

A First Amendment Theory for Protecting Attorney Speech

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~ [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against government intrusion.²

I. Introduction

In June 2010, the United States Supreme Court held that Congress could constitutionally prohibit attorneys from providing legal assistance and legal advice regarding lawful nonviolent conduct to groups that the Secretary of State has designated as Foreign Terrorist Organizations (FTOs).³ The plaintiffs, Ralph Fertig and the Humanitarian Law Project, wished to assist two such FTOs by advising them on how “to use humanitarian and international law *to peacefully resolve disputes*,”⁴ “to petition various representative bodies” including the United Nations and the United States Congress,⁵ to obtain recognition under the Geneva Conventions,⁶ and other peaceful, lawful activities aimed at securing human rights. As explained by counsel for the Plaintiffs at oral argument, the Humanitarian Law Project sought to advise these groups regarding “how to pursue their goals in a lawful, rather than a terrorist way.”⁷ The Supreme Court held that the restrictions clearly prohibited plaintiffs’ proposed activities,⁸ but did not violate the Free Speech Clause of the First Amendment because the attorneys could still engage

² NAACP v. Button, 371 U.S. 415, 429 (1963).

³ See Holder v. Humanitarian Law Project, 130 S.Ct. 2705 (2010).

⁴ See *id.* at 2716.

⁵ See *id.* (stating that plaintiffs wished to teach two FTOs “how to petition various representative bodies such as the United Nations”); see *id.* at 2732 (Breyer, J., dissenting) (noting that plaintiffs wanted to petition the United States Congress).

⁶ See *id.* at 2739 (Breyer, J., dissenting) (noting that declarations below showed that relief sought would not be monetary, but would include seeking “recognition under the Geneva Conventions.”)

⁷ See Holder v. Humanitarian Law Project, Nos. 08-1498, 09-89, Oral Arg. Trans. at 46 (Feb. 23, 2010) (Ginsburg, J., clarifying); see also *id.* (“They want to engage in advocacy of peaceful means of achieving the goals of these groups.”). See also David Cole, *The Roberts Court’s Free Speech Problem*, NYRblog, June 28, 2010. Cole was counsel to the Humanitarian Law Project, and summarizes the Court’s opinion thus: the Court “ruled that the First Amendment permits Congress to imprison human rights activities for up to fifteen years merely for advising militant organizations on ways to reject violence and pursue their disputes through lawful means.” See *id.*

⁸ See *Humanitarian Law Project*, 130 S.Ct. at 2709 (holding that “the statutory terms are clear in their application to [and thus prohibition of] plaintiffs’ proposed conduct”).

in “independent advocacy” of any political or other message they wished to promote.⁹ Allegedly, the plaintiff attorneys’ First Amendment rights were not infringed because the law merely *criminalized* (with a potential fifteen-year prison sentence¹⁰) their speaking “in coordination with or under the direction of” their proposed clientele.¹¹

Holder v. Humanitarian Law Project underscores some of the distinctive problems associated with restrictions on attorney speech. Unfortunately, as demonstrated by the Court’s opinion, as well as Justice Breyer’s impassioned dissent, there is not a workable First Amendment methodology for analyzing restrictions on attorney speech.

Traditionally, attorneys have been considered a self-regulating profession.¹² Consequently, even though many of the rules of professional conduct, court rules, and other regulations restrict attorney speech, the traditional theory was that attorneys agreed to all such regulations as a condition of being admitted into the bar. In the words of Benjamin Cardozo, “Membership in the Bar is a privilege burdened with conditions.”¹³ Thus, attorneys were deemed to have voluntarily waived their free speech rights vis-à-vis judicial and state bar regulators as a condition of becoming an attorney. Although imperfect, this traditional reservation of attorney regulation to judiciaries and the bar arguably worked to preserve the special role that attorneys play in the administration of justice. Theoretically, the regulator, namely the judiciary and/or the bar, understood the role that attorneys played in the United States justice system and so would

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

¹⁰ See *id.* at 2712, n. 1.

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

¹² Indeed, the Preamble to the Model Rules of Professional Conduct talks of “self-regulation” and states that “[t]he legal profession is largely self-governing.” MODEL RULES OF PROF’L CONDUCT, Preamble, ¶¶ 10–11.

¹³ See *In re Rouss*, 221 N.Y. 81, 84 (1917).

impose appropriate regulations. Consequently, self-regulation ideally would ensure that attorney speech restrictions would be tailored to the attorney's function in our system of government.

However, self-regulation has long since been a myth¹⁴—a myth that is increasingly disassociated with reality. In the words of Fred Zacharias, “law has become a highly regulated industry in modern times” that is subject to regulation from multiple entities external to itself, including state and federal legislatures and administrative agencies.¹⁵ Additionally, Zacharias notes the fallacy of considering regulation by the judiciary to be “self-regulation.”¹⁶ Zacharias posits “that judges overseeing lawyers take their independence from the bar and their regulatory functions seriously” and thus “discipline by courts” is “a form of regulation external to the profession.”¹⁷ Moreover, as Thomas Morgan recently reiterated, when the Supreme Court began invalidating attorney regulations as unconstitutional or violative of congressionally-enacted law, “the idea that, as a profession, lawyers were self-regulating and thus need look only inward, was gone forever.”¹⁸ Importantly, self-regulation is not a successful argument for staving off attorney regulation from other governmental entities. National and intergovernmental regulation applicable to attorneys exists and will only continue to expand. As explained by Laurel Terry:

Although the ABA recently reaffirmed the traditional view that lawyers should be regulated by the state judicial branch, commentators have noted that lawyers already are subject to multiple sources of regulation. The combination of globalization and the service providers paradigm means that lawyers are likely to face regulation from more

¹⁴ See, e.g., Fred Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009); see *id.* at 1188 (“Whatever its actual meaning, the term ‘self-regulation’ produces an image of lawyers unilaterally controlling the behavior of their peers. That image is patently false.”). Zacharias notes that “in the post-revolutionary period of the United States, law truly was a self-regulated profession” and the rise of bar associations in the late nineteenth and early twentieth centuries “represented the modern form of lawyer self-regulation.” See *id.* at 1157, 1160. See also, Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 S.M.U. L. REV. 1385 (2004).

¹⁵ See Zacharias, *supra* note 14, at 1155.

¹⁶ *Id.* at 1153–54.

¹⁷ *Id.* at 1154.

¹⁸ THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 76 (2010)

and more entities. . . . U.S. lawyers face regulation from many new sources, including global entities.¹⁹

Indeed, to the extent that regulation of lawyers has been left to state judiciaries, it is done merely as a matter of comity and not because Congress and other governing bodies lack such power. The Supreme Court’s 2010 decision, *Milavetz, Gallop & Milavetz v. United States*, illustrates this point. In *Milavetz* attorneys challenged the constitutionality of congressional restrictions on attorneys when advising clients in contemplation of bankruptcy. The restrictions directly circumscribed the advice an attorney would be allowed to give to a client. The ABA argued in an amicus brief that “the licensing and regulation of attorneys has been reserved to, and performed by, the State judicial systems.”²⁰ The Supreme Court flatly rejected “self-regulation” as a defense that shielded attorneys from congressional regulation. It noted that “Congress and the bankruptcy courts *have long overseen aspects of attorney conduct* in this area of substantial federal concern,” and summarily concluded that an argument that Congress had “impermissibly trench[e]d on an area of traditional state regulation [] *lacks merit.*”²¹ Bankruptcy is not the only area of “federal concern” where Congress has been and will be able to regulate attorneys, including attorney speech. Moreover, in the modern globalized economy, there are and will be areas of legitimate and substantial international concern with consequent regulation.²² As Morgan summarizes: “By now it is clear that the legal profession no longer exists in a protective bubble, and legal ethics is no longer the business of lawyers alone.”²³

Yet even under the self-regulation theory, the constitutional conditions argument was never wholly satisfactory. The fact that the judiciary (or a bar association) imposes a restriction

¹⁹ Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 J. PROF. LAW. SYMP. ISSUES 189, 205–206 (2008).

²⁰ *Milavetz, Gallop & Milavetz v. United States*, Brief for Amicus Curiae the American Bar Association Supporting Petitioners, available at 2009 WL 2875367, at *8.

²¹ *Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324, 1332–33 (2010) (emphasis added).

²² See Terry, *supra* note 19, at 205–206.

²³ MORGAN, *supra* note 18, at 79.

or punishment on speech does not (and should not) “constitutionalize” a restriction. Indeed, there are scenarios, such as the regulation of attorney speech regarding the judiciary, where the judiciary has demonstrated a failure to protect speech that clearly should enjoy constitutional protection.²⁴

The breakdown of self-regulation, the declining viability of the constitutional conditions theory, and the imposition of attorney regulations by entities external to the profession (such as Congress, state legislatures, or intergovernmental entities) create a twofold problem. First, there is not a workable analytical method for examining the constitutionality of restrictions on attorney speech; and second, outside entities (especially those subject to majoritarian capture) may impose restrictions on attorney speech that compromise the central role of the attorney in providing access to justice and the fair administration of laws. *Humanitarian Law Project* and *Milavetz*, again, illustrate both problems.

In *Milavetz*, the Court employed typical First Amendment methodologies, examining whether the statute was overbroad or vague. During the *Milavetz* oral argument, Chief Justice Roberts indicated a concern that the regulation achieved its substantive objective (getting debtors to avoid incurring more debt) “indirectly [] by interfering with the attorney-client relationship.”²⁵ Indeed, the regulation did *not* prohibit debtors from incurring debt; rather, *it prohibited attorneys from advising clients* to incur debt in contemplation of bankruptcy. Yet normal First Amendment doctrines did not account for the problematic interference with the attorney-client relationship. Indeed, counsel for the plaintiffs agreed that if the statute was unconstitutional as applied to

²⁴ See, e.g. Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363 (2010) [hereinafter, Tarkington, *Free Speech Right to Impugn*]; Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567 (2009) [hereinafter, Tarkington, *The Truth Be Damned*].

²⁵ *Milavetz, Gallop & Milavetz v. United States*, Nos. 08-119, 08-1225, Oral Arg. Trans. at 47 (Dec. 1, 2009).

attorneys, it would be unconstitutional as applied to everyone—again highlighting the lack of a methodology for reaching the distinctive problems of the statute as applied to attorney speech.²⁶

The Supreme Court ultimately avoided interfering with the attorney-client relationship by interpreting the statute narrowly.²⁷ Importantly, the protection of the attorney-client relationship came from the Court’s attorney-friendly interpretation of the statute and not from the First Amendment.

Unfortunately, in *Humanitarian Law Project*, the Supreme Court did not even recognize the important and weighty implications of the restriction as applied to attorney speech. Indeed, the Court purported to “fix” any constitutional problems by allowing attorneys to *independently* advocate whatever messages they like, but prohibiting any and all speech made in coordination with or at the direction of their proposed clients.²⁸ The majority went so far as to note that plaintiffs were “barred” by the statute from even *speaking to* the FTOs if their speech “communicates advice derived from ‘specialized knowledge’—for example, training on the use of international law or advice on petitioning the United Nations.”²⁹ Justice Breyer’s dissent argued that a prohibition on speaking “in coordination with” others had never previously constituted a valid exception to First Amendment protection.³⁰ But Justice Breyer’s dissent did not recognize how acutely problematic such a distinction is in the context of attorney speech. Specifically, attorneys are denied their core function in the United States legal system if they can be prohibited from speaking to, on behalf of, or in coordination with their clients. While the

²⁶ Counsel for appellants agreed with Justice Scalia that if the statute was vague or overbroad for attorneys it would be equally problematic for anyone else to whom the statute applied. *See id.* at 20 (“don’t bring in the fact that, well, and moreover, if it’s applied to attorneys, it’s unconstitutional . . . [b]ecause if it’s applied to anybody it’s unconstitutional, according to your [vagueness] argument.”).

²⁷ The Court interpreted the statute to prohibit only advice to a debtor “to incur more debt *because* the debtor is filing for bankruptcy, rather than for a valid purpose.” *Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324, 1336–38 & n.6 (2010) (emphasis added).

²⁸ *See Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2722–24, 2728 (2010).

²⁹ *See id.* at 2723–24.

³⁰ *See id.* at 2733 (Breyer, J., dissenting).

majority claimed that the attorneys lost nothing because they could still speak *independently*,³¹ the majority's distinction completely denied the role and function of the attorney, as will be explored more fully below.

In this paper, I propose a new access-to-justice theory of the First Amendment to be used in examining the constitutionality of restrictions on attorney speech—regardless of the regulating entity and applicable to regulation or punishment imposed by legislative, judicial or other governing entities. As demonstrated by the Court's appalling decision in *Humanitarian Law Project*, reliance on traditional First Amendment doctrines will not suffice, as those doctrines fail to account for the distinctive and important role that attorney speech plays in access to and in the fair administration of justice. The access-to-justice theory maintains that where attorney speech is key to providing or ensuring access to justice or the fair administration of the laws, it needs special protection under the Free Speech Clause of the First Amendment. The theory thus not only provides a workable theory for evaluating restrictions on attorney speech, it also, and more importantly, protects the role of the attorney in our system of justice.

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

In Part III, I will briefly show the lack of a workable theory for examining restrictions on attorney speech. The case law either employs normal First Amendment doctrine for regulated

³¹ See *Humanitarian Law Project*, 130 S. Ct. at 2723–24 (concluding that plaintiffs “may say anything they wish on any topic,” indicating that their speech is not abridged because they can engage in “independent advocacy and expression”).

industries,³² or declares that the restriction is a valid condition on the practice of law without any Free Speech Clause protection or even analysis. Moreover, prior scholarly commentary engages in analogies of attorney speech to other areas of limited First Amendment protection. None of these methods for examining the constitutionality of restrictions on attorney speech is satisfactory because all of them fail to preserve both the role of the attorney in our administration of justice and the underlying rights of clients.

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

In Part V, I discuss how this new theory protects the role of the attorney in the system of justice as attorney self-regulation ceases to be a reality. As entities other than state judiciaries increase their role in regulating attorney speech, it is imperative that there be a method to preserve the role of attorneys in the fair administration of justice.

³² See e.g., *Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324, 1339 (2010); *Republican Party of Minn. v. White* 536 U.S. 765, 788 (2002); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637–44 (1985); *In re R.M.J.*, 455 U.S. 191, 203–06 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977).

II. Lawyers are Engaged in a Special Kind of Speech

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

As lawyers, speech is our stock in trade. Speech is all we have. Our tools are books and not saws or scalpels. Our product is argument, persuasion, negotiation, and documentation, so speaking (by which I include writing) is not only central to what the legal system is all about, and not only the product of law as we know it, but basically the only thing that lawyers and the legal system have.³³

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

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

While Professor Schauer is correct that the practice of law “is speech-constituted activity” and thus may be termed “our stock in trade”—he goes much too far by arguing that “speech is all we have” and that “[o]ur product is argument, persuasion, negotiation, and documentation, so speaking (by which I include writing) is not only central to what the legal system is all about, and not only the product of law as we know it, but basically the only thing that lawyers and the legal system have.”³⁴ Speech may be the lawyer’s tools (our “saws or scalpels”³⁵), but speech in the abstract is not the end-product of the law or the service that clients seek. Attorneys are not hired speech-writers, journalists, academics, or street-corner protestors.

³³ Frederick Schauer, *Speech of Law and Law of Speech*, 49 ARK. L. REV. 687, 688 (1997).

³⁴ *Id.*

³⁵ *Id.*

Nor is speech (including “argument, persuasion, negotiation, and documentation”³⁶), “the only thing that . . . the legal system ha[s].” What the legal system has to offer *is* the force of law.

Clients use attorney speech to invoke and/or to avoid the power of the government. Often what clients’ pay for when they hire an attorney is not speech at all (even though it is accomplished through speech), but a *legally binding result*: a plea agreement; the creation of a business association; an estate that will be probated according to the wishes of the testator; debts discharged; recognition under the Geneva Conventions; the dissolution of a marriage; payment for personal injuries caused by another; a valid title to property, provide just a handful of examples. Even when a client hires an attorney “to speak” on her behalf in litigation or a criminal prosecution, eloquence is not the primary product sought—the reason for using an attorney is that the attorney has the training and skills to know (1) what arguments are legally significant and most likely to effectively invoke the force of law on behalf of that client and (2) the methods for raising and preserving legal and constitutional rights, including the use of procedural devices, as well as temporary, preliminary, or extraordinary relief having the force of law.

