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INTRODUCTION

State laws against the "unauthorized practice of law" (UPL) generally prohibit nonlawyers from giving "legal advice." Legal advice includes interpreting the law for another person,[1] expressing an opinion about what law applies to a person's situation,[2] and recommending ways that a person might use the law to obtain her objectives.[3] However, these are the kinds of

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[1] *See, e.g.*, U.S. DIST. CT. RULES N.D. W. VA., LR PL P 9 ("legal advice . . . includes offering interpretations of rules . . . or interpreting the meaning or effect of any Court Order or judgment"); *In re* County of Erie, 473 F.3d 413, 419 (2d Cir. 2007) ("legal advice involves the interpretation . . . of legal principles"); Unauthorized Practice of Law—Workmen's Compensation Commission—Nonlawyers May Not Represent Claimants at Commission Hearings or Give Legal Advice on Matters Before It, 65 Op. Att'y. Gen. Md. 28, 33 (1980) ("nonlawyer[s] may not . . . interpret legal documents").

[2] *See, e.g.*, *In re* McDaniel, 232 B.R. 674, 679 (Bankr. N.D. Tex.1999) (Legal advice occurs where the nonlawyer "applies the statutes, rules, and information from [legal] publications to the facts of the particular case."); Franko v. Mitchell, 762 P.2d 1345, 1360 (Ariz. Ct. App. 1988) (Grant, J., concurring in part, dissenting in part) ("Legal advice is often defined as giving an opinion as to the law applicable to the subject matter." (citing Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 692–93 (Minn. 1980)); Kennedy v. Bar Ass'n., 561 A.2d 200, 208 (Md. 1989) ("advising clients by applying legal principles to the client's problem is practicing law").

[3] *See, e.g.*, U.S. DIST. CT. RULES N.D. W. VA., LR PL P 9 ("[L]egal advice . . . includes . . . recommending a course of action."); Meza-Sayas v. Conway, 2007 U.S. Dist. LEXIS 66772, at *19 (D.C. Idaho Sept. 10, 2007) ("Legal advice includes the choice of action to pursue, [and] the court in which to pursue it."); Family Law—Domestic Violence—Unauthorized Practice of Law—Activities of Advocates, 80 Op. Atty. Gen. Md. 138 (1995) (Nonlawyers "may not help [persons] decide, based upon the [persons'] particular circumstances, whether to invoke any of their rights or pursue any of their potential remedies."); DEP'T OF DISPUTE RESOLUTION SERVS. OF THE SUPREME CT. OF VA., GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (n.d.), http://www.courts.state.va.us/courtadmin/aoc/djs/programs/drs/mediation/resources/upl_guidelines.pdf [https://perma.cc/5SNG-YHK4] (Legal advice "directs, counsels, urges,

speech—involving the expression of ideas, opinions, and advocacy—that have generally been entitled to First Amendment protection. Thus, it is not surprising that some commentators have suggested that UPL restrictions interfere with the free speech rights of nonlawyers and those who would hear such speech.[4]

Nonetheless, all the appellate courts that have considered whether nonlawyers' legal advice is speech protected by the First Amendment have concluded that it is not.[5] Such unanimity might be presumed to resolve the issue, if these appellate decisions were not scattershot in their approaches, unconvincing in their reasoning, and inept at applying existing First Amendment precedent. This article argues in Part I that these appellate decisions, though espousing a wide range of theories, present no convincing rationale for why nonlawyers' legal advice is not protected speech. Further, as explained in Part II, the U.S. Supreme Court's jurisprudence indicates that the UPL restrictions that exist in most states against nonlawyers giving legal advice do violate the First Amendment.[6]

Although the failure of courts in this situation to police an important constitutional right is reason enough for concern, as discussed in Part III, this failure also presents the additional disadvantage of undermining access to justice. Persons with civil legal problems need guidance about how to enforce their legal rights, but many of them cannot afford an attorney or obtain one of the few available free ones. Unlike criminal defendants, the

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or recommends a course of action by a disputant or disputants as a means of resolving a legal issue.").

