too, says nothing about whether the First Amendment protects the legal advice rendered by a government attorney.³⁵¹ The majority did state that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."³⁵² The free speech protection for legal advice, however, does not flow solely from an attorney's rights as a public citizen. As discussed earlier in Part III.C, legal advice encompasses important political attributes as well as client rights and attorney-client relationship values.³⁵³

Further, under the Court's holding in *Legal Services Corp. v. Velazquez*, the outcomes of *Connick* and *Garcetti* should not be read as applying to legal advice.³⁵⁴ The *Garcetti* majority explicitly recognized "that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this court's customary employee-speech jurisprudence" and, therefore, did not "decide whether the analysis [in *Garcetti*] would apply in the same manner to a case involving speech related to scholarship or teaching."³⁵⁵ A similar argument can be made about legal advice. As Justice Breyer, writing in dissent, explained:

[T]he speech at issue is professional speech—the speech of a lawyer. Such speech is subject to the independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished. . . . The objective specificity and

For a thought-provoking discussion of concerns unique to national security advice rendered by government lawyers, see generally Margulies, *Lawyers' Independence*, *supra* note 284.

351. See *Garcetti*, 547 U.S. at 424 ("[T]he parties in this case do not dispute that Ceballos wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate.").

352. *Id.* at 421–22 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)).

353. See *supra* notes 189–203 (discussing the political value involved in free speech rights of attorneys).

354. Justice Souter, writing in dissent, would go so far as to apply *Legal Services Corp. v. Velazquez* to protect the whistleblowing activity in *Garcetti*. See *Garcetti*, 547 U.S. at 437 ("Some public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto." (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542 (2001) (Souter, J., dissenting))).

355. *Id.* at 425.

public availability of the profession's canons also help to diminish the risk that the courts will improperly interfere with the government's necessary authority to manage its work.³⁵⁶

Finally, the Supreme Court's conclusion in *Polk County v. Dodson*³⁵⁷ offers guidance here: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."³⁵⁸ That government lawyers are employed and paid by the government cannot dictate the scope and contours of the legal advice rendered to the government.

C. Solutions Beyond Bans on Attorney Advice

When an attorney gives mistaken, immoral, or illegal advice, procedures exist to remedy or otherwise address the consequences that result. For example, as Peter Henning notes, "[m]alpractice suits provide clients with a means of redress when the lawyer was negligent in the representation. Similarly, even if the lawyer was not negligent, a breach of fiduciary duty can result in an award of damages or a return of the legal fees."³⁵⁹ Additionally, "[e]ach state maintains an extensive disciplinary apparatus for reviewing complaints against lawyers and can impose sanctions against lawyers from private admonitions to suspensions and even disbarment for serious misconduct."³⁶⁰ And, of course, attorneys remain subject to criminal sanctions.³⁶¹

What might a legislative ban on advice achieve that existing protections do not? A cynical view likely sees the bans as nothing more

356. *Id.* at 446–47 (citations omitted). Justice Breyer would have employed the *Pickering* balancing test here, i.e. "that the government should prevail unless the employee (1) 'speaks on a matter of unusual importance,' and (2) 'satisfies high standards of responsibility in the way he does it.'" *Id.* at 448 (quoting Souter, J., dissenting) (citations omitted).

357. *Polk Cnty v. Dodson*, 454 U.S. 312, 320 (1981) (holding "that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding"). *But see* *West v. Atkins*, 487 U.S. 42, 51–52 (1988) (declining to extend holding of *Polk County* to cover a physician).

358. *Id.* (quoting MODEL CODE OF PROF'L RESPONSIBILITY DR 5-107(B) (1976)).