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

³⁶ As a contrasting example, all the academic has is speech—argument, persuasion, and documentation. While we hope that our arguments and documentation will persuade, they have no power to bind anyone—even if published in the *HARVARD LAW REVIEW*, the speech lacks the force of law.

For purposes of illustration, a subpoena or summons could be termed to solely constitute “speech”—but it is far more than speech. It is a government-backed and government-enforced order for information, documents, or appearance, the violation of which may lead to sanctions or arrest. While the modern subpoena is done through speech, it has the same effect as a physical search or seizure of the requested materials or person. Indeed, the modern summons for civil service of process is the descendant of the writ of *capias ad respondendum*—a writ that “directed the sheriff to secure the defendant’s appearance by taking him into custody.”³⁷ In modern practice—rather than physically arrest a person who is sued, “the *capias ad respondendum* has given way to personal service of summons or other form of notice.”³⁸ The point is that while such “notice” in the form of a summons or subpoena could technically be termed “speech”—and often even *attorney* speech, it serves the same function as did historical government brute force.

The tie of attorney speech to government power is far broader than in the blatant example of compulsory process. Anytime a judgment is rendered or a person is convicted of a crime, individuals are subject to government brute force—defendants held liable will pay the judgment at the risk of wages being garnished or their property being seized and sold. On the other hand, if the plaintiff loses, the plaintiff will have to bear the cost of harm done to her and will not be allowed to seek retribution or vengeance on the person allegedly responsible for her harm. In the transactional context, attorneys set up business entities and contractual structures that protect and increase the property of their clients, including through organizing and profiting from the labor of others. Such arrangements, if created properly, are backed by the law, by government power—which is how they effectively protect individuals from liability and maximize their wealth.

³⁷ *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999).

³⁸ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

It is this very quality of attorney speech—its tie to the power of government and to the force of law—that makes attorney speech distinct, and which requires that it receive special protection attuned to its function. Recognizing the need to protect attorney speech does not create a right to attorney “unregulated talkativeness” either in or out of court.³⁹ Rather, the needed protection is tied to the essential role attorneys play in access to and in the fair administration of justice. Thus, the recognized protection would cover such attorney speech as the right to raise and argue relevant arguments in official proceedings, to create legally binding entities and agreements for clients, to give advice about lawfulness or unlawfulness of client conduct, or to otherwise preserve people’s constitutional and legal rights—in short, to invoke or avoid the power of government.

B. Protection of Life, Liberty and Property

Lawyers are not paid to provide “speech”—rather, their services are aimed at securing life, liberty, and/or property. This is as true for the transactional attorney (involved in creating legally-recognized business organizations and contracts that have the potential to protect and enhance’ people’s property, avoid liability, and bind themselves and others) as it is the civil litigator and the criminal lawyer. Of course rights to life, liberty, and property are among the inalienable rights given to all men and women recognized in the Declaration of Independence as providing an essential rationale for the creation of our government.⁴⁰ Indeed, these rights are secured against state or federal intrusion through the Fifth and Fourteenth Amendments.⁴¹

³⁹ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 25 (1948) (“The First Amendment [] is not the guardian of unregulated talkativeness.”).

⁴⁰ The Declaration of Independence para. 2 (U.S. 1776); *cf.* Landon W. Magnusson, *Selling Ourselves into Slavery: An Originalist Defense of Tacit Substantive Limits to the Article V Amendment Process and the Double – Entendre of Unalienable*, 87 U. DET. MERCY L. REV. 415, Part II.A (2010).

⁴¹ U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or peroperty, without due process of law.”); U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

In recounting the legal profession's narrative, Geoffrey Hazard summarizes, "the legal profession's basic narrative is a defense of due process. The lawyer's work consists of resistance to government intervention in the lives, liberty, or property of private parties."⁴² Although Hazard questions the propriety and legitimacy of equating life and liberty with property,⁴³ he notes that this equivalence "was established in the Constitution" which "expresses the parity of person and property: 'No person shall . . . be deprived of life, liberty, or property, without due process of law.'"⁴⁴ Hazard posits that "protection of property [particularly business property] might be viewed as (1) essential to a stable and prosperous society and (2) continually threatened by majoritarian democratic politics. This would validate the legal profession's role as *mediator between property and democracy*."⁴⁵ Hazard ultimately concludes:

Since the adoption of the Constitution, the basic function of the legal profession in the United States has been to *reconcile* the constitutional necessities of *an economic system devoted to the production of wealth* through business enterprise *with a political system that is predominantly democratic*. A related function is to *reconcile majoritarian politics* with protection of *the rights of religious and other minorities*. The lawyer's "practice" of bringing about these accommodations embodies the legal profession's primary set of skills and expresses *its primary role in the American social system*.⁴⁶

It is this primary, and constitutionally essential, role of attorney speech in protecting life, liberty, and property from governmental intrusion (which, in a self-governing society, includes protection from majoritarian excess and overreaction) that requires special protection. Monroe Freedman and Abbe Smith similarly argue that the rights comprising the adversary system (and

⁴² Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 YALE L. J. 1239, 1246 (1991). *See also id.* at 1266 ("[T]he legal profession's traditional ideal viewed the lawyer as the protector of life, liberty, and property through due process.")

⁴³ *Id.* at 1266. Notably, Hazard posits that while the "traditional ideal" is that lawyers protect life, liberty and property through due process, yet in actual practice, the work of lawyers "primarily involves the protection of property, specifically business property." *Id.* Hazard states that "[t]he profession's legitimacy in performing this function [protecting business property] rests on the continual reaffirmation, under the rubric of due process, of the parity between property on the one hand and life and liberty on the other." *Id.*

⁴⁴ *Id.* at 1245.

⁴⁵ *Id.* at 1267.

⁴⁶ *Id.* at 1278.

that should shape the professional responsibilities of the lawyer) are “included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law.”⁴⁷ They conclude that “[a]n essential function of the adversary system, therefore, is to maintain a free society in which individual human rights are central.” Freedman and Smith contend that by preserving these rights that comprise due process, “[p]recious as those objectives are, we also seek through the adversary system ‘to preserve the integrity of society itself . . . [by] keeping sound and wholesome the procedure by which society visits its condemnation on an erring member.’”⁴⁸ Such societal condemnation obviously exists in the criminal context, but also whenever government deprives a person of life, liberty, or property, including in civil litigation and by legislation having such an effect.

While Hazard, Freedman, and Smith discuss the attorney’s central role in protecting due process as a key to understanding professional ethics, it is my contention that this role should be defining for determining the scope of Free Speech Clause protection to be afforded attorney speech.

A major debate in the legal ethics academy is whether attorneys should be considered (and thus regulated as) professionals or as service providers.⁴⁹ Yet the debate fails to recognize the distinct and important role of the attorney in the administration of justice. For example, Thomas Morgan argues that attorneys should be regulated like other service providers because

⁴⁷ See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LEGAL ETHICS* 13 (3d ed. 2004).

⁴⁸ See *id.* at 18 (quoting Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 35 (H. Berman ed., 1960)). Freedman and Smith also quote Lawrence H. Tribe making a similar point, specifically in the criminal context:

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

See *id.* at 19 (quoting Lawrence H. Tribe, *Trial by Mathematical Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1391–1392 (1971)).

⁴⁹ See generally MORGAN, *supra* note 18 (arguing that lawyers should not be treated as professionals, but as service providers); see also Terry, *supra* note 19, at 205–06.

“[m]uch of what lawyers do is what most merchants do, i.e., sell commodities.”⁵⁰ However, the “commodity” sold has special characteristics that create a need for special protection from certain forms of regulation—not applicable to the commodities sold by most merchants. The commodity that attorneys are selling *is* the invocation or avoidance of government power. Attorneys are selling/providing the force of law to protect the individual’s life, liberty or property. This fact does not necessarily reach Morgan’s argument that attorneys should be categorized as service providers rather than as professionals (a debate which is aside from the present discussion). But it is important in understanding the protections that must be afforded to attorneys in providing their services, selling their commodities, or fulfilling their profession (however attorney services are ultimately categorized). Regardless of the classification, the fact remains that the commodity sold (1) is tied to the power of government; and (2) serves a defining attribute of our constitutional government—providing for the protection of individual or collective life, liberty, or property. Thus, that commodity, the speech of the attorney, cannot be abridged in such a way that it defeats this purpose that is central to our constitutional compact.

Morgan’s argument that attorneys can (and will) be regulated by outside entities because they really are commodity sellers or service providers, misses the essential point. The essential point is that attorneys (and perhaps some day others who are allowed to provide legal services after the inevitable breakdown of certain unauthorized practice of law restrictions⁵¹) need special

⁵⁰ MORGAN, *supra* note 18, at 95. Notably, Morgan is making this claim in light of the growing existence of and access to standardized forms for legal services. Thus he argues, “the result of document standardization is that it is now an open secret that an increasing amount of what lawyers do is no longer a complex task requiring expertise worthy of premium pay. Much of what lawyers do is what most merchants do, i.e., sell commodities that ultimately command only a price set in competition with many potential sellers.” *Id.*

⁵¹ While there are legitimate reaches to unauthorized practice of law rules, restrictions creating the current enforced monopoly of all legal services to lawyers will certainly be loosened. The breakdown (to a certain extent) of unauthorized practice of law rules appears to be inevitable in part because of the globalization of lawyering (*see* Terry, *supra* note 19, at 205–06), and the growing existence of and access to standardized forms for legal services (*see* MORGAN, *supra* note 18, at 95). Morgan argues that the regime should change so that certain levels of legal services could be permissibly provided by someone with a period of specific training, but less than that required of a

protection for speech that is necessary to fulfill their key function in providing individuals with access to justice—that is, access to the invocation or avoidance of government power in the protection of life, liberty, and property.

C. Access to Justice

As used in this article and in the access-to-justice theory of the First Amendment, the idea of access to justice is far broader than the constitutionally-recognized, although ill-defined, right to court access⁵² or the constitutionally-recognized right to counsel for indigent defendants.⁵³ Additionally, it is significantly broader than “access to justice” in the oft-used sense of providing legal services to those of low or moderate income.⁵⁴

Indeed, in discussing “access to justice” here, I include access to justice and the fair administration of the laws *by anyone*—which means that work of a lawyer (whether paid or not, whether transactional or litigation, whether civil, administrative or criminal) that serves to invoke or avoid the power of the government in securing individual or collective life, liberty or property. The access-to-justice theory recognizes the constitutional right that *all* litigants have to counsel. Even where litigants do not have a constitutional right to have the state provide legal counsel for them,⁵⁵ they still have a constitutional right to hire a lawyer and have the lawyer speak on their

full-fledged lawyer. See MORGAN, *supra* note 18, at 214–15. Perhaps jurisdictions will begin to allow and schools will begin to offer such training and licensing. Such a system would certainly be an improvement over the current regime and perhaps would help to solve the long-existing lack of legal services for the middle class.

⁵² See, e.g., Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) (“Decisions of this Court have grounded the right of access to courts in the Article IV of the Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses” (citations omitted)); see also Tarkington, *Free Speech Right to Impugn*, *supra* note 24, at 379–85 (reviewing Supreme Court decisions regarding the constitutional right to court access in the context of raising claims of judicial bias).

⁵³ See Gideon v. Wainwright, 372 U.S. 335 (1963).

⁵⁴ See, e.g., DEBORAH RHODE, ACCESS TO JUSTICE (2004).

⁵⁵ See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (recognizing Sixth Amendment right to counsel for state indigent criminal defendants).

behalf and act as their advocate and advisor.⁵⁶ As Monroe Freedman and Abbe Smith have summarized, “the Supreme Court has reiterated that the right to counsel is ‘the most precious of our rights,’ because it affects one’s ability to assert any other right.”⁵⁷ The Supreme Court, in recognizing the constitutional right for indigent criminal defendants to be supplied with counsel, explained: “The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”⁵⁸ The Court also recognized that “assistance of counsel” is “deemed necessary to insure fundamental human rights of life and liberty” without which justice cannot be done.⁵⁹ As set forth in the preceding discussion, lawyer speech plays a critical role in our constitutional justice system by invoking and avoiding government power on behalf of clients and thus preserving their individual or collective life, liberty, and/or property.

Although “access to justice,” as used here, encompasses speech broader than the right to court access, it certainly includes and protects attorney speech commensurate with that right.⁶⁰ In our justice system, attorneys are the gateway to effective access to the third branch of government. Litigants have constitutional rights to due process and court access, but those rights would be of little value if attorneys could be restricted from speaking on behalf of clients and securing client’s underlying rights.⁶¹

Thus, as more fully developed below, in examining the essential role of the attorney in our system of justice for everyone, access to justice includes at least (1) the ability to invoke the

⁵⁶ *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (explaining that it “would be a denial of a hearing, and therefore of due process” under the Fifth and Fourteenth Amendments to prohibit litigants from employing attorneys to represent them); *see also* *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5th Cir. 1980) (discussing the “constitutional right to retain hired counsel”).

⁵⁷ FREEDMAN & SMITH, *supra* note 47, at 13.

⁵⁸ *Gideon*, 372 U.S. at 344–45 (1963).

⁵⁹ *Id.* at 343.

⁶⁰ *See infra* notes 215–23, and accompanying text (discussing the constitutional right to court access).

⁶¹ *See* Tarkington, *Free Speech Right to Impugn*, *supra* note 24, at 383, 419–22 (“Due process guarantees to criminal and civil litigants . . . are defeated if the attorney has no right to express and vindicate them in court proceedings.”)

protection of the law; (2) the ability to obtain legal advice about the lawfulness or unlawfulness of proposed or past conduct; (3) the ability to access court and government processes and to raise relevant and colorable arguments therein; and (4) the ability to secure the constitutional rights of others.

II. Methods for Analyzing the Constitutionality of Attorney Speech Regulation

In the existing literature and case law, various theories emerge regarding the appropriate analysis for determining the constitutionality of restrictions on attorney speech. There is no consensus or agreed upon method. Nevertheless, as will be shown by reviewing the existing views, all of them fail to adequately protect the speech of attorneys when made in their capacity as an attorney. Indeed, the U.S. Supreme Court has seemed to condone this dichotomy by stating, in dicta: “It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed.”⁶² A central idea of the access-to-justice theory is that attorneys—in their capacity as attorneys both in and out of court—perform essential functions in our justice system. Consequently, their speech cannot be circumscribed to frustrate those essential functions—especially when that speech is made by a lawyer acting as a lawyer. As *Humanitarian Law Project* illustrates, the most obstructive form of lawyer regulation is that which denies attorneys their essential role to speak to and on behalf of clients.

A. All Restrictions by the Judiciary or Bar are Constitutional

1. Constitutional Conditions of Practicing Law

The traditional American view is that attorneys have no Free Speech protection for

⁶² *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (citations omitted).

restrictions on their speech that are imposed by the judiciary or state bar.⁶³ The central thesis of this constitutional conditions theory is that, as a condition of receiving a license to practice law, the lawyer voluntarily waives her constitutional rights to free speech and agrees to abide by any conditions or restrictions on her speech that the judiciary or bar may impose. Justice Stewart, in words that are still frequently cited by state courts, explained in his *In re Sawyer* concurrence:

If . . . there runs through the principal opinion an intimation that a lawyer *can invoke the constitutional right of free speech to immunize himself* from even-handed discipline *for proven unethical conduct*, it is an intimation in which I do not join. . . . Obedience to ethical precepts may require *abstention from* what in other circumstances might be *constitutionally protected speech*.⁶⁴

For example, in 2003, the Ohio Supreme Court paraphrased Stewart’s concurrence in holding that, “attorneys may *not* invoke the federal constitutional right of free speech to immunize themselves from evenhanded discipline for proven unethical conduct.”⁶⁵ (Which raises the quandary of how speech can really be “proven unethical conduct” if it would also be entitled to “federal constitutional” protection.)

⁶³ As noted above, this classic view was expressed by Benjamin Cardozo thus: “Membership in the Bar is a privilege burdened with conditions.” See *In re Rouss*, 221 N.Y. 81, 84 (1917). The idea can be seen in earlier cases even as to traditional judiciary-imposed standards for attorneys before the existence of codes of lawyer conduct. In *Bradley v. Fisher*, 80 U.S. 335, 355 (1871), the Supreme Court declared that attorneys agree, upon admission to the bar to be respectful to the judiciary—as a condition of practicing law. See *id.* (explaining that when admitted, attorneys take upon themselves the obligation “to maintain *at all times* the respect due to courts of justice and judicial officers,” which “includes abstaining *out of court* from all insulting language and offensive conduct toward the judges personally for their judicial acts.”).

Professor Zacharias notes that in colonial and post-revolutionary America, “[a]ny regulation of lawyers came from judges exercising their authority to admit lawyers to practice in their courts,” as “judges could forbid lawyers to appear, sanction them for litigation misconduct, or punish them in more indirect ways.” See Zacharias, *supra* note 14, at 1156. In the late nineteenth and early twentieth centuries, bar associations were created and “represented the modern form of lawyer self-regulation.” See *id.* at 1158–60. In the 1920s “a movement began to produce court rules or statutes requiring all practicing lawyers to belong to state bar organizations,” which “allowed the organizations to collect fees, control (and limit) admission to the bar, and participate in the discipline of lawyers.” See *id.* at 1161; see generally, Andrews, *supra* note 14.

Freedman and Smith argue that the creation of ethics codes in the early twentieth century was “not inspired purely by disinterested concerns with improving the ethical conduct of lawyers,” but, instead, “the established bar adopted educational requirements, standards of admission, ‘canons of ethics’ designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession.” See FREEDMAN & SMITH, *supra* note 47, at 3.

⁶⁴ *In re Sawyer*, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring).

⁶⁵ Office of Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 429 (Ohio 2003) (paraphrasing Justice Stewart’s concurrence in *In re Sawyer*, 360 U.S. at 646–47).

In *Gentile v. State Bar of Nevada*, Justice Rehnquist, speaking for four justices, articulated the constitutional conditions argument extremely broadly:

When petitioner was admitted to practice law before the Nevada courts, the oath which he took recited that “I will support, abide by, and follow the Rules of Professional Conduct as are now or may hereafter be adopted by the Supreme Court” . . . *The First Amendment does not excuse him from that obligation*, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada.⁶⁶

Because the lawyer, Dominic Gentile, had sworn to abide by the Rules of Professional Conduct when he was admitted to the bar, he could not object to any restriction imposed by the state bar on the basis that it abridged his freedom of speech. He agreed when he was admitted to the bar to forfeit his rights to free speech, and thus the state could constitutionally regulate attorney speech without violating the First Amendment. Courts have cited, and continue to cite, the constitutional conditions idea as sufficient to defeat First Amendment challenges to judicially-imposed regulation or punishment.⁶⁷

Of course, one of the major problems with the constitutional conditions argument is that it is patently inaccurate. While pronouncing the constitutional conditions theory from time to time, the Supreme Court has repeatedly held attorney regulations unconstitutional as violative of attorneys’ First Amendment rights.⁶⁸ The constitutional conditions theory is invoked selectively.

⁶⁶ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1081 (1991) (Rehnquist, J.) (emphasis added).

⁶⁷ See, e.g., *In re Pyle*, 283 Kan. 807, 822–23 (2007) (“A lawyer’s right to free speech is tempered by his or her obligations to the courts and the bar, obligations ordinary citizens do not undertake.”); *In re Shearin*, 765 A.2d 930, 938 (Del. 2000) (holding that “there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer’s constitutional right to freedom of speech”); *In re Guy*, 756 A.2d 875, 881 (Del. 2000) (explaining that “Respondent’s right to free speech did not supersede his ethical obligation as a member of the Bar”); *Iowa Sup. Ct. Board of Prof’l Ethics and Conduct v. Ronwin*, 557 N.W.2d 515, 519 (Iowa 1996) (stating that “a lawyer’s right to free speech does not include the right to violate the statutes and canons proscribing unethical conduct”); *In re Erdmann*, 33 N.Y. 2d 559, 561–62 (1973) (Burke, J., dissenting) (explaining that statements by attorney for article in LIFE magazine “violate restrictions placed on attorneys which they impliedly assume when they accept admission to the Bar”). *State v. Nelson*, 201 Kan. 637, 640 (1972) (“the right to free speech may not be invoked to protect an attorney against discipline for unethical conduct”); see also *In re Westfall*, 808 S.W.2d 829, 834 (Mo. 1991) (“[A]n attorney’s voluntary entrance to the bar acts as a voluntary waiver of the [First Amendment] right to criticize the judiciary.”).

⁶⁸ See, e.g., *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. State Bar of Arizona*, 433

Sometimes it prevents First Amendment scrutiny, but sometimes not, and there is not any established method for determining when it is or is not applicable. However, as noted below, Kathleen Sullivan has argued that the case law can be understood as providing normal First Amendment protection when attorneys are speaking “as participants in ordinary public or commercial discourse on a par with other speakers in those realms,” but that their free speech rights are limited (or even lost) when attorneys are speaking in their role of attorney as officers of the court or “delegates of state power.”⁶⁹

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

Suppose a lawyer is disciplined for making racist remarks in a closing argument at trial. It is no avail to claim that the disciplinary agency *is requiring the lawyer to surrender a constitutional right* in exchange for the privilege of trying cases before the courts of the state because *the lawyer had no preexisting right* to address a jury in a courtroom.⁷⁰

That is, because a non-lawyer lacks a constitutional (or any) right to speak on behalf of a client in a court proceeding, the lawyer similarly has no constitutional right to engage in such speech. While the example provided by Wendel is alluring, the problem is the ultimate implications of the argument. Indeed, the *Humanitarian Law Project* decision can be read to espouse a similar view. The Court concludes that attorneys are not denied their free speech rights because they can independently advocate whatever views they want.⁷¹ That is, they can act as lay citizens. What they cannot do is act as attorneys—they cannot engage in any speech or advice to or in

U.S. 421 (1977) (striking rule of professional conduct consisting of traditional ban on all attorney advertising); *In re Primus*, 436 U.S. 412 (1978) (striking rule of professional conduct prohibiting direct solicitation by non-profit groups like the ACLU); *In re R.M.J.*, 455 U.S. 191 (1982) (striking rule of professional conduct restrictions on advertising); *Zauderer v. Office of Disciplinary Counsel of the supreme Court of Ohio*, 471 U.S. 626 (1985) (same).

⁶⁹ Kathleen Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 584 (1998)

⁷⁰ W. Bradley Wendel, *Free Speech for Lawyers*, 28 *HASTINGS CONST. L. Q.* 305, 373–74 (2001).

⁷¹ *Holder v. Humanitarian Law Project*, slip op. at 2722–23 (2010) (“The statute does not prohibit independent advocacy or expression of any kind.”).

coordination with their proposed clients.⁷² Such a theory completely denies the attorney’s function in our system of justice.

In that vein, *Humanitarian Law Project* is in tension with the Supreme Court’s prior decisions in *Legal Services Corp. v. Velazquez*⁷³ and *NAACP v. Button*,⁷⁴ both of which correctly recognized that attorneys must have free speech rights to perform at least some lawyer functions—even though they could not have engaged in such speech prior to becoming an attorney. In *Velazquez*, the Court held that attorneys have a First Amendment right to raise relevant and colorable arguments in legal proceedings on behalf of clients.⁷⁵ Certainly this is a speech right that the attorney did not have prior to being sworn into the bar, but the Court found it constitutionally protected and rightly so. In order for the client to be able to vindicate her legal and constitutional rights, the attorney cannot be prohibited from undertaking such speech.⁷⁶ Indeed, as the *Velazquez* Court noted, if Congress could prohibit attorneys from raising constitutional challenges to congressional legislation, the very function of the judiciary would be frustrated.⁷⁷ Similarly, in *Button*, the Court held that Virginia could not constitutionally prohibit NAACP lawyers from advising members of the African American community of their rights and offering to instigate litigation on their behalf.⁷⁸ The *Button* Court recognized that such “communication” between attorney and prospective clients and the subsequent litigation was “a

⁷² See *id.* at 2722–24.

⁷³ *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

⁷⁴ *NAACP v. Button*, 371 U.S. 415 (1963).

⁷⁵ *Velazquez*, 531 U.S. at 545–47 (holding that the statute prohibited “speech and expression” and that “attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case”); see *id.* at 546 (noting that the statute attempts “to exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider”).

⁷⁶ See Tarkington, *Free Speech Right to Impugn*, *supra* note 24, 371–73 & 417–22.

⁷⁷ See *Velazquez*, 531 U.S. at 545 (“By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits *speech* and *expression* upon which courts must depend for the proper exercise of the judicial power.”(Emphasis added.)).

⁷⁸ See *Button*, 371 U.S. at 421–22.

form of political expression” protected by the First Amendment.⁷⁹ Notably, in both *Button* and *Velazquez*, the restriction purportedly only prohibited attorney speech, and did not directly restrict client speech. Nevertheless, the Court in both cases recognized a Free Speech Clause right belonging to the lawyer to speak to and on behalf of her clients—even in official court processes.

2. Protection of Essential Functions through Traditional “Self-Regulation”

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

Indeed, one of the traditional justifications for allowing attorneys and other traditional professions to self-regulate is that attorneys “alone have the specialized knowledge to understand the unique nature of their profession’s problems and hence, [will alone know how] to apply effective cures.”⁸⁰ Regulation by the judiciary is generally attuned to this same purpose. The judiciary, generally composed of lawyers,⁸¹ understands the role of attorneys in our system of justice and so, in theory, will prescribe appropriate regulations.

Unfortunately, there have been instances where the judiciary has failed to protect speech that should fall within the core protection of attorney functions. For example, as I have argued in previous articles, the judiciary has failed to protect attorney speech that is critical of the

⁷⁹ *See id.* at 420.

⁸⁰ William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 490 (1995).

⁸¹ *See, e.g.*, MORGAN, *supra* note 18, at 73 (noting that throughout the “1950s and 1960s, lawyers could get away with convincing themselves they were part of a self-regulating profession” in part because “rules of professional conduct has been established by bar associations working through state supreme courts *whose justices had been lawyers only a few years before*” (emphasis added)).

judiciary—even when that speech has been used to raise a relevant argument of judicial bias in a court proceeding.⁸² Indeed, the judiciary has harshly punished attorneys for speech impugning judiciary integrity regardless of the forum in which the speech has been made and regardless of whether the attorney was acting in a representative capacity when the speech was made.⁸³

Attorneys play a key role in checking government power when it encroaches upon or threatens the life, liberty, or property of individuals. Often the criminal defense attorney or civil rights litigator is upheld as the archetypal example of the attorney who plays this role.⁸⁴ Yet attorneys also challenge judicial power. Every appellate attorney challenges government and government decrees—but the attorney is challenging judicial action rather than actions of the executive or legislative branch.⁸⁵ Thus, leaving regulation and punishment solely in the hands of the judiciary leaves open the problem that the judiciary is left to punish or restrict challenges to their own actions.

Further, as Benjamin H. Barton has argued, although regulation by state supreme courts has the advantage of coming from someone who understands the needs of the courts and of attorneys,⁸⁶ this advantage is “tempered by the fact that courts rarely use this expertise. They generally delegate almost all of their authority back to bar associations or regulatory agencies.”⁸⁷

Most importantly, in light of the reality that regulation is imposed by entities other than the state judiciary, the underlying compact of the constitutional conditions idea is undermined. The traditional idea was that attorneys waived their rights to free speech, but the regulation came

⁸² See generally Tarkington, *Free Speech Right to Impugn*, *supra* note 24; Tarkington, *The Truth Be Damned*, *supra* note 24.

⁸³ Tarkington, *The Truth Be Damned*, *supra* note 24 at 1569–70.

⁸⁴ See, e.g., Sullivan, *supra* note 69 at 587–88 (“It would plainly be untenable for the Court to treat lawyers as entirely the agents of the state, for part of their very job description within the administration of justice is to challenge the state—for example, in the capacities of criminal defense lawyer or civil rights litigator.”)

⁸⁵ See Tarkington, *Free Speech Right to Impugn*, *supra* note 24, 391–92.

⁸⁶ Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1210 (2003).

⁸⁷ *Id.*

from the state judiciary or state bar (an insular and inside group) who would understand the role of the attorney and whom the attorney could trust to impose appropriate regulation. Although the compact was always imperfect, the basic premise is significantly weakened where regulation of attorneys comes from outsiders.

B. Normal First Amendment Theory and Doctrine

The primary alternate to the “constitutional conditions” method of denying attorneys access to First Amendment protections is to use normal First Amendment case law and doctrines. Notably, outside of the constitutional conditions argument that attorneys have ceded their rights to free speech, the Supreme Court has employed normal First Amendment analysis and doctrine in examining regulations or punishment of attorney speech. For example, the Supreme Court has analyzed restrictions on attorney advertising by applying the *Central Hudson* commercial speech test. The Court has not modified the test based on the fact that the regulation restricts attorney speech.⁸⁸ Although the state interests and the regulations themselves may involve interests specific to attorneys, the analysis used to test the constitutionality of the restriction, along with the level of scrutiny employed, are the same used for regulation of any other service provider or regulated industry. Further, In *Republican Party of Minnesota v. White*,⁸⁹ the Court applied strict scrutiny—the normal level for restrictions on political speech—in analyzing the constitutionality of an announce clause, which prohibited attorneys (and judges) running for judicial office from expressing their views on certain political issues.⁹⁰

The options for analyzing attorney speech have thus taken two completely opposed paths—either the attorney has no constitutional rights, or the attorney has regular constitutional

⁸⁸ See e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637–44 (1985); *In re R.M.J.*, 455 U.S. 191, 203–06 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977).

⁸⁹ 536 U.S. 765 (2002).

⁹⁰ See *id.*

rights. (This may be contrasted with the special analysis created by the Supreme Court for restrictions on speech of public employees.⁹¹) Kathleen Sullivan has contended that the cases can be understood as depending on whether the attorney is acting in a public or private role—when an attorney is acting more as an officer of state power (for example, in courtroom speech), then the constitutional conditions argument is used and the attorney has no First Amendment rights. However, when the attorney is acting more as a private citizen, then the attorney has speech rights similar to those of other citizens.⁹² The Supreme Court, however, has not expressly adopted such a dichotomy in its treatment of attorney speech.

Even when normal First Amendment doctrines are employed, they are not always sufficient to protect the essential access-to-justice functions performed by attorneys through their speech. As noted, in *Milavetz*, the problematic attribute of the regulation was that it restricted the ability of attorneys to fully advise a client about the boundaries of lawful and unlawful behavior. Yet the argument used to contest the regulation’s constitutionality was vagueness.⁹³ Similarly, in *Humanitarian Law Project*, one of the primary arguments employed by plaintiffs (and the one relied on by the Ninth Circuit in finding the law unconstitutional) was vagueness, when the true problem with the law is that it denies attorneys the ability to invoke the law on behalf of desired

⁹¹ See, e.g., *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 568 (1968) (“The problem in any case is to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”). The *Pickering* test has been significantly undermined by the Supreme Court’s decision in *Garcetti v. Ceballos*, which held that public employees lack Free Speech Clause protection for speech made pursuant to their employment duties. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

⁹² Sullivan, *supra* note 69, at 569 (positing that “lawyers are sometimes perceived as classic speakers in public discourse”; however, attorneys in some roles are “thought of as delegates of state power—officers of the court and professional licensees whose special privileges are conditioned upon foregoing some speech rights that others enjoy”); *id.* at 584 (“The lawyer speech cases reflect a dichotomy between the Court’s treatment of lawyers as participants in ordinary public or commercial discourse on a par with other speakers in those realms, and its treatment of lawyers as subject to some additional speech restrictions by virtue of their ties to state power.”)

⁹³ See *Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324, 1337 (2010).

clientele, or even advise them on how to do so.⁹⁴ In both cases, the Fifth and First Amendment prohibition on vague laws was the primary argument used (apparently viewed as the most likely to be successful). In neither case was there a theory or doctrine of the Free Speech Clause that adequately addressed the core problems with the restrictions: specifically that they frustrated the essential role of attorneys in our system of justice.

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

C. Analogy to Other Areas of Limited Protection

While not generally employed by courts, a final method for analyzing attorney speech questions is to analogize attorney speech to other, more developed, areas of limited speech protection. For example, Kathleen Sullivan and W. Bradley Wendel have analogized attorney speech problems to government-funded speech, speech of public employees, and speech made in a non-public forum.⁹⁵

⁹⁴ See *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2714 (2010).

⁹⁵ See Sullivan, *supra* note 69, at 585–87 (analogizing regulation of attorney speech to public employee speech regulation, government-funded speech and speech in a non-public forum); Wendel, *supra* note 70, at 375–81 (same); Terri R. Day, *Speak No Evil: Legal Ethics v. The First Amendment*, 32 J. LEGAL PROF. 161, 187–90 (2008) (analogizing attorney speech to public employee speech); Caprice L. Roberts, Note, *Standing Committee on Discipline v. Yagman: Missing the Point of Ethical Restrictions on Attorney Criticism of the Judiciary?*, 54 WASH. & LEE L. REV. 817, 846–54 (1997).