359. Henning, *supra* note 248, at 693.

360. *Id.*

361. *See id.* at 684–85 (listing crimes for which lawyers have been prosecuted including "embezzlement of client trust funds, insider trading, and the use of confidential information for their own benefit" as well as money laundering and bankruptcy fraud (citation omitted)).

than empty political gestures. Perhaps the bans are meant to have a deterrent effect, particularly when hefty civil or criminal penalties are attached. An important area for future research would be to conduct an empirical assessment of advice bans to determine how they alter attorneys' advice, if they do at all. This sort of foundation may be particularly helpful in demonstrating to the Roberts Court why the advice rendered by an attorney is unique and warrants special protection from undue government control.³⁶²

The problematic nature of legislative advice bans under the First Amendment does not mean that other mechanisms cannot be adopted to address concerns about advice that enables or facilitates law-breaking. One response to address these concerns about attorney advice might be found in the regulation of lawyers as gatekeepers,³⁶³ compliance monitors,³⁶⁴ and whistleblowers.³⁶⁵ For example, perhaps the appropriate check against problematic legal advice would be a heightened reporting requirement and relaxed confidentiality standards when an attorney has knowledge of ongoing, covert wrongdoing.³⁶⁶ The proposals to regulate lawyers as

362. See Knake, *The Supreme Court's*, *supra* note 23, at 1565–66 (discussing cases from the 2009 term where the Court expressed interest in empirical support for the position taken by the ABA on behalf of the consequences to lawyers and law practice).

363. See, e.g., Schneyer, *supra* note 7, at 582–83 ("All lawyers are 'gatekeepers' in the obvious sense that they may not knowingly assist clients in unlawful conduct and some have long had modest duties to monitor their clients as well."); see also David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145, 1164 n.80 (1993) ("[D]efining a 'whistleblower' strategy as one that 'compels third parties to disclose misconduct directly to potential victims or to enforcement officials.'" (citing Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986))); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 111–17 (1993) (discussing reputational incentives and legal incentives along with the costs and benefits of their adoption in relation to lawyers as gatekeepers).

364. See Christine E. Parker, Robert Eli Rosen & Vibeke Lehmann Nielsen, *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 207 (2009) (discussing "mechanisms through which . . . research has suggested that businesses' use of lawyers should increase business compliance with the law" and explaining that these mechanisms are "examples of lawyers being expected to act as 'monitors' of their clients' compliance").

365. See, e.g., Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1251–63 (2009) (discussing concerns present when public and private sector attorneys are not protected for whistleblowing).

366. Peter Margulies makes a similar recommendation in his authoritative treatment of lawyers' independence and collective illegality, observing that "[i]n the government lawyer scenario, further leverage for gatekeeping could be obtained by reading the provisions permitting disclosure in cases of reasonably certain substantial bodily harm or death [under

gatekeepers or to protect lawyers as whistleblowers place varying duties on the lawyer that include refusing to assist clients in questionable activities, monitoring client activity, and external reporting of bad client behavior. Altering a lawyer's traditional role through these additional obligations has met criticism. For example, John Leubsdorf explains that, "the lawyer increasingly becomes not just an advocate and advisor but a gatekeeper as well, so that not just the details of legal representation but its rationale and function are changing."³⁶⁷ Thus, Professor Leubsdorf concludes, "even when the new regulations appear to leave intact the substance of previous rules balancing the interests of clients and those of nonclients, they often impose more stringent penalties that will sway lawyers to pay more attention to the latter."³⁶⁸ On the other hand, Sung Kim argues, at least in the context of corporate business, "as an internal advisor, compliance overseer, and external liaison, inside counsel are well-positioned to access critical information that may reveal company misconduct."³⁶⁹

Another possible response to address troubling attorney advice is proposed by Peter Margulies in what he calls "equipoise as a working approach."³⁷⁰ Acknowledging the complicity of attorneys in "terrorism, organized crime, and government and corporate misconduct"³⁷¹ he argues for a substitution of "branding and gatekeeping norms"³⁷² in place of "an amorphous invocation of independence"³⁷³ that occurs when "courts and commentators" evaluate attorney advice.³⁷⁴ Professor Margulies recognizes that "[a]ll lawyers establish a brand—a distinctive professional identity . . . [which] serves constitutional and social interests."³⁷⁵ At the same time,

ABA Model Rule 1.6] to include disclosure of a policy like the coercive interrogation program." Margulies, *Lawyers' Independence*, *supra* note 288, at 979. For other possibilities, see Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 25–37 (2002) (proposing reforms such as professional independence, disclosure obligations, professional accountability, liability standards, substantive standards and professional norms, and professional education).

367. John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 960 (2009).

368. *Id.*

369. Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 452 (2008).

370. Margulies, *Lawyers' Independence*, *supra* note 288, at 952.

371. *Id.* at 942.