Notably, in all of these analogies, attorney speech is treated as deserving little or no protection whenever the attorney is speaking in her capacity as an attorney. The premise of the government-funded speech theory, for example, is that that the government has funded the court systems and made attorneys officers of the court, and thus can restrict attorney speech made in that capacity.⁹⁶ Further, in the analogy to public employee speech, the attorney as “officer of the court” is treated in like manner to an employee of the court whose speech rights vis-à-vis the judiciary are extremely circumscribed.⁹⁷ Finally, in the non-public forum analog, the entire legal system is viewed as a non-public forum where the government, which created the forum, can restrict the speech of participant attorneys.⁹⁸ Although some of the analogies are more problematic than others, none of them are satisfactory, and all of them fail to protect speech of attorneys made in the role of attorney, counselor, or representative of others.⁹⁹ Consequently, as I have argued elsewhere, these analogies fail to adequately protect litigant rights, including due process and access to courts rights. Moreover, such analogies do not recognize the constitutionally-required role of our judicial system or the role of attorneys in that system.¹⁰⁰

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

⁹⁶ See Tarkington, *Free Speech Right to Impugn*, *supra* note 24, at 393–401 (discussing the analogy of attorney speech regulation to government funded expression).

⁹⁷ See *id.* at 401–409 (discussing the analogy of attorney speech to the speech of public employees).

⁹⁸ See *id.* at 409–413 (discussing the treatment of attorney speech as speech made in a non-public forum).

⁹⁹ See *id.* at 392–413 (“Whatever the term ‘officer of the court’ means, it cannot mean something that denies the very function of the court system and the role of attorneys therein, particularly where it results in the loss of rights and protections for litigants. Under each of these analogies such protections are lost.”).

¹⁰⁰ See *id.* As I show in *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, [E]ach of these analogies fails to recognize and account for the following: (1) the nature of the court system as an essential part of our tripartite system of government that performs constitutionally required functions; (2) the constitutional rights of litigants and criminal defendants to access that system and to protections within that system . . . ;and (3) the attorney’s role in representing her client in that court system, particularly in light of its American adversarial form.

See *id.* at 393.

in transactional and other situations where attorneys are invoking the protection of the law on behalf of the client.

D. The First Amendment Is Inapplicable to Ubiquitous Regulation

Frederich Schauer argues that the First Amendment has been, and probably should continue to be, simply inapplicable to the “omnipresence” of regulation imposed on attorney speech.¹⁰¹ While he notes the occasional “outburst” of First Amendment application to areas of attorney speech, he argues that in general, the doctrines and discourse of the First Amendment have not been thought to apply to attorney speech.¹⁰² Schauer considers arguments in favor of providing constitutional protection for attorney speech, including that the First Amendment likely should apply in certain scenarios, for example to fulfill the First Amendment’s purpose “to ensure that government, its officials, and its processes are subject to public criticism,” including the judiciary.¹⁰³ Yet Schauer contends that there are “strong arguments for continuing to treat the question of regulation of much of the speech of law as a policy rather than as a constitutional question.”¹⁰⁴ When Schauer says that regulation of attorney speech should be treated as a matter of “policy” rather than constitutional law, the idea is that law makers—those entities regulating attorneys—should be able to consider the policies at issue and determine whether or not to impose a given restriction on attorney speech, and that they should be able to do so free from First Amendment constraints.

Schauer argues that attorney speech should lack constitutional protection because speech restrictions are necessary to protect our justice system, specifically, “a criminal defendant’s right

¹⁰¹ See Schauer, *supra* note 33, at 689–92.

¹⁰² See *id.*; see also *id.* at 694–95.

¹⁰³ See *id.* at 697–98. I absolutely agree with Professor Schauer that attorney speech regarding the judiciary should be protected by the First Amendment. See generally, Tarkington, *The Truth Be Damned*, *supra* note 24 (arguing that attorneys should be afforded constitutional protection for speech critical of the judiciary).

¹⁰⁴ Schauer, *supra* note 33, at 698.

to a fair trial,” “the integrity of the trial process,” courtroom order, and “more particularly, [protection] of the jury process.”¹⁰⁵ Schauer indicates that if attorney speech received protection under the normal doctrines and discourse of the First Amendment, speech restrictions (such as exclusionary rules or rules prohibiting communication with jurors) aimed at preserving these essential features of our justice system could be unconstitutional. Further, Schauer argues, that because these speech restrictions are essential to our justice system, they are “inevitable,” and thus, if the Constitution were deemed generally applicable to attorney speech, then the normal doctrines and discourse of the First Amendment would have to be diluted to allow such restrictions.¹⁰⁶ Schauer fears that “expanding the First Amendment into the process of law-speech entails risks to the First Amendment itself, risks that may come from the dilution of necessarily scarce First Amendment resources.”¹⁰⁷

IV. The Access-to-Justice Theory

A. Modeled after a Democratic Theory of the First Amendment

One of the major interpretations of the First Amendment views the protection of democracy itself as the primary purpose of the Speech Clause. As explained by its initial proponent, Alexander Meiklejohn, the purpose of the First Amendment is to protect the ability of United States citizens to govern themselves.¹⁰⁸ In his own words, “[t]he First Amendment does not protect a ‘freedom to speak.’ It protects the freedom of those activities of thought and communication by which we ‘govern.’”¹⁰⁹ The central idea is that free speech is essential for democracy to function. Free speech must exist so that all citizens can fully participate in the

¹⁰⁵ *Id.* at 695; *see also id.* at 689–90, 693.

¹⁰⁶ *See id.* at 698–700 (“[T]here remains the distinct possibility that the diluted tests *that make the inevitable constitutional* are the same *diluted tests* that might *make other forms of less-inevitable regulation* constitutional as well.” (Emphasis added.)).

¹⁰⁷ *See id.* at 699.

¹⁰⁸ *See generally*, MEIKLEJOHN, *supra* note 39.

¹⁰⁹ Alexander Meiklejohn, *The First Amendment is Absolute*, 1961 SUP. CT. REV. 245, 252 (“The freedom that the First Amendment protects is not, then, an absence of regulation. It is the presence of self government.”).

privilege and responsibility of self-government. Meiklejohn stressed the idea of the social contract of the Constitution, whereby “We, the People of the United States” established a government, and consequently, each citizen has the duty and privilege of participating in self-government and also agrees to abide by the laws created thereby.¹¹⁰

Further, Meiklejohn contends that in a democracy, the people are the ultimate sovereigns: “All constitutional authority to govern the people of the United States belongs to the people themselves, acting as members of the corporate body politic.”¹¹¹ Through the constitutional compact, the people delegated limited powers to “subordinate agencies, such as the legislature, the executive, [and] the judiciary.”¹¹² However, “[t]he people do not delegate all their sovereign powers.”¹¹³ Consequently:

Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom *unabridged by our agents*. Though they govern us, *we, in a deeper sense, govern them*. Over our governing they have no power. *Over their governing we have sovereign power.*¹¹⁴

Thus, as Cass Sunstein has reiterated, “the American tradition of free expression” and its “extraordinary protection” for “political speech can well be understood as an elaboration of the distinctive American understanding of sovereignty.”¹¹⁵ This is so, because “[r]estrictions on political speech have the distinctive feature of impairing the ordinary channels for political change” and thus “are especially dangerous.”¹¹⁶ For “if the government forecloses political argument, the democratic corrective is unavailable”¹¹⁷—the citizen loses its sovereignty over the government. The overall point of view is summarized by Martin Redish and Abby Mollen,

¹¹⁰ MEIKLEJOHN, *supra* note 39, at 15.

¹¹¹ Meiklejohn, *supra* note 109, at 253.

¹¹² *Id.* at 254.

¹¹³ *Id.*

¹¹⁴ *Id.* at 257.

¹¹⁵ Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 257 (1992).

¹¹⁶ *Id.* at 306.

¹¹⁷ *Id.*

“democracy and free expression are inextricably intertwined in a symbiotic relationship.”¹¹⁸

Because free speech is essential for democracy and popular sovereignty to function, commentators, such as Meiklejohn, have argued that speech essential to self-government is absolutely protected by the Free Speech Clause of the First Amendment.¹¹⁹ Although the Supreme Court has not adopted Meiklejohn’s theory in whole, it has been strongly influenced thereby¹²⁰ as seen in the protection afforded political speech as being at the “core” of the First Amendment,¹²¹ and in the Court’s adoption of the “actual malice” standard for the punishment of allegedly defamatory speech regarding public officials in *New York Times v. Sullivan* and progeny.¹²² The thrust of these Supreme Court decisions is that democracy cannot function properly without free speech.

¹¹⁸ Martin H. Redish & Abby Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NORTHWESTERN U. L. REV. 1303, 1303 (2009).

¹¹⁹ See MEIKLEJOHN, *supra* note 39, at 46. Meiklejohn explains that “[s]o long as [a citizen’s] active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged.” See Meiklejohn, *supra* note 109, at 257. However, Meiklejohn does not contend that the First Amendment as “an unlimited license to talk,” but instead notes that “there are many forms of communication which, since they are not being used as activities of governing, are wholly outside the scope of the First Amendment.” *Id.* at 258.

¹²⁰ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554 (1977) (“The most influential scholarly analysis of the First Amendment to be published since World War II is Professor Alexander Meiklejohn’s *Free Speech and Its Relation to Self-Government*”).

¹²¹ See, e.g., *Virginia v. Black*, 538 U.S. 343, 365 (2003) (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’”); *Republican Party of Minn. v. White*, 536 U.S. 765, 774–75 (2002) (holding that “speech about the qualifications of candidates for public office” is “‘at the core of our First Amendment freedoms’”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (“Indeed, the speech in which Mrs. McIntyre engaged—handing out leaflets in the *advocacy of a politically controversial viewpoint—is the essence of First Amendment expression.*” (Emphasis added.)); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (“Whatever difference may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” (internal citations omitted)).

¹²² See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); see also *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ([S]peech concerning public affairs is more than self-expression; *it is the essence of self-government.* (emphasis added)).

In *Sullivan* the Court held that a public official could not recover for libel unless the defendant acted with actual malice, meaning that the defendant knew that the statement was false or acted with reckless disregard regarding the truth or falsity of the statement. See *Sullivan*, 376 U.S. at 270; see also *Garrison*, 379 U.S. at 74–75 (“only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions”).

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

This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected. *The theory of the freedom of speech clause was put right side up for the first time.*¹²³

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

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

Just as citizen free speech is essential to the proper functioning of democracy, the access-to-justice theory posits that certain species of attorney speech are essential to the proper functioning of our justice system. Thus, the core protection for attorney speech must be the protection of attorney speech that is essential or key to the proper and constitutional functioning of the United States justice system. As Monroe Freedman and Abbe Smith explain, the American adversary system "consists of a core of basic rights that recognize, and protect, the dignity of the individual in a free society."¹²⁴ Freedman and Smith elaborate that core rights such as "personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury," and others are "included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law—a concept which itself has been

¹²³ Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 208.

¹²⁴ FREEDMAN & SMITH, *supra* note 47, at 13.

substantially equated with the adversary system. An essential function of the adversary system therefore, is to maintain a free society in which individual human rights are central.”¹²⁵

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

Just as the Supreme Court in *Garrison v. Louisiana* recognized that political speech “was more than self-expression” but constituted “the essence of self-governance,”¹²⁶ so too attorney speech—particularly speech made in her capacity as attorney on behalf of or to clients—is far more than self-expression, and instead provides access to the invocation or avoidance of government power. Thus, unlike the analogies to limited speech protection or the constitutional conditions ideas discussed above, the access-to-justice theory places its primary protection on attorney speech made in the capacity of attorney. Indeed, the protected core of *attorney* speech should generally not be “*self-expression*” in a normal sense of that word. Rather, the protected core of attorney speech is representative and/or communicative by nature. Even attorneys committed to a cause can only bring cases to courts involving real parties in interest who have suffered a legally cognizable harm and hire the attorney to represent them.¹²⁷ Attorney speech creates effective access to the third branch of government, advises people regarding their rights so that they can structure their conduct and protect their life, liberty, and property, and provides

¹²⁵ *Id.* Freedman and Smith elaborate upon the constitutional core of rights protected through the American justice system to help attorneys understand their professional duties to their clients. They conclude: “[T]he professional responsibilities of the lawyer, serving as counsel within our constitutionalized adversary system, must be informed by the same civil libertarian values that are expressed in the Constitution.” *See id.*

¹²⁶ *See Garrison*, 379 U.S. at 74–75.

¹²⁷ *See infra* note 147 and accompanying text

access to law itself even outside of official court proceedings. It is this speech that constitutes the core and essential role of attorneys in our system of justice and which deserves core protection under the access-to-justice theory of the First Amendment.

In examining the constitutionality under the Free Speech Clause of any regulation or punishment of attorney speech, the central question should be whether the speech being restricted or punished is central to the attorney's role in our system of justice in providing access to justice or the fair administration of the laws. While the contours of the theory and its real-world application require fuller development and exploration, there are certain categories of attorney speech that should fall within this essential role that attorneys play in the American justice system. These include: (1) the ability to invoke the protection of the law; (2) the ability to provide legal advice about the lawfulness or unlawfulness of proposed or past client conduct; (3) the ability to access courts and raise relevant and colorable legal and constitutional arguments in judicial, administrative, and other government-sponsored proceedings that threaten citizen life, liberty, or property; and (4) speech necessary to preserve the constitutional rights of individuals. Such speech should be afforded core protection, in like manner to political speech, subject to strict scrutiny.

1. The Power to Invoke the Protection of the Law

A key element to a proper understanding of the access to justice provided by lawyers through their speech, is the lawyer's ability (through legal training and knowledge) to use speech that will invoke the protection or power of the law. While the litigator provides this service as well, it is the transactional attorney's very function to use speech that will have the force of law and will protect her client's interests. The transactional attorney drafts documents that create business organizations and contractual relationships, invoking the law's protection by complying

with legal requirements. Again, this “speech” from the lawyer is calculated to have the force of law and to preserve the client’s life, liberty, or property or protect the client from future liability. Examples include estate planning, creating business organizations, issuing securities, real estate contracts, mergers and acquisitions, etc. In each instance a lawyer is called upon because the lawyer has the requisite legal knowledge and training (1) to understand what is required to make the speech legally binding on the parties; and (2) to understand how the speech will likely be interpreted in the event of a dispute.

Lawyers thus serve an essential role in our system of justice by providing individuals with the necessary language and process to invoke or avoid government power (including future liability). Indeed, by forbidding such speech—even though allegedly only a restriction on attorney speech—individuals would in large part be unable to invoke the law to protect their life, liberty, or property.¹²⁸ Thus attorney speech that invokes the protections of existing law is essential to access to justice and the fair administration of the laws and deserves core Free Speech Clause protection.

Holder v. Humanitarian Law Project exemplifies this category of speech. *Humanitarian Law Project* concerns the constitutionality of the “material support” provisions of the Intelligence Reform and Terrorism Prevention Act (IRTPA)¹²⁹ which make it a crime (punishable by up to 15 years of imprisonment) to “knowingly provide material support or

¹²⁸ See *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also Tarkington, *Free Speech Right to Impugn*, *supra* note 24, at 419–22.

¹²⁹ See 18 U.S.C. 2339A & 2339B. The prohibition on providing “material support” to foreign terrorist organizations was initially enacted in 1996 with the Anti-Terrorism and Effective Death Penalty Act, yet those provisions did not clearly include within their scope attorney speech and advice. In 2001, as part of the USA PATRIOT Act, 115 Stat. 377, Congress amended the material support statute by additionally prohibiting “expert advice or assistance.” Finally, in IRTPA in 2004, Congress “added the term ‘service’ to the definition of ‘material support or resources’ and defined ‘training’ to mean ‘instruction or teaching designed to impart a specific skill, as opposed to general knowledge,’” and “also defined ‘expert advice or assistance’ to mean ‘advice or assistance derived from scientific, technical or other specialized knowledge.’” See *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2712, 2714–15 (2010); see also 18 U.S.C. § 2339A & 2339B.

resources”¹³⁰ to any group designated by the Secretary of State as a “foreign terrorist organization [FTO].”¹³¹ As defined in the statute, providing material support or resources includes “any . . . service . . . training . . . expert advice or assistance . . . [and] personnel.” The plaintiffs, all of whom are United States citizens or organizations,¹³² instituted a pre-enforcement challenge to the constitutionality of the “material support” law because they had been previously engaged in providing legal assistance to two such FTOs: namely, the Partiya Karkeran Kurdistan (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both of which are devoted to establishing independent states, for Kurds in Turkey and for Tamils in Sri Lanka, respectively. The types of activities with which the Humanitarian Law Project wished to help the PKK and LTTE included providing legal advice “on how to use humanitarian and international law to peacefully resolve disputes”¹³³; teaching organization members “how to petition various representative bodies” for relief, including the United Nations and the United States Congress;¹³⁴ advising the groups on how to obtain recognition under the Geneva Conventions,¹³⁵ and providing other “political advocacy”¹³⁶—“advocacy of peaceful means of achieving the goals of these groups.”¹³⁷ There was no question that “[t]he Humanitarian Law Project has no interest in

¹³⁰ 18 U.S.C. § 2339B.

¹³¹ See 8 U.S.C. § 1189.

¹³² See *Humanitarian Law Project*, 130 S.Ct. at 2731.

¹³³ See *id.* at 2716.

¹³⁴ See *id.* (stating that plaintiffs wished to teach FTOs “how to petition various representative bodies such as the United Nations”); see *id.* at 2732 (Breyer, J., dissenting) (noting that plaintiffs wanted to petition the United States Congress).

¹³⁵ See *id.* at 2739 (Breyer, J., dissenting) (noting that declarations below showed that the “relief” sought would *not* be monetary, but would include seeking “recognition under the Geneva Conventions.”).

¹³⁶ The *Humanitarian Law Project* majority held that they could not tell what “political advocacy” included and so they could not address the plaintiff’s pre-enforcement challenge regarding engaging in “political advocacy” on behalf of the PKK and LTTE. See *Humanitarian Law Project*, 130 S.Ct. at 2729. However, as noted by the dissent, the majority should have remanded to the lower court to consider the precise activities “relating to ‘advocating’ for the organizations’ peaceful causes.” See *id.* at 2742–43 (Breyer, J., dissenting). Further, Justice Breyer contends that “the majority is wrong about the lack of specificity. The record contains complaints and affidavits, which describe in detail the forms of advocacy these groups have previously engaged in and in which they would like to continue to engage.” See *id.* (Breyer, J., dissenting).

¹³⁷ See *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89, Oral Arg. Trans. at 46 (Feb. 23, 2010) (Ginsburg, J., clarifying).

furthering terrorism” or the illegal activities of any of the FTOs; but instead wanted to protect the human rights of members of such organizations and to help and encourage such organizations to “disavow violence and engage in lawful peaceful means of resolving their disputes.”¹³⁸

The Court held that the statute clearly prohibited the plaintiff’s proposed speech,¹³⁹ and that such a prohibition did not violate the First Amendment’s Free Speech or Free Association Clauses. The determining factor for the Court was that “[t]he statute does *not* prohibit *independent advocacy or expression* of any kind.”¹⁴⁰ According to the Court, “plaintiffs may say anything they wish on any topic”¹⁴¹ and “Congress has not, therefore, sought to suppress ideas or opinions in the form of ‘pure political speech.’”¹⁴² Rather, the statute prohibits solely speech performed “in *coordination with or at the direction of*” an FTO.¹⁴³ Notably, the words “in coordination with” are not found in the statute.¹⁴⁴ Apparently, the Court saw its construction of

¹³⁸ *See id.* at 22.

¹³⁹ Indeed, the *Humanitarian Law Project* Court held that the plaintiffs’ vagueness challenge failed because, while the statute may be vague as applied to the activities of others, “the statutory terms are clear in their application to plaintiffs proposed conduct.” *See Humanitarian Law Project*, 130 S.Ct. at 2709.

¹⁴⁰ *See id.*, at 2722–23.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See Humanitarian Law Project* at 19 & 21; *see also id.* at 31 (“[M]ost importantly, Congress has avoided any activities not *directed to, coordinated with, or controlled by* foreign terrorist group” (emphasis added)).

¹⁴⁴ The prohibition on activities done “in coordination with” an FTO is *not* in the statute. The statute explains that the prohibition on providing “personnel” to FTOs is limited to prohibiting

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

See 18 U.S.C. § 2339B(h) (emphasis added). The Court in *Humanitarian Law Project* interpreted this provision to prohibit providing “personnel” who work or “services” made “*in coordination with or at the direction of*” the FTO. *See Humanitarian Law Project*, 130 S.Ct. at 2721–22; *see also id.* at 2722–23 (stating that “Congress has avoided any activities not *directed to, coordinated with, or controlled by* foreign terrorist group”). From the language of § 2339B(h) regarding “personnel,” the additional prohibition added by excluding people who work “in coordination with” (rather than solely “under the [FTO’s] direction or control” as stated in the statute) can possibly be inferred from the second sentence of § 2339B(h), which explains that individuals are allowed to “act *entirely independently*.” *See* 18 U.S.C. § 2339B(h). But such an interpretation was not inevitable, and the Court’s interpretation may in fact prohibit more speech and conduct than Congress even intended.

Further, the addition of the “in coordination with or at the direction of” gloss onto “service” has no place in the statute, but is based on the Court’s insistence that “service” implies work done “in coordination” with another.

the statute as “fixing” any constitutional problem because the statute would “cover *only a narrow category* of speech *to, under the direction of, or in coordination with*” FTOs and thus Congress did not “suppress . . . ‘pure political speech.’”¹⁴⁵ Justice Breyer in dissent argued that “the simple fact of ‘coordination’ alone cannot readily remove protection that the First Amendment would otherwise grant,” particularly because “[t]hat amendment, after all also protects the freedom of association.”¹⁴⁶

Yet the most poignant problem with the Court’s distinction—which neither the majority nor the dissent seemed to appreciate—arises from the fact that the constitutionality of the restriction was being challenged as applied to *attorney* speech. However unworkable a prohibition against speech “directed to, coordinated with, or controlled by” certain organizations may be for the public at large, it is distinctively and acutely problematic for attorney speech. The essence of the role of the attorney is to speak in coordination with and on behalf of clients. Attorneys, when acting as attorneys, do *not* speak for themselves or independently. It is nearly absurd to say that an attorney’s speech has not been abridged because the attorney is “only” prohibited from speaking “in coordination with or at the direction of” their desired clientele. The

Indeed, the Court cites to Webster’s Third New International Dictionary to support its interpretation. *See Humanitarian Law Project*, 130 S. Ct. at 2721.

The Court appears to have adopted the “in coordination with” gloss onto “service” and “personnel” from the Government’s brief. *See Holder v. Humanitarian Law Project*, Brief of Respondents, 2009 WL 4951303, at *45 (arguing that petitioners violate the statute because they want to “engage in certain activities *in coordination with, or under the direction or control of*, groups that they know have been designated as terrorist organizations or have engaged in terrorist activity”(emphasis added)); *id.* at *37 (“[b]ecause those proposed *coordinated activities* clearly fall within the statutory definition of ‘personnel’”(emphasis added)); *id.* at 41–42 (“they want to render benefit *directly* to those groups by *coordinating their actions*” and thus “Petitioners’ proposed conduct therefore falls squarely within the term ‘service’ on any interpretation”(second emphasis added).

Even without such glosses on the prohibitions of “service” and “personnel,” the plaintiffs’ proposed activities (and likely all legal services) would probably come within the prohibitions on providing “expert advice or assistance.” Indeed, the Court noted that “plaintiffs’ activities also fall comfortably within the scope ‘expert advice or assistance.’” *See id.* at 2720.

¹⁴⁵ *See Humanitarian Law Project*, 130 S.Ct. at 2722–23; *see also id.* at 2728 (listing reasons why Court concludes statute constitutional, namely that number of FTOs are limited, that Congress added clarity to the statute, Congress excluded religious and medical support, and “*most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by* foreign terrorist groups”).

¹⁴⁶ *See Humanitarian Law Project*, 2732–33 (Breyer, J., dissenting).

attorney's very role is to speak on behalf of someone else; to invoke the law for someone else; to provide legal advice to someone else on how to act or invoke the law, to raise arguments and claims in court proceedings for someone else. Indeed, the attorney cannot fulfill any of these functions without speaking to and in coordination with the client. All of the essential aspects of attorney speech identified in this article are thwarted by such a restriction. In fact, attorneys generally cannot invoke the protections of the law for non-clients or act on behalf of non-clients.¹⁴⁷

The statute prohibits (and is aimed at prohibiting) attorney speech that is politically and legally effective. The *Humanitarian Law Project* Court purports to allow the attorneys to “say anything they wish on any topic,”¹⁴⁸ and, yet, at the same time forbids them from speaking *as attorneys* to assist others by providing legal advice or access to international human rights law. For example, as noted by the dissent, the Humanitarian Law Project wanted to help these groups resolve disputes peacefully and petition the United Nations for recognition under the Geneva Conventions.¹⁴⁹ The plaintiffs cannot perform either of these functions by speaking “independently.” They must coordinate with the FTOs for their speech to be effective. Thus the plaintiffs cannot “say anything they wish” because they are deprived of speaking in the manner and context in which the speech will effectively create desired legal and political results. Speech loses its value if it can be prohibited in the context in which it matters. As the Supreme Court

¹⁴⁷ As summarized by Richard Freer and Wendy Perdue, “Our system does not allow everyone who is irked about something to bring a suit.” See RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS AND QUESTIONS 642 (5th ed. 2007). To properly challenge government (or private) action through court processes, a litigant must generally be a real party in interest and satisfy the justiciability requirements, including standing to sue and the existence of a ripe, non-moot controversy. See, e.g., FED. R. CIV. P. 17; ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.1 (5th Ed. 2007).

Outside of court processes, an attorney obviously cannot advise clients or invoke the law on behalf of clients without coordination or discussion with the proposed client.

¹⁴⁸ *Humanitarian Law Project*, 130 S.Ct. at 2722–23.

¹⁴⁹ See *id.* at 1738–39 (Breyer, J., dissenting).

itself has explained: “Urgent, important, and *effective speech* can be no less protected than impotent speech, lest the right to speak be relegated to those instances when it is least needed.”¹⁵⁰

Further, the Court’s claim in *Humanitarian Law Project* that Congress can limit attorney speech made “in coordination with” specific undesirable groups, and somehow avoid “suppressing . . . political speech” is entirely fallacious. The elimination of a group’s access to lawyer speech, including lawyer advice and lawyer direction on invoking and avoiding government power, suppresses that group’s very ability to play a role in politics, or even exist. It denies the group an effective political voice. Attorney aid and assistance is necessary for the FTO’s political voice to be effective—for them to invoke the protections of the law and properly petition the United Nations and Congress. Indeed, the majority’s discussion regarding the government’s interests being served by restricting attorney speech underscores that what is suppressed is pure political speech. The Court argues that even peaceful legal assistance for lawful ends of the type offered by the plaintiffs can be criminalized because such assistance “serves to legitimize” the group.¹⁵¹ Repeatedly, the Court notes that the plaintiff attorneys’ speech “importantly *helps lend legitimacy* to foreign terrorist groups—*legitimacy* that makes it *easier for those groups to persist*.”¹⁵² It is quite clear that the purpose of the statute is to destroy any such organization, which is accomplished in part by denying them legal advice and access to the law.¹⁵³

The ends of the statute are achieved by prohibiting *attorneys* from providing designated people with access to the power of the law—even international human rights law through

¹⁵⁰ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (emphasis added). Indeed, rather than lessening the protection provided, the *McIntyre* Court recognized that the urgency, importance, and effectiveness of speech “*only strengthens the protection* afforded to [the] expression.” *See id.* (emphasis added).

¹⁵¹ *See Humanitarian Law Project*, 130 S.Ct. at 2725.

¹⁵² *See id.*

¹⁵³ As summarized by Justice Scalia: “The end that Congress seeks to proscribe is the existence of these terrorist organizations.” *Holder v. Humanitarian Law Project*, Nos. 08-1498, 09-89, Oral Arg. Trans. at 17 (Feb. 23, 2010). *See also id.* at 34, 39–40 (statements of Solicitor General).

international entities such as the United Nations. Notably, the FTOs themselves are not forbidden (and Congress lacks the ability to forbid them) from seeking the protections of international law. Rather, the goal of denying access to the law for these groups—even for peaceful and legitimate purposes—is accomplished by restricting speech of United States citizen attorneys. The threatened punishment for the attorney is severe enough that the scheme works. As stated by the lawyer for Humanitarian Law Project: “The government has spent a decade arguing that our clients cannot advocate for peace, cannot *inform about international human rights*.”¹⁵⁴ “We think it’s our right, but we’re not going to risk going to jail for 15 years to do it.”¹⁵⁵

In fact, *Humanitarian Law Project* is not the only time in United States history that government has attempted to thwart a group by prohibiting attorneys from informing people about their legal rights and how to invoke the law’s protection. In *NAACP v. Button*, Virginia attempted to obstruct desegregation by re-defining prohibited attorney solicitation to include the methods used by NAACP lawyers to inform African Americans about their rights and urge them to take legal action. The NAACP generally invited African-American parents and children to a meeting where a lawyer would explain to them “the legal steps necessary to achieve desegregation.”¹⁵⁶ The lawyers would then bring forms “to authorize . . . NAACP or Defense Fund attorneys . . . to represent the signers in legal proceedings to achieve desegregation.”¹⁵⁷ After the Supreme Court decided *Brown v. Board of Education*,¹⁵⁸ the Virginia legislature (along with the legislatures of Arkansas, Florida, Georgia, Mississippi, South Carolina, and

¹⁵⁴ *See id.* at 60.

¹⁵⁵ *Id.*

¹⁵⁶ *NAACP v. Button*, 371 U.S. 415, 421 (1963).

¹⁵⁷ *See id.*

¹⁵⁸ 347 U.S. 483 (1954).

Tennessee¹⁵⁹) enacted legislation that changed their barratry statutes to include (and thus prohibit) “attorneys paid by an organization such as the NAACP and representing litigants without charge.”¹⁶⁰ The restrictions were aimed at frustrating the NAACP’s ability to effectively invoke the power of the law to bring about desegregation.¹⁶¹ The Virginia Supreme Court of Appeals upheld the constitutionality of the new barratry law and held that the NAACP’s activities were prohibited thereby. The Supreme Court reversed and held that the NAACP’s activities constituted “*expression and association* protected by the First and Fourteenth Amendments which Virginia may not prohibit under its power to regulate the legal profession.”¹⁶² The Supreme Court eloquently explained that “abstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, *certainly of lawful ends*, against governmental intrusion.”¹⁶³ Thus, the Court noted that for the NAACP, litigation “is a means for achieving *the lawful objectives of equality of treatment* by all government, federal, state and local, for the members of the Negro community in this country. It is thus *a form of political expression*.”¹⁶⁴

As in *Humanitarian Law Project*, the legislative enactment in *Button* only purported to restrict *attorney* speech that would inform others about their rights, tell others how to invoke the law, and offer them legal assistance. In theory, individual non-lawyer African Americans could still pursue these ends on their own. Further, attorneys for the NAACP could still independently “say” anything they wanted. They were only prohibited from speech made to potential clients

¹⁵⁹ *Button*, 371 U.S. at 445 (Douglas, J., concurring) (writing separated to note the “discriminatory nature” of the Virginia law and its “legislative purpose to penalize the NAACP because it promotes desegregation of the races.”)

¹⁶⁰ *See Button*, 371 U.S. at 445 (Douglas, J., concurring).

¹⁶¹ As discussed in Justice Douglas’s concurrence, the laws were “enacted as part[] of the general plan of massive resistance to the integration of schools of the state under the Supreme Court’s decrees.” *See id.* (internal citations omitted).

¹⁶² *See Button*, 371 U.S. at 428–29.

¹⁶³ *See id.* at 429 (emphasis added).