372. *Id.* at 941.

373. *Id.*

374. *Id.*

375. *Id.* As examples of constitutional or social interests in a lawyer's professional identity, Professor Margulies cites "the late William Kunstler, who defined his professional identity in opposition to the state, . . . lawyers for the government who drafted the torture memos saw themselves as vindicating the Framers' vision of the separation of powers[.] . . .

"[a]s professionals, however, lawyers must balance branding with gatekeeping,"³⁷⁶ that is, "safeguard[ing] the public's interest in a fashion that may check and balance short-term client preferences."³⁷⁷

To achieve this balance, Professor Margulies turns to "equipoise" under two conditions: "freedom from prior knowledge of client wrongdoing and freedom to give the client bad news."³⁷⁸ He also offers several suggestions in the context of national security advice rendered by the Office of Legal Counsel, suggestions that warrant consideration for wider use by attorneys generally: (1) disclosure of legal opinions as a safe harbor; (2) revision of ABA Model Rule 2.1 to require, rather than permit, "advice that goes beyond doctrine, to assess . . . non-legal ramifications;" and (3) extending ABA Model Rule 3.3(a)(2)'s requirement to disclose directly adverse, controlling legal authority to include not only the court, but also the client.³⁷⁹ Similar to the concept of a disclosure safe harbor, other commentators have proposed that a solution "may be for an attorney to 'make a record' of the advice given in the context of a court proceeding . . . [a sort of] declaratory judgment to validate the legal advice,"³⁸⁰ or for an attorney to engage in "full-picture counseling[, i.e.] giving the client the full picture . . . to enable the client to choose a course of action that the client, while aware of societal interests in the legal measure, considers appropriate."³⁸¹

Other legal ethics experts advocate reforms by legal employers and educators. For example, Professor Rhode urges legal employers "to

[and] lawyers for Enron and the like viewed themselves as championing innovation in the financial markets." *Id.*

376. *Id.*

377. *Id.* at 982.

378. *Id.*

379. Margulies, True Believers, *supra* note 207, at 81–82. For further support of disclosure as an effective safe-harbor, see generally Wendel, *Professionalism*, *supra* note 281. Wendel suggests:

[T]he only reason lawyers . . . may have been comfortable arguing for the formally plausible interpretation [in cases where legal advice led to wrongdoing] is that they expected some degree of secrecy, either through the audit lottery (in the case of tax shelters), the cover provided by byzantine transactions and obfuscated disclosures (the Enron manipulations), or geographic isolation and covert activities (the interrogations at Guantanamo Bay and Abu Ghraib).

Id. at 1175.

380. Joel Cohen & Norman Bloch, *Can Lawyers Be Prosecuted for the Advice They Give?*, N.Y.L.J., July 23, 1991, at 1.

381. Jamie G. Heller, Note, *Legal Counseling in the Administrative State: How to Let the Client Decide*, 103 YALE L.J. 2503, 2504 (1994).

integrate ethical considerations into all organizational functions,"³⁸² "[m]ore protections for whistleblowing are equally critical,"³⁸³ "enhanced gatekeeping requirements for corporate counsel,"³⁸⁴ "[m]ore stringent ethical requirements and oversight systems . . . for indigent defense counsel,"³⁸⁵ and "more public accountability for professional performance"³⁸⁶ as well as law school curriculum reform.³⁸⁷ Similarly, Professor Vischer suggests that "[t]he road out of amoral lawyering starts with a profession-wide emphasis on greater moral sensitivity and self-awareness among attorneys. Certainly this effort must begin in law schools . . . [and] regulation also has a role to play in the effort."³⁸⁸

A complete discussion about the range of reforms that might be adopted to curtail attorney advice in the law-bending or law-breaking activity of clients is beyond the scope of this Article, but these examples demonstrate that many viable and better-suited options exist beyond bans on legal advice. To suggest that these concerns could be effectively addressed by federal or state legislation controlling the advice an attorney offers (or cannot offer) to a client is problematic on a number of levels in addition to the First Amendment concerns.³⁸⁹ Such constraints run afoul of ethical obligations and professional conduct rules and norms.³⁹⁰ They also compromise what Fred Zacharias characterizes as society's "interest in having clients consult lawyers about legal issues and receive advice regarding the lawfulness of their conduct."³⁹¹ Moreover, David Wilkins

382. Rhode, *supra* note 245, at 1335.

383. *Id.*

384. *Id.* at 1336.