¹⁶⁴ *See id.* (emphasis added).

informing them about their rights and securing them as clients. As in *Humanitarian Law Project*, the law in *Button* “only” separated attorneys from their desired clientele. Importantly, this separation was aimed at defeating, and would in fact defeat, desegregation in large part. The NAACP could not bring litigation themselves without clients—they couldn’t act on behalf of non-clients. The only way for the NAACP to secure the rights of African Americans—to engage in the NAACP’s desired political advocacy—was to act in concert with and on behalf of clients. Thus the Supreme Court determined that the statute abridged *the attorneys’* “right to engage in political expression and association.”¹⁶⁵

Obviously the NAACP’s proposed clientele was quite different from the FTOs in *Humanitarian Law Project*. The NAACP wanted to represent American citizens and help them obtain constitutionally-required equality, while the Humanitarian Law Project wants to represent certain militant organizations accused of violently attacking American citizens or their allies and teach them how to invoke international law to resolve their disputes peacefully, invoke their own human rights and the protections of the Geneva Conventions. Despite the difference in clientele, the underlying theory of the Virginia law and IRTPA are not very far apart: if *attorneys* can be prohibited from informing and helping others invoke the law’s protections, then, in large part, the law’s protections will never be successfully invoked. The legislature is able to make the law inapplicable to a certain unpopular group not by changing the underlying legal rights of the group, but by prohibiting attorneys from speaking to the group and telling them how or helping them to invoke the law’s protections. In both scenarios, the attorneys are only pursuing “lawful objectives” and peaceful conduct on behalf of their proposed clientele. Moreover, in both scenarios, there is no punishment imposed against the unpopular group for trying to invoke the

¹⁶⁵ See *id.* at 431; see also *id.* at 442 (explaining that the NAACP attorneys “employ[] constitutionally privileged means of expression to secure constitutionally guaranteed civil rights” (emphasis added)).

law in their favor, but there are severe punishments imposed on any attorney who helps invoke the law on behalf of that group. In both *Button* and *Humanitarian Law Project*, helping a group invoke the law could subject the attorney to criminal prosecution: In *Button*, the threatened punishment was a fine of \$100 to \$500 plus imprisonment for one to six months;¹⁶⁶ in *Humanitarian Law Project*, the threatened punishment is a fine and/or imprisonment for up to fifteen years.¹⁶⁷

The question under the access-to-justice theory is whether attorney speech invoking the law's protections on behalf of clients falls within the essential role that attorneys play in access to justice and the fair administration of the laws. As shown above, it does. Indeed, such speech *constitutes* access to justice and the fair administration of the laws. It is speech central to the special role that attorneys play in invoking and avoiding government power by securing individual or collective life, liberty, and property.¹⁶⁸

Geoffrey Stone has commented that attorneys “play and have played, a critical role in opposing, and sometimes, moderating” abuses to civil liberties, particularly during times of war or conflict.¹⁶⁹ Stone puts the historical Shakespeare quote, “The first thing we do, let's kill all the lawyers,” in its literary and historical context—the reason the lawyers needed to be killed was to make it possible for conspirators to “destroy the rights and liberties of the English people.”¹⁷⁰ Indeed, in the lines immediately following this statement, the conspirators demonstrate their intent to deprive citizens of life and liberty when they unjustly put to death the Clerk of Chatham for being able to write his name.¹⁷¹

¹⁶⁶ See *Button*, 371 U.S. at 423 n.7.

¹⁶⁷ See *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2712, n. 1 (2010).

¹⁶⁸ See *supra* Part II.

¹⁶⁹ Geoffrey Stone, *A Lawyer's Responsibility: Protecting Civil Liberties in Wartime*, 22 WASH. U. J. L. & POL'Y 47, 53 (2006).

¹⁷⁰ *Id.* at 47.

¹⁷¹ WILLIAM SHAKESPEARE, *THE SECOND PART OF HENRY THE SIXTH*, Act IV, Scene 2, Lines 81-114.

But an alternate to “killing” lawyers could be accomplished through the abridgment of attorney speech in such a way to inhibit or block the attorneys’ ability to fulfill their function in invoking the law to preserve rights to life, liberty, and property. While initially sounding extreme and unlikely, *Humanitarian Law Project* illustrates that one way to destroy an undesirable group is to restrict lawyers from providing speech that assists the group from pursuing even lawful and peaceful ends. The purpose of the restriction is to eliminate the organization.¹⁷² But this purpose is accomplished not by directly denying the organization access to law, but by prohibiting attorneys from speaking—specifically from assisting the organization in invoking either domestic or international law. The organization is killed by “kill[ing] [] the lawyers.” Regulation of attorney speech is used to destroy the organization through keeping the organization from being able to effectively invoke or avoid the power of government.

In *Free Speech and its Relation to Self-Government*, Meiklejohn eloquently poses the problem: “If the legislature has both the right and the duty to prevent certain evils, then apparently it follows that the legislature must be authorized to take whatever action is needed for the preventing of those evils.”¹⁷³ Certainly terrorism is an evil that threatens the United States—can Congress then “take whatever action is needed” to prevent that evil? Meiklejohn explains that “our plan of government by limited powers forbids that that inference be drawn.”¹⁷⁴ Rather:

The Bill of Rights . . . lists, one after the other, forms of action which, however useful they might be in the service of the general welfare, the legislature is forbidden to take. And that being true, *the ‘right to prevent evils’ does not give unqualifiedly the right to prevent evils.* In the judgment of the Constitution, *some preventions are more evil than are the evils from which they would save us.* And the First Amendment is a case in point. If that amendment means anything, it means that certain substantive evils which, in principle, Congress has a right to prevent, must be endured *if the only way of avoiding*

¹⁷² See *supra* notes 151–53 & accompanying text.

¹⁷³ See MEIKLEJOHN, *supra* note 39, at 48.

¹⁷⁴ *Id.*

*them is by the abridging of that freedom of speech upon which the entire structure of our free institutions rests.*¹⁷⁵

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

2. The Ability to Provide Legal Advice Regarding Client Conduct

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

The purpose of the attorney-client privilege is often regarded as the need for full and frank communication from the client to the attorney so the attorney will know how to best serve the client's needs.¹⁷⁶ This purpose even has constitutional underpinnings found in the Fifth Amendment right against self-incrimination—the government should not be able to obtain from an attorney what they constitutionally are unable to obtain from the client.¹⁷⁷ However, the purpose of the privilege is not solely to allow the client to fully and frankly communicate with the lawyer, but it is equally essential in the fair administration of the laws for the attorney to be able to fully and frankly advise the client, particularly regarding the lawfulness or unlawfulness

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g.,* Upjohn v. United States, 449 U.S. 383, 389 (1981).

¹⁷⁷ *See* FREEDMAN & SMITH, *supra* note 47, at 186–90; MORGAN, *supra* note 18, at 57 n. 137.

of proposed or past conduct. Thus, as explained by the U.S. Supreme Court, the purpose of the privilege “is to encourage full and frank *communication between attorneys and their clients* and *thereby promote* broader public interests in *the observance of law and administration of justice.*”¹⁷⁸

Thus it is not just full and frank *disclosure* by the client that is essential, but full and frank *communication* on the part of both the attorney and the client.¹⁷⁹ The ability of the client to obtain full and frank advice from an attorney is essential, again, to help individuals invoke or avoid the power of the government. When a person consults an attorney about proposed conduct—whether in a transactional context, criminal context, or civil liability context—the attorney serves an important legitimizing and fairness function for governmental civil and criminal power that deprives individuals of life, liberty, and property. Just as the client should be able to fully and frankly explain the facts to the attorney, the attorney should likewise be able to fully and frankly explain the contours of the law, its purpose and function, and the potential for and extent of liability or criminal sanctions for violations thereof. As recognized in Model Rule of Professional Conduct 1.2(d), lawyers should “discuss the legal consequences of any proposed course of conduct with a client” and may “counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”¹⁸⁰ The ability of the individual to obtain such advice and interpretation of law before acting (or even after acting in order to determine the potential scope of liability or other consequences of violation) improves the

¹⁷⁸ *Upjohn*, 449 U.S. at 389.

¹⁷⁹ The Restatement of the Law Governing Lawyers explains why the focus of the case law has been on the client’s ability to provide full and frank communication. The vast majority of cases dealing with attorney-client privilege deal with situations where the attorney is being compelled to reveal a client confidence. Thus, “[t]he rationale based on the social desirability of encouraging communication by the lawyer to the client is a minor theme in the decisions, probably because it is typically relevant only in cases dealing with the narrow question of the application of the privilege to a lawyer’s communication to a client.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 cmt. c (2000).

¹⁸⁰ See MODEL RULE OF PROF’L CONDUCT 1.2(d). However, Rule 1.2(d) prohibits a lawyer from engaging or assisting a client in engaging “in conduct that the lawyer knows is criminal or fraudulent.” See *id.*

fairness of government-imposed liability and sanctions, which in turn improves the legitimacy of our entire system of justice. Part of “keeping sound and wholesome the procedure by which society visits its condemnation on an erring member”¹⁸¹ must include fair notice and warning through the ability of the “erring member” to obtain assistance in understanding the potential “condemnation” they may receive for their actions and thus to help them structure their conduct in such a way to avoid such criminal and civil government-backed condemnation.

In fact, one of the premises underlying the attorney-client privilege is that “vindicating rights and complying with obligations under the law and under modern legal processes are matters often too complex and uncertain for a person untrained in the law, so that clients need to consult lawyers.”¹⁸² If this assumption is true, justice and fairness require that a person be able to consult with an attorney regarding the reach and extent of the law. As the New York Court of Appeals has explained, the privilege is intended to “foster *uninhibited dialogue between lawyers and clients* in their professional engagements, thereby ultimately *promoting the administration of justice.*”¹⁸³ Gregory Sisk has recently argued that by protecting the attorney-client “*dialogue* from outside intrusion,” the privilege allows “lawyers and clients to engage with difficult problems by *considering the full spectrum of legal and moral dimensions*” and thus “also promotes the public interest in obedience to the rule of law and advancement of the common good.”¹⁸⁴

Certainly large segments of the population lack access to such legal advice, yet that problem does not undermine the importance of the availability of such access to as many people

¹⁸¹ See FREEDMAN & SMITH, *supra* note 47, at 18 (quoting Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 35 (H. Berman ed., 1960)).

¹⁸² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68(c) (2000).

¹⁸³ *Rossi v. Blue Cross & Blue Shield*, 540 N.E.2d 703, 705 (N.Y. 1989); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68(c) (2000) (“It is assumed that, in the absence of such frank and full *discussion between client and lawyer*, adequate legal assistance cannot be realized.”(Emphasis added.)).

¹⁸⁴ Gregory C. Sisk, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 217 (2010).

who can either pay for it or otherwise obtain it. The key point is that the ability of attorneys to provide such advice is an essential part of our system of justice in promoting the fair administration of the laws and, thus, should be protected from government restriction and interference.

Nevertheless, while the existing attorney-client privilege serves to protect communications from compelled disclosure, it does not protect attorney advice from regulation or restriction. Again, *Humanitarian Law Project* and *Milavetz* are cases in point. In *Milavetz*, Congress forbade attorneys (and others falling within the rubric of “debt relief agencies”) from advising clients to incur debt in contemplation of bankruptcy.¹⁸⁵ The law appeared to forbid attorneys from even advising clients regarding lawful conduct—such as selling a home and entering into a lease (which would be a new debt obligation).¹⁸⁶ The debtor herself was not prohibited from undertaking new debt obligations under the law, but the attorney was prohibited from advising a client that they could lawfully incur such a debt. The Supreme Court in large part avoided the problem by interpreting the statute in such a way that the attorney was only prohibited from providing particular advice that would abuse the bankruptcy system.¹⁸⁷ The Court acknowledged that without this narrowing interpretation, the statute “would seriously undermine the attorney-client relationship”¹⁸⁸ through its “inhibition of frank discussion.”¹⁸⁹

Notably, the *Milavetz* Court strove to preserve the attorney-client relationship by narrowly interpreting the statute, and not through application of the First Amendment. Indeed, no

¹⁸⁵ *Milavetz, Gallop & Milavetz v. United States*, 130 S.Ct. 1324, 1330–31 (2010).

¹⁸⁶ Indeed, this was how the Eighth Circuit had interpreted the statute, as “‘broadly prohibit[ing] a debt relief agency from advising an assisted person . . . to incur any additional debt when the assisted person is contemplating bankruptcy,’ even when that advice constitute[d] prudent [and legal] prebankruptcy planning not intended to abuse the bankruptcy laws.” *See id.* at 1331.

¹⁸⁷ The Court specifically held that the statute “prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose.” *See id.* at 1336–38 & n.6.

¹⁸⁸ *See id.* at 1338 n. 5.

¹⁸⁹ *See id.* at 1338.

First Amendment doctrine or theory accounted for the fact that the restriction frustrated the essential role of attorneys in the fair administration of justice. Rather, the best argument available was that the statute was vague—and not only vague for attorneys, but vague as applied to anyone.¹⁹⁰ Vagueness was similarly one of the primary challenges used in the *Humanitarian Law Project* case. The important point is that no First Amendment doctrine was presented, in either case, that could effectively recognize and preserve the attorney-client relationship.

Unlike its *Milavetz* decision, the *Humanitarian Law Project* Court did not interpret the statute in such a way as to avoid the frustration of the attorney-client relationship. In fact, the Court specifically noted that under its interpretation, the statute “barred” plaintiffs from “*spea[ing] to the PKK and LTTE*” if their “speech to those groups imparts a ‘specific skill’ or *communicates advice derived from ‘specialized knowledge’*—for example, training on the use of international law or advice on petitioning the United Nations.”¹⁹¹ Thus, in *Humanitarian Law Project*, the law not only prohibits attorney invocation of the law on behalf of clients, but also the provision of any legal advice to groups designated as foreign terrorist organizations. As noted, the goal of the statute is eradication of the group—and in pursuit of that goal, the statute forbids attorneys from advising members of the group regarding the contours and reach of the law, how to begin acting in a lawful manner, how to petition our own United States government (to perhaps change its policy about specific groups), and how to seek international assistance from the United Nations and under the Geneva Conventions. As noted by the dissent, not only did the *Humanitarian Law Project* plaintiffs want to advise the FTOs regarding international law, but also to advocate on their behalf “in *this* country directed to *our* government and *its*

¹⁹⁰ *Milavetz, Gallop & Milavetz v. United States*, Nos. 08-119, 08-1225, Oral Arg. Trans. at 20 (Dec. 1, 2009) (“[D]on’t bring in the fact that, well, and moreover, if it’s applied to attorneys, it’s unconstitutional . . . [b]ecause if it’s applied to anybody it’s unconstitutional, according to your [vagueness] argument.”) (Scalia, J.)

¹⁹¹ *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2723–24 (2010).

policies.”¹⁹² The government’s goal is to eradicate these groups, and yet the statute forbids attorneys from providing their legal expertise to these groups on how to change their methods and act lawfully and peacefully, on how to petition *our* government to avoid eradication, or even how to petition the United Nations for human rights relief and recognition under the Geneva Conventions.

The *Humanitarian Law Project* Court emphasized that it would “legitimize” the FTOs if they received such lawful, peaceful advice (and from this the Court concluded that Congress constitutionally could criminalize giving such advice). But what would truly be “legitimized” by allowing attorneys free speech to provide such advice to designated FTOs is our own government’s policies, power, and commitment to justice. The Court allows our government first, to enact a policy of destroying particular groups, and then on top of that allows the government to threaten citizen attorneys with imprisonment if they provide the targeted group with any legal advice—even legal advice on how to change their conduct, how to act peacefully and lawfully, or how to obtain human rights relief. While the Court explains that it does “not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations,” the Court’s analysis does not rely on that distinction.¹⁹³ Rather, the Court relies on the superficial distinction that the plaintiffs can independently say whatever they want, they just cannot speak to or in coordination with the FTOs.¹⁹⁴

¹⁹² See *id.* at 2732 (Breyer, J., dissenting).

¹⁹³ See *Humanitarian Law Project*, 130 S.Ct. at 2730.

¹⁹⁴ See *id.* at 2722–24 (concluding that the statute does not abridge “pure political speech” because plaintiffs are only prohibited from coordinated speech with FTOs and so can independently say whatever they wish); *id.* at 2728 (listing reasons why Court concludes statute constitutional, namely that number of FTOs are limited, that Congress added clarity to the statute, Congress excluded religious and medical support, and “*most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups*”).

The Court fails to identify the scrutiny that it is applying in analyzing the constitutionality of the statute. The Court says that it need *not* apply strict scrutiny because only coordinated speech is prohibited, *see id.*, but then says that the First Amendment test for analyzing restrictions on conduct found in *United States v. O’Brien*, 391 U.S.