385. *Id.*

386. *Id.* at 1337.

387. *Id.*

388. Vischer, *supra* note 287, at 271–72. Vischer also notes: "One meaningful step would be to encourage attorneys to begin talking about moral considerations generally with their client . . . [but ultimately] [a]ttorneys must realize that brining their own moral perspective into their dialogues with clients is not a paternalistic power play; it is an essential component of ethical lawyering." *Id.* at 272.

389. See, e.g., *supra* notes 99–120 and accompanying text (suggesting potential First Amendment conflicts with attorney advice bans).

390. See Renee Newman Knake, *Contemplating Free Speech and Congressional Efforts to Constrain Legal Advice*, 37 RUTGERS L. REC. 12, 18 (2010) ("Not only do Congressional constraints like the BAPCPA and AEDPA provisions present serious First Amendment concerns with regard to their limits on the delivery of legal advice, but they also contradict an attorney's established ethical duties.").

391. Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 494 (2006). Zacharias also notes:

maintains that "[i]f lawyers were to comply only with the literal commands of clear rules, and advise their clients to do likewise, many important societal goals would be frustrated."³⁹² He gives the example of lawyers' refusal during the McCarthy era to represent political dissidents, which "undermine[d] society's commitment to preserving the right to free speech expression and other important democratic liberties."³⁹³ He also recognizes, however, that "if tax lawyers systematically choose to exploit the indeterminacy of the legal standards regarding what constitutes proper tax advice, the entire revenue collection system would be endangered."³⁹⁴ The solution, Professor Wilkins maintains, is that "society must rely on something other than direct enforcement to ensure that a proper content is infused in these norms. Independence claims properly seek to occupy this discretionary space."³⁹⁵ Professor Wendel makes a similar point in writing about the independence of government lawyers. He explains that "[l]awyers cannot understand their role as merely executing their clients' preferences; the distinctive function of lawyers is that they act as agents of their clients, but only within the bounds of the law."³⁹⁶ Yet Wendel also acknowledges that "the meaning of the law is a function, in part, of the acceptability of the interpretation to a professional community."³⁹⁷ Thus he concludes that "the only way to evaluate whether lawyers have given advice within the bounds of the law is to engage the interpretative arguments on their own terms."³⁹⁸ Ultimately, he joins in the suggestions of others that the solution lies with attorneys and the legal academy.³⁹⁹

Arguably, society may even be willing to insist that clients follow that advice to the extent that it identifies actions that clients must avoid to satisfy the law. On the surface, however, the interest in promoting law-abiding behavior cuts against rules that would allow lawyers to threaten clients into acting morally or into avoiding wrongful actions for which there is a legitimate argument in favor of their lawfulness. Clients are unlikely to confide in a lawyer whom they know can force them to abide by her personal moral code.

Id.

392. Wilkins, *supra* note 339, at 861.

393. *Id.*

394. *Id.* at 861–62.

395. *Id.* at 862.

396. W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 *FORDHAM L. REV.* 1333, 1362 (2009).

397. *Id.*

398. *Id.*

399. *See id.* (arguing that "the only way to evaluate whether lawyers have given advice within the bounds of the law is to engage the interpretive arguments on their own terms," which "is something that lawyers and legal scholars are well-equipped to do"). Deborah

V. Conclusion

Given the integral role of attorneys in America's democratic government, it seems reasonable, if not imperative, that this category of speech—attorney advice—should be fiercely guarded from unnecessary regulation. This is not to say that legal advice may never be restricted. But any constraint ought to satisfy strict scrutiny—that is, be necessary to further a compelling government interest and narrowly tailored to do so using the least restrictive means possible. This is especially true when the advice relates to a client's political activity, whether that activity involves the exercise of rights under a federal statute or working with controversial organizations through nonviolent, peaceful means.⁴⁰⁰ The *Milavetz* ban (even under the narrowed construction⁴⁰¹) and the *HLP* prohibition (in its

Rhode contends that "individual lawyers need to become more effective monitors of their own advice." Rhode, *supra* note 245, at 1334. Rhode cites suggestions from several other leading legal ethics scholars:

David Luban suggests that when lawyers' advice reaches the result that a client wants, they should ask themselves whether the advice would be the same if the client asked the identical question but wanted a different outcome. Robert Gordon proposes that lawyers consider whether a fair minded, fully-informed observer, or a judge committed to serving the law's societal objectives, would find their position persuasive. Many business ethics experts suggest a variation on those questions: "How would it feel to defend that position on the evening news?"

Id. at 1334 (citations omitted).

For a significant discussion of "social science research to suggest strategies that both lawyers and clients can take to minimize the risk of overly partisan legal advice," see Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 40 (2009). Professor Robertson cautions against regulating role separation to "encourage lawyers' independence from their clients." *Id.* at 38. Instead, she "recommends a more modest approach to increase the salience of lawyers' professional identities and to minimize the biases that result from subordination of that identity." *Id.* at 47. In yet another important proposal for balancing these concerns in the context of rendering national security advice, Peter Margulies contends that lawyers "should expressly consider institutional culture's impact." Peter Margulies, *National Security Lawyering and the Persistent Neglect of Institutional Culture*, 35 WM. MITCHELL L. REV. 5187, 5187 (2009). In other words, "[i]n the government lawyer context, the interaction of a legal opinion with institutional culture may determine if the lawyer is reasonable in assuming that the limits of the opinion will be observed, or whether the force of ingrained culture will overwhelm those limits." *Id.* at 5191–92. Professor Margulies would require "[i]f the limits are vulnerable, [that] the lawyer should reconsider the advice and either require more limits on the conduct authorized or forego authorization entirely." *Id.* at 5192.

400. See *supra* notes 317–19 and accompanying text (discussing regulation of legal advice connected to political activity).

401. See *supra* notes 32–55 and accompanying text (discussing *Milavetz*).

coverage of legal advice about lawful activity⁴⁰²) fail the strict scrutiny test. Even if it can be argued that the government holds a compelling interest in regulating attorney advice based on concerns about bankruptcy abuse or national security, because these bans contain no explicit exception for good-faith legal challenges (and, in the case of *HLP*, the ban prohibits otherwise lawful advice) it is difficult to reach any conclusion other than that they are neither narrowly tailored nor the least restrictive means possible to further the government's interest.

The cases of *Milavetz* and *HLP* reveal the crucial First Amendment rights of lawyers and clients that are at stake when legislative limitations are placed on legal advice. In the wake of these decisions, it appears that the Supreme Court is likely to treat attorney advice as speech, rather than conduct, for First Amendment purposes. Whether attorney advice will warrant strict scrutiny protection under the First Amendment remains an open question, though both cases seem to suggest that this or a similarly highly-protective test is appropriate, a conclusion compelled by the Court's attorney speech precedent and relevant First Amendment theory as this Article documents.

In addition to pushing the question of First Amendment protection for attorney advice into the forefront of constitutional law and legal ethics, the *Milavetz* and *HLP* cases may have considerable repercussions for clients who need complete and accurate legal advice about bankruptcy or humanitarian aid efforts, and for their attorneys who are under ethical obligations to deliver that information. The Supreme Court's rulings in these cases also may adversely impact the ability of attorneys to offer advice in other areas of law. The Court's affirmation of the statutory restriction on legal advice in *Milavetz*, albeit a narrow reading of the restriction, along with the outcome of *HLP* potentially encourages similar restraints in the future. To fully understand the practical ramifications of legislative bans on legal advice, further empirical study should be undertaken. It is important to document in a systematic way how attorneys (and their clients) respond to bans on advice and the consequences that result.

This Article has endeavored to demonstrate that an attorney's advice is a category of speech deserving strong protection under the First Amendment. Such speech ought not to be banned simply because Congress or the states deem it undesirable, inappropriate, or even abusive, especially where no safe harbor is made for counseling about actions designed to test

402. See *supra* notes 56–84 and accompanying text (discussing *HLP*).

or challenge the law at issue. Nor should it be banned because the recipients of otherwise lawful advice are unpopular or disliked. An attorney's advice to her client is precisely the kind of speech that the First Amendment was designed to protect.