An important aspect of *Humanitarian Law Project* that deserves serious contemplation and examination is the Court’s consideration of attorney speech to or on behalf of FTOs as involving a greater association (and thus one that can be criminalized) than membership in the FTO (which the Court agrees could not constitutionally be forbidden under the First Amendment right to free association).¹⁹⁵ The Court holds that plaintiffs are doing more than being mere members, because they are “providing material support”¹⁹⁶ to the FTOs through legal advice, and thus their actions can constitutionally be criminalized consistent with the First and Fifth Amendments. This holding is particularly troubling in light of the attorney’s role in the administration of justice and the attorney’s duty to take on legal causes and provide access to justice even for unpopular clients.¹⁹⁷

The “material support” statute in *Humanitarian Law Project* not only *frustrates* the attorney-client relationship (as did the law in *Milavetz*), but in fact *criminalizes* the attorney-client relationship and imputes culpability for the unlawful conduct of the client onto the attorney who advises her. As with red scare statutes aimed at eradicating communism, the “material support” statute as applied to the *Humanitarian Law Project* plaintiffs can be said to “quite

367 (1968), is inapplicable and “a more demanding standard” should be used. *See Humanitarian Law Project*, 130 S.Ct. at 2723–24. Yet, the Court from there just defers to the government’s generalized claims of harm with very little concrete evidence of either harm or tailoring, including specificity on how the plaintiff’s conduct could cause that harm. *See id.* at 2724–30; *see also infra* note 202.

¹⁹⁵ *See id.* at 2718 & 2730.

¹⁹⁶ *See id.* at 2718 (“Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing ‘material support’ to such a group.”); *see also id.* at 2730 (explaining that “the statute does not penalize mere association with a foreign terrorist organization,” because “[t]he statute does not prohibit *being a member* of one of the designated groups or *vigorously promoting and supporting* the political goals of the group” but instead “prohibits [] the act of giving material support” which is what “Plaintiffs want to do” and so concluding that “[o]ur decisions scrutinizing penalties on simple association or assembly are therefore inapposite”(emphasis added)).

¹⁹⁷ *See, e.g.*, MODEL RULE OF PROF’L CONDUCT 6.2, cmt. 1 (“All lawyers have a responsibility to assist in providing pro bono publico service. . . . An individual lawyer fulfills this responsibility *by accepting a fair share of unpopular matters* or indigent or *unpopular clients*. A lawyer may also be subject to appointment by a court to serve *unpopular clients*”) (Emphasis added.).

literally establish[] guilt by association alone,”¹⁹⁸ because it criminalizes association even if the associating attorney “disagree[s] with th[e] unlawful aims”¹⁹⁹ of the FTO. Reliance on the government’s war power does not change this principle: “Even the war power does not remove constitutional limitations safeguarding essential liberties.”²⁰⁰ If attorneys advise and help clients to violate law or engage in criminal or fraudulent conduct, attorneys have acted in such a culpable manner that it would seem fair to hold them civilly or criminally responsible for such actions. But where an attorney is only advising a client to pursue peaceful and perfectly lawful conduct, and is providing advice on how to pursue lawful conduct, how can that speech be criminalized? Again, as established from our era of convicting communists, “[i]n our jurisprudence *guilt is personal*, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . *that relationship must be sufficiently substantial to satisfy the concept of personal guilt.*”²⁰¹ The Humanitarian Law Project wanted to give advice to help FTOs cease acting unlawfully (using terrorism) and instead pursue their goals through peaceful and lawful means. How can such advice be criminal? How can advice to cease criminal behavior and act lawfully “satisfy the concept of personal guilt”?²⁰²

¹⁹⁸ United States v. Robel, 389 U.S. 258, 265 (1967).

¹⁹⁹ See *id.* at 267.

²⁰⁰ See *id.* at 264.

²⁰¹ Scales v. United States, 367 U.S. 203, 225 (1961).

²⁰² In *Humanitarian Law Project*, the Court determined that even providing peaceful advice could be criminalized because it could “legitimize” the group and the group could find ways to use such advice to further their unlawful activities. See *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 1725–26 (2010) Specifically, the Court said if shown how to petition the United Nations or how to negotiate for peace, an FTO could feign interest in peace negotiations and to gain time and position. See *id.* at 2729 (“The PKK could, for example, *pursue peaceful negotiation as a means of buying time* to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks.” (Emphasis added.)). Justice Breyer’s response is provoking:

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

Even if the client has been engaged in unlawful activities, as long as the attorney does not provide assistance aimed at furthering those unlawful activities, the attorney should not be seen as being so “associated” with their client that advising or counseling the client is criminal. The attorney may in fact completely disagree with the client’s conduct or views, but understands that the entire theory of the adversary system and the criminal justice system in the United States is that people threatened with government-imposed loss of life, liberty, or property should be able to obtain advice and assistance from a legal advocate. In its landmark decision, *Gideon v.*

Wainwright, the Curt explained:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals *in which every defendant stands equal before the law*. This noble ideal cannot be realized if the poor [or unpopular] man charged with crime has to face his accusers without a lawyer to assist him.²⁰³

The Court held that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”²⁰⁴ Thus, even criminals performing the most heinous and inhumane crimes are entitled to legal counsel in the United States. But the crimes of the client are not imputed to the attorney—rather the attorney is recognized as performing an essential role in our constitutional justice system of being the accused’s “champion against a hostile world.”²⁰⁵ Our conception of due process and liberty, established by the Constitution, includes providing the individual or group threatened with government-imposed loss of life or liberty with legal assistance to help that person effectively challenge the overbearing power of government. Indeed, we respect “the

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

²⁰³ *Gideon v. Wainwright*, 372 U.S. 338, 344 (1963).

²⁰⁴ *Id.* at 344.

²⁰⁵ *See* FREEDMAN & SMITH, *supra* note 47, at 16 (internal quotations omitted).

rights even of the guilty individual,” which is “a significant expression of the political philosophy that underlies the American system of justice.”²⁰⁶

In the non-criminal context, attorneys have a professional duty to take on legal causes and provide access to justice even for unpopular clients.²⁰⁷ The decision to represent the unpopular client has been celebrated in the lives of exemplary lawyers since the founding of the United States—beginning with John Adams’ decision to represent the British soldiers involved in the Boston Massacre²⁰⁸—and demonstrates that American attorneys recognize their role in the justice system as the protectors of due process regardless of the unpopularity of their clients.

Consequently, someone who acts as an attorney to a criminal, or even a terrorist organization, should be recognized as having a lesser associational tie to the conduct of the organization than even membership. The attorney may in fact completely disagree with the client’s actions or goals, but yet be firmly committed to principles of due process, legal representation, equal protection, human rights, and access to justice—principles at the core of our justice system. Absent attorney assistance to the criminal endeavors of the client, the association of attorney and client, particularly the provision of legal advice to the client, cannot

²⁰⁶ See *id.* at 17. Freedman and Smith quote Professor Zupancic in elaborating on this point:

In societies which believe that the individual is the ultimate repository of existential values, his status vis-à-vis the majority will remain uncontested even when he is accused of crime. He will not be an object of purposes and policies, but *an equal partner in a legal dispute*.

See *id.* (quoting Zupancic, *Truth and Impartiality in Criminal Process*, 7 JOUR. CONTEMP. L. 39, 133 (1982)).

²⁰⁷ See, e.g., MODEL RULE OF PROF’L CONDUCT 6.2, comment 1 (“All lawyers have a responsibility to assist in providing pro bono publico service. . . . An individual lawyer fulfills this responsibility *by accepting a fair share of unpopular matters or indigent or unpopular clients*. A lawyer may also be subject to appointment by a court to serve *unpopular clients*”) (Emphasis added.).

²⁰⁸ See JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 2:79 & 3:291–96 (ed. 1961). Adams explains:

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

See *id.* at 2:79.

be an association that constitutionally can be prohibited through the “taint” of the client’s activities.

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

Nevertheless, there are limits to the appropriate scope of protection. Justice Breyer, in dissent in *Humanitarian Law Project*, argued that existing First Amendment doctrine “permit[s] pure advocacy of *even the most unlawful activity*—as long as that advocacy is not ‘directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.’”²⁰⁹ However, that rule, as initially announced in *Brandenburg v. Ohio*²¹⁰ should *not* be the standard for attorney speech. The access-to-justice theory provides core speech protection for speech essential to providing access to justice and the fair administration of the laws. It is patently *not* essential to the fair administration of the laws to constitutionalize attorney speech advising their clients to engage in “even the most unlawful activity”²¹¹—regardless of whether or not it would

²⁰⁹ See *Holder v. Humanitarian Law Project*, 130 S.Ct 2705, 2732–33 (2010) (Breyer, J., dissenting) (emphasis added).

²¹⁰ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²¹¹ *Humanitarian Law Project*, 130 S.Ct at 2732–33 (Breyer, J., dissenting).

“incite or produce imminent lawless action.”²¹² The dichotomy of alternatives demonstrates, again, the need for a First Amendment theory attuned to the attorney’s function in the system of justice and the attorney’s tie to government power and processes. The divergence between the majority and the dissent in *Humanitarian Law Project* reflect the typical alternative methods for examining restrictions on attorney speech: either no protection for attorney speech or the application of traditional First Amendment doctrine (which is not attuned to the attorney function in the administration of justice). The *Humanitarian Law Project* majority provides attorney speech, including lawful advice, no protection. But the application of *Brandenburg v. Ohio*, as indicated by the dissent, to attorney speech would make unconstitutional rules such as Model Rule of Professional Conduct 1.2(d), which forbids an attorney from counseling or assisting a client to engage in criminal or fraudulent activities.²¹³

The access-to-justice theory provides protection for attorney advice that is essential to the role of the attorney in our justice system, including advising the client regarding “the legal consequences of any proposed course of conduct” and “the validity, scope, meaning or application of the law.”²¹⁴ However, it would not provide Free Speech Clause protection for attorney advice intended to further or assist client crimes or fraud.

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

Although the Supreme Court has been unclear regarding the precise source for the right to court access,²¹⁵ the Court has recognized a constitutional right to access the courts arising

²¹² *Brandenburg*, 395 U.S. at 447.

²¹³ MODEL RULE OF PROF’L CONDUCT 1.2(d).

²¹⁴ *See id.*

²¹⁵ *See Christopher v. Harbury*, 536 U.S. 403, 415, n. 12 (2002) (“Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.” (Citations omitted)).

from the Due Process Clauses for criminal defendants,²¹⁶ civil rights litigants,²¹⁷ and people denied fundamental rights over which the state courts have a monopoly.²¹⁸ In *NAACP v. Button*, the Supreme Court recognized that the First Amendment rights to petition for redress of grievances, of free association, and, importantly, of expression secured the *attorneys*’ “First Amendment rights to enforce constitutional rights through litigation.”²¹⁹ The Supreme Court has also recognized under the First Amendment’s Petition Clause, a right of civil litigants to bring non-frivolous claims in court proceedings, including state and federal common law claims.²²⁰ Consequently, litigants cannot be punished or sanctioned for filing a non-frivolous civil claim.²²¹ Moreover, the Due Process Clauses prohibits the state and federal governments from depriving individuals of life, liberty, or property without due process of law. The Due Process Clauses thus require “a meaningful opportunity to be heard.”²²² These rights to due process and court access belong to the client, but if the attorney can be punished or prohibited from bringing claims, the underlying rights of clients to court access are weakened and perhaps lost.²²³ Attorneys provide *effective* access to the court system, and to the extent that individuals have a right to raise a claim

²¹⁶ See, e.g., *Bounds v. Smith*, 430 U.S. 817, 821 (1977) (“It is now established beyond doubt that prisoners have a constitutional right of access to the courts.”).

²¹⁷ See, e.g., *NAACP v. Button*, 371 U.S. 415 (1963).

²¹⁸ See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–19 (1996); *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971).

²¹⁹ See *Button*, 371 U.S. at 437–40.

²²⁰ See *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. at 62–63 (holding that litigant could not be punished under the anti-trust laws for filing a civil claim against a competitor unless the claim was “objectively baseless”); *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (holding that the NLRB cannot enjoin civil litigation unless “plaintiff’s position is plainly foreclosed as a matter of law or is otherwise frivolous”); see also *Harbury*, 536 U.S. at 414–15.

²²¹ See *FREEDMAN & SMITH*, *supra* note 47, at 22–26; *Prof’l Real Estate Investors*, 508 U.S. at 62–63 (1993); *Bill Johnson’s Rests.*, 461 U.S. at 743.

²²² See *Boddie*, 401 U.S. at 377; see also *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (creating three-factored balancing test to determine what process is due and whether there has been a meaningful opportunity to be heard).

²²³ See *Tarkington, Free Speech Right to Impugn*, *supra* note 24, 371–79 (concluding that “[i]f attorneys are punished or deterred from bringing such claims, the underlying rights of the litigants are lost”).

or defense in court proceedings, attorneys should have a corresponding speech right to effectuate the client's access and due process rights.

The argument that attorneys should have protected speech rights to access the courts, bring claims and raise arguments in court proceedings initially seems problematic. Speech made in conjunction with formal court proceedings (including administrative and traditional court processes) is perhaps among the most highly-regulated speech. Between the applicable rules of evidence, procedure, and professional conduct, the attorney works in an environment where her speech is subject to multiple levels of highly-restrictive regulation. Schauer describes attorney speech in court proceedings as containing an “omnipresence of speech regulation.”²²⁴ Moreover, and rightly so, Schauer contends that “the speech of the law—in court and out—owes its effectiveness and its very possibility to rules that restrict and prohibit certain forms of speaking and writing.”²²⁵ Schauer argues that “something like a courtroom trial” is both “rule-dependen[t] and enforcement-dependen[t].”²²⁶ A trial (or really any courtroom proceeding) simply cannot proceed without “elaborate rules about who goes when, about who speaks, and about who does not speak,” “rules about how to speak,” and “rules about what not to say.”²²⁷ Schauer argues that “the First Amendment has, [] *properly never been thought to apply*” to “a vast array of lawyer and legal system activity” and thus the “omnipresence of speech regulation” is (and should remain) “unencumbered by either the doctrine or the discourse of the First Amendment.”²²⁸ Inherent in Schauer's conclusion is an assumption that (outside of “extrajudicial utterances”) the application of the First Amendment to attorney speech would necessarily interfere with the role

²²⁴ Schauer, *supra* note 33, at 691.

²²⁵ *Id.* at 688.

²²⁶ *Id.* at 689.

²²⁷ *Id.*

²²⁸ *Id.* at 702 & 691. Notably, Schauer argues that the First Amendment may apply to attorney speech when “the justifications for the First Amendment's existence, in particular the distrust of the self-protective activities of government itself, apply to that activity.” *See id.* at 702.

of attorneys and legal processes.²²⁹ Indeed, the Supreme Court, in dicta, has seemed to agree with Schauer's conclusion by stating: "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."²³⁰

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

Alexander Meiklejohn, in his seminal work, *Free Speech and Its Relation to Self-Government*, takes up this very problem. In talking about restrictions on political speech, Meiklejohn provides as an illustration, the traditional American town meeting. Meiklejohn notes that the meeting is held "not primarily to talk, but primarily by means of talking to get business done."²³¹ Meiklejohn also notes that "the talking must be regulated and abridged as the doing of business under actual conditions may require," and provides examples of having a chair who conducts and moderates the meeting, of limiting arguments to an assigned share of the time available,²³² of finding people out of order if a speaker is "abusive or in other ways threatens to defeat the purpose of the meeting" and in extreme circumstances, even denying such abusive

²²⁹ See, e.g., *id.* at 695. In discussing the inapplicability of the First Amendment, Schauer argues that "the most obvious" argument for not protecting speech "is respect for a criminal defendant's right to a fair trial, and many of these arguments would spill over into the less-constitutionalized realm of litigants in general. There are also policy arguments about preserving the integrity of the trial process and preserving the integrity, more particularly, of the jury process, arguments of the type that have generated many of the rules of evidence themselves." See *id.*

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

²³⁰ *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1071 (1991) (citations omitted).

²³¹ MEIKLEJOHN, *supra* note 39, at 23.

²³² *Id.* at 26.

speakers continued use of the floor.²³³ Indeed, Meiklejohn says “[t]he town meeting, *as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged.*”²³⁴ This is precisely Schauer’s point about regulations on attorney speech in judicial proceedings—the speech must be abridged in order to be effectual, in order to fulfill its purpose.

But Meiklejohn does not conclude, as does Schauer, that therefore the First Amendment’s protections are inapplicable in town meetings. To the contrary, Meiklejohn contends that as to such speech, the First Amendment’s prohibition on abridgement is *absolute*. Meiklejohn explains his “paradox” thus: “These speech-abridging activities of the town meeting indicate what the First Amendment to the Constitution does not forbid. When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses.”²³⁵ Rather, in the town meeting, the First Amendment allows citizens, as “free and equal men” and women, to “cooperat[e] in a common enterprise, and us[e] for that enterprise responsible and regulated discussion. It is not a dialectical free-for-all. It is self-government.”²³⁶ In this system,

Every man [and woman] is free to come. They meet as political equals. Each has a right and a duty to think his own thoughts, to express them, and to listen to the arguments of others. *The basic principle is that the freedom of speech shall be unabridged.* And yet the meeting cannot even be opened unless, by common consent, speech is abridged.”²³⁷

In like manner, the court systems are created as part of our constitutional government and all individuals are free to access the courts and seek legal redress (assuming they have suffered an injury and have a legally cognizable right). Litigants “meet as political equals” and are able to

²³³ *Id.* at 22–23.

²³⁴ *Id.* at 23.

²³⁵ *Id.* at 23–24.

²³⁶ *Id.* at 23.

²³⁷ *Id.* at 22 (emphasis added).

raise their own arguments and respond to the arguments of others. But this free speech is only possible because of the agreement to abridge speech so that court business can get done.

Meiklejohn, of course does not end there. Having illustrated permissible speech regulation of political speech, he then examines the impermissible restriction. “[T]he vital point” according to Meiklejohn “is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. And this means that though citizens may be barred from speaking on other grounds, they may not be barred because their views are thought to be false or dangerous. . . . And that means unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American.”²³⁸

Meiklejohn contends that “[t]hese conflicting views may be expressed, *must be expressed*, not because they are valid, but *because they are relevant*.”²³⁹ “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”²⁴⁰

Thus, while “[t]he First Amendment is not the guardian of unregulated talkativeness”—particularly in political processes like the town meeting or the courtroom, that does not mean that the First Amendment plays no role in those settings. To the contrary, such settings is where the First Amendment plays its most central role. What Meiklejohn argues the First Amendment prohibits in these structured political processes is the mutilation and manipulation of self-government: “It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.”²⁴¹ Thus each side (and multiple sides and views) of an issue must be heard.

²³⁸ *Id.* at 26.

²³⁹ *Id.* at 27.

²⁴⁰ *Id.* at 25.

²⁴¹ *Id.* at 26; *see also id.* at 8 (“But the manipulation of men is the destruction of self-government”).

In the context of courtroom speech, what is vital, “is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another”²⁴² and that “conflicting views . . . [are] *expressed . . . because they are relevant.*”²⁴³ This idea is particularly compelling in the adversary system—an underlying premise of which is that truth is more likely to be found if multiple points of view are heard.²⁴⁴ The adversary system and the attorney’s role therein are frustrated where “mutilation” of the presentation of relevant and conflicting views are allowed.

Thus, the saturation of attorney speech regulation in court proceedings does not compel the conclusion that First Amendment protection is neither needed nor appropriate. The Supreme Court has recognized what I would characterize as “core” attorney speech protection for court proceedings in its decision, *Legal Services Corp. v. Velazquez*.²⁴⁵ In *Velazquez*, the Supreme Court struck, as violative of the First Amendment, restrictions on the advice and advocacy of attorneys funded through the Legal Services Corporation. The restrictions forbade attorneys from undertaking any representation that sought to amend or challenge existing welfare law.²⁴⁶ In so doing, the Court recognized that the attorneys had First Amendment rights and that speech restrictions could violate those rights even in the highly regulated area of courtroom speech and argument. The *Velazquez* Court recognized two categories of attorney in-court speech (including written and oral communications to a court) that must be protected: (1) attorneys must be free to

²⁴² *Id.* at 100.

²⁴³ *Id.* at 27.

²⁴⁴ As explained by the Fourth Circuit:

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

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

²⁴⁵ 531 U.S. 533 (2001).

²⁴⁶ *See id.* at 536–37.

“present all the reasonable and well-grounded arguments necessary for proper resolution of the case”²⁴⁷; and (2) regulators cannot restrict attorney speech in order to “insulate the Government’s laws” or government action “from judicial inquiry” and scrutiny.²⁴⁸

As with Meiklejohn’s arguments regarding self-government, what regulators must be forbidden from doing in restricting attorney in-court speech (both written and oral) is manipulating the judicial system by manipulating the substantive arguments that may be presented. To the extent that such manipulation is allowed, justice itself is manipulated and access to justice is thwarted for those on the losing side of the regulation.

4. The Ability to Preserve the Constitutional Rights of Others

Although in many respects the attorney’s ability to preserve constitutional rights is covered in the prior section on being able to raise relevant and colorable claims on behalf of clients, there are scenarios where an attorney must speak to preserve constitutional rights in special contexts other than representing her own client. As with the entire access-to-justice theory, the contours of this portion need further development and exploration. A notable example, however, is that of the prosecutor’s constitutional obligation to provide the defense with exculpatory evidence under *Brady v. Maryland*.²⁴⁹ In *Garcetti v. Ceballos*, the Supreme Court held that attorneys lack a First Amendment right (vis-à-vis their supervisors/employers) when performing their official duties, including providing such constitutionally required materials to the defense.²⁵⁰ Thus the Supreme Court held that a deputy district attorney, Richard

²⁴⁷ See *id.* at 545.

²⁴⁸ See *id.* at 546; see also Tarkington, *Free Speech Right to Impugn*, *supra* note 24, 386–87 (arguing that the judiciary should not be able to insulate itself from scrutiny by punishing attorneys for raising colorable arguments of judicial bias).

²⁴⁹ 373 U.S. 83 (1963).

²⁵⁰ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Ceballos, could be punished by his employer for fulfilling what he understood were his obligations under *Brady* to provide exculpatory materials to the defense.²⁵¹

Under the access-to-justice theory, attorney speech that preserves the constitutional rights of others (including, and perhaps especially the constitutional rights of criminal defendants) would be speech that is essential to providing access to justice and the fair administration of the laws and thus would be entitled to core free speech protection. An attorney in Ceballos's position should have a recognized free speech right to provide the defense with exculpatory materials—especially as attorneys are required by the Constitution and the Rules of Professional Conduct to provide such materials. When admitted to the bar, attorneys take an oath to uphold the Constitution. Attorneys should have a free speech right sufficient to fulfill that oath where speech is needed to preserve constitutional rights of one's own clients or others in the justice system.

V. Preserving the Attorney's Role

One of the primary justifications for self-regulation of attorneys is the idea that attorneys (and in our system of self-regulation, state judiciaries) understand the role of the attorney in the administration of justice and thus will impose appropriate regulation. Although certainly prone to failings, self-regulation in theory would safeguard the role of the attorney in providing access to justice and the fair administration of the laws. The regulations in *Humanitarian Law Project* and *Milavetz* that appear to interfere with the attorney-client relationship and the role of the attorney in our system of justice were enacted by Congress. The Supreme Court in *Milavetz* approved Congressional regulation of attorney speech in areas of “national concern.” However, such approval—the recognition of the *power* of Congress to regulate attorneys—contains no method for ensuring that the essential *role* of the attorney in our system of justice is safeguarded. Further,

²⁵¹ *See id.*

normal First Amendment doctrines are not keyed to protecting this role—and will certainly fail to adequately protect it as happened in *Humanitarian Law Project*. (Often these doctrines have been employed in the attorney advertising arena where attorney speech is arguably more similar to that of other regulated entities.²⁵²) The lack of such safeguards is particularly troubling when a majoritarian entity subject to majoritarian overreactions and pressures—like Congress—can shape the extent to which attorneys are allowed to provide access to justice and the fair administration of the laws.

Justice can only be obtained through speech. I argue above that Schauer inaccurately asserts that “speech is all we have” because attorney speech is tied to government power and is not speech in the abstract.²⁵³ Yet, the invocation and avoidance of government power to preserve client life, liberty, and property by an attorney can only happen through speech. And thus, in a sense, Schauer is absolutely correct that “speech is all we have” because speech is the only *means* that attorneys have to fulfill their role in the justice system. Speech is the attorney’s only tool, her sole “saw[] [or] scalpel[],”²⁵⁴ to accomplish her work, including all four of the areas of attorney speech essential to the administration of justice outlined above. To turn Schauer’s point on its head—it is precisely because “speech is all we have” that the vocation and role of the attorney can be frustrated and even denied through restricting attorney speech essential to the attorney’s role in the administration of justice.

It should be disconcerting if that speech is not protected by anything but the good graces of regulators, especially from regulators who may be subject to majoritarian capture. Thus, the greatest concern is for protecting the life, liberty, and property interests of minorities and groups

²⁵² See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995); *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 472 (1988); *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 637–44 (1985); *In re R.M.J.*, 455 U.S. 191, 203–06 (1982).

²⁵³ See Schauer, *supra* note 33, at 688; see also *supra* Part II.

²⁵⁴ See *id.*

deemed undesirable by the majority. (It would be hard to be a more unpopular group than the designated foreign terrorist organizations in *Humanitarian Law Project*.) Madison noted his concern “that measures are too often decided, not according to *the rules of justice and the rights of the minor party*, but by the superior force of an interested and overbearing majority.”²⁵⁵ But as *Milavetz* indicates and *Humanitarian Law Project* demonstrates, regulation from “an interested and overbearing majority” could thwart “the rules of justice” themselves through the restriction of attorney speech on behalf of “the minor party.”

John Hart Ely warned against malfunction of political processes, whereby elected representatives can “act[] as accessories to majority tyranny”²⁵⁶ According to Ely, “malfunction” occurs when

(1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or vote, representatives beholden to an effective majority *are systematically disadvantaging some minority* out of simple hostility or *a prejudiced refusal to recognize commonalities of interest*, and thereby denying that minority the protection afforded other groups by a representative system.²⁵⁷

One way of creating such malfunction is through the regulation of attorney speech that cuts off certain people because of their unpopular status (e.g., terrorists, debtors, the NAACP during the 1960s, communists in the 1950s) from attorney access, and thus from the protection of law. For example, in *Humanitarian Law Project*, the plaintiffs wanted to teach certain groups how to use the law to achieve their goals through peaceful and lawful means, rather than through terrorism. Eradicating terrorism is a common interest of both the Humanitarian Law Project and the Congress that enacted IRTPA, but there is “a prejudiced refusal to recognize commonalities of

²⁵⁵ The Federalist Papers, No. 10.

²⁵⁶ JOHN HART ELY, *DEMOCRACY AND DISTRUST* at 103.

²⁵⁷ *Id.*

interest” and so these minorities are denied “the protection” and the ability to invoke the power of law and obtain attorney advice that is “afforded other groups.”

In the face of the McCarran Act and other red scare legislation of the 1950s, including legislation aimed at curtailing attorney activities in relation to alleged communist groups,²⁵⁸

Zechariah Chaffee wrote:

The only way to preserve ‘the existence of free American institutions’ is *to make free institutions a living force*. To ignore them in the very process of purporting to defend them, as frightened men urge, will leave us little worth defending. We must choose between freedom and fear—we cannot have both.²⁵⁹

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

Recognition of the access-to-justice theory, consequently, is not only aimed at providing a workable First Amendment theory for examining regulations of attorney speech, but more importantly, is aimed at preserving the role of the attorney in our system of justice—regardless of the regulating entity. The theory restores the theoretical benefit of self-regulation by having regulation come primarily through a judiciary who understood the role of attorneys in our justice system. By providing core First Amendment protection to attorney speech that is essential to our

²⁵⁸ ZECHARIAH CHAFEE, JR., *THE BLESSINGS OF LIBERTY* 142, 157–61 (1956). Chaffee argued against the creation of a “new political crime” that punished anyone who “contribute[d] to the establishment within the United States of a totalitarian dictatorship” under “the direction and control” of a foreign organization, government, or individual. *See id.* at 142. Chaffee also argued against the requirement that attorneys annually sign a loyalty oath and “affidavit stating whether he is or ever has been a member of the Communist Party” or other organization committed to overthrowing the United States government. *See id.* at 158. Chaffee maintains that while citizens and lawyers ought to work to prevent a totalitarian dictatorship from “taking over our government and our lives and destroying our freedoms; [] we ought to try to do so by choosing methods which will be effective, . . . which will *not impair the very freedoms which we are anxious to maintain.*” *See id.* at 160–61.

²⁵⁹ *Id.* at 156 (1956).

justice system, the theory also safeguards the attorney's role in providing equal access to justice and to the fair administration of the laws.

It is also important to understand what the access-to-justice theory does *not* do. It does *not* protect attorney speech that would frustrate the American system of justice, including the trial process itself, the right to jury trial, the right against compelled self-incrimination, the right to effective assistance of counsel, the right to confront and to call witnesses, and other constitutional and otherwise essential components to our justice system.²⁶⁰ Schauer attempts to illustrate how problematic it would be to apply the First Amendment to attorney speech, with a hypothetical situation where a trial court rules that evidence of a drug deal should be excluded.²⁶¹ Schauer's hypothetical prosecutor decides in opening argument to describe to the jury the excluded evidence and the fact of its exclusion by the judge.²⁶² Schauer asserts: "Now we all know what would happen to the trial and the prosecutor at this point were this to happen. And we know as well what would happen if the prosecuting attorney were to claim a denial of his or her First Amendment right to speak to the jury—unmitigated laughter."²⁶³ Schauer is trying to illustrate the inapplicability of the First Amendment to the "speech of law." Yet employing the access-to-justice theory does not create his hypothetical problem. The idea of the access-to-justice theory is to create First Amendment protection for attorney speech that is attuned to the United States justice system and the role of the attorney therein. Thus if a "restriction" (like the exclusionary rule or the rule prohibiting *ex parte* communications to jurors) is aimed at, for

²⁶⁰ See FREEDMAN & SMITH, *supra* note 47, at 13 ("The rights that comprise the adversary system include personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury, the rights to call and to confront witnesses, and the right to require the government to prove guilt beyond a reasonable doubt and without the use of compelled self-incrimination. These rights, and others, are also included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law—a concept which itself has been substantially equated with the adversary system.").

²⁶¹ Schauer, *supra* note 33, at 693.

²⁶² *See id.*

²⁶³ *See id.*

example, respecting the criminal defendant’s right to a fair trial, or right against compelled self-incrimination, or right to jury trial, then that restriction would clearly be constitutional. There certainly would be no Free Speech Clause protection for attorney speech that *frustrates* the justice system by interfering with the core rights protected thereby. While the access-to-justice theory needs further development and there may be areas where there is room for argument as to whether attorney speech is essential to providing access to justice or the fair administration of the laws, yet in situations like Schauer’s hypothetical where allowing attorney speech would in fact frustrate the justice system, then the prohibition would not receive First Amendment protection under the access-to-justice theory.

Schauer’s example is accurate in demonstrating that the normal doctrines and discourse of the First Amendment would not readily show when attorney speech *should be restricted* to preserve our justice system. However, the application of—or even Schauer’s view to disregard—the normal doctrines and discourse of the First Amendment also fails to show when attorney speech *should be protected* because the speech is essential to fulfill the attorney’s function and role in the justice system. Further, Schauer’s concern that if the First Amendment were applied to attorney speech then the general doctrines of the First Amendment would have to be diluted (to allow for restrictions like the exclusionary rule) is also resolved by a theory of the First Amendment that is particularly attuned to attorney speech.²⁶⁴ Because the access-to-justice theory would only apply to the “speech of law,” and not to speech in general, it would not serve to dilute other areas of Free Speech Clause protection.

²⁶⁴ See *id.* at 698–700.

IV. Conclusion

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

Traditionally, such “officers of the court” have been viewed as having relinquished their free speech rights, as part of their office.²⁶⁵ Further, under the constitutional conditions doctrine, the attorney relinquished her personal liberty interest (guaranteed by the Free Speech Clause) to speak contrary to the regulations imposed by the judiciary and bar.²⁶⁶ However, the idea was always flawed. Even assuming an attorney can waive her own personal liberty interest of free speech in exchange for a license to practice law, the attorney cannot waive providing speech essential to the fair administration of justice. The attorney cannot waive fulfilling her essential role in our system of justice. Indeed, the lawyer is not solely an officer of the specific court of which she is admitted, but is more importantly an officer of the overall United States justice system. Rather than extinguishing her right to free speech, the attorney’s office and her oath to uphold the Constitution instead *require* that the attorney assert her constitutional right to free speech on behalf of clients in invoking and avoiding the power of government and securing the rights of her clients to life, liberty, and property.

²⁶⁵ See, e.g., Sullivan, *supra* note 69, (explaining that attorneys are more likely to be seen as lacking free speech rights when acting in their capacity as officers of the court).

²⁶⁶ See *supra* notes 64–67 and accompanying text.