[4] *See, e.g.*, Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2276 (1999) ("[I]t is not likely that rules prohibiting nonlawyers from giving legal advice can survive constitutional scrutiny."); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 62 (1981) ("Unauthorized practice prohibitions plainly implicate first amendment values by restricting both lay speakers' ability to convey information and the public's opportunities to receive it."); *see also* Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights? Some Thoughts about Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255, 257 (2011) ("[T]o the extent that these [UPL] statutes broadly sweep vast amounts of law-related speech within their scope, they may infringe on free speech rights.") (focusing on First Amendment issues pertaining to nonlawyers drafting legal documents).

[5] *See* cases discussed *infra* Part I.

[6] UPL restrictions could also be challenged as impermissibly burdening the First Amendment right of petition. *See* Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (per curiam) (Fla. 1978) ("Once a person has made the decision to represent himself, we should not enforce any unnecessary regulation which might tend to hinder the exercise of this constitutionally protected right"), or in some circumstances as an interference with the First Amendment right of association. *See* Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 431 (1962) (protecting nonlawyers' solicitation of clients for impact litigation as a form of "political expression and association"). This article focuses specifically on the free speech clause.

litigants in civil cases are not entitled to counsel. While the ideal solution would be to ensure that all can have attorneys, in civil as well as criminal cases, that ideal is very far from being realized and would be expensive. If courts enforced the First Amendment in this situation, it would offer a much less costly and easier-to-scale-up remedy by permitting trained and knowledgeable nonlawyers to give legal advice in appropriate situations in civil legal cases where litigants must presently go it alone. Such a result would not come without risks, because the legal advice of nonlawyers will generally fall below the quality of advice from lawyers. In Part III, this article describes how to address the risks while still enforcing the Constitution and improving access to justice.

I. THE PROBLEMATIC ARGUMENTS AGAINST FIRST AMENDMENT PROTECTION

Varied rationales have been advanced by appellate courts to justify the conclusion that nonlawyers' legal advice is not protected by the First Amendment. One theory is that such advice amounts to "conduct," not "speech," and so can be prohibited without raising First Amendment concerns.[7] A related theory considers legal advice to be speech but supposes that because it is speech that is "incidental" to professional conduct, it can be prohibited without running afoul of the First Amendment.[8] Another idea supposes that the broad authority of the state to regulate the practice of law entitles it to such deference that UPL restrictions against nonlawyers giving legal advice need only have a rational basis in order to be upheld.[9] And, finally, there is the idea that because nonlawyers' legal advice occurs in the context of a private interaction and involves matters of private rather than public concern, it does not fall within the type of speech protected by the First Amendment.[10] While the courts that have considered the issue may agree that there is no First Amendment violation, their explanations for why not are so varied and inconsistent with each other as to cast doubt on the validity of this collective conclusion. Further, their rationales employ faulty reasoning and misapply and misrepresent applicable precedent, and thus do not provide convincing support for the view that nonlawyers' legal advice can be constitutionally suppressed and punished.

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[7] *See infra* Section I.A.
[8] *See infra* Section I.B.
[9] *See infra* Section I.C.
[10] *See infra* Section I.D.

A. Nonlawyers' Legal Advice is Speech, not Conduct

One of the most prominent arguments made against First Amendment protection for nonlawyers' legal advice is that such advice is conduct rather than speech, and therefore not covered by the First Amendment. For example, in *People v. Shell*, the Supreme Court of Colorado rejected a nonlawyer's First Amendment defense against UPL charges, reasoning that the state's "ban on the unauthorized practice of law does not implicate the First Amendment because it is directed at *conduct*, not *speech*."[11] Such a position has been taken fairly often by courts and commentators.[12] However, the court in *Shell* not only forbade the defendant from representing parties in legal proceedings or preparing legal documents, activities that may conceivably be described as conduct, but also from offering individuals legal advice,[13] which would not appear to be conduct.

In support of its conclusion that the defendant's various activities, including the giving of legal advice, amounted to conduct, the Colorado court cited the U.S. Supreme Court's decision in *Ohralik v. Ohio State Bar Association*.[14] However, *Ohralik* deals with "commercial speech."[15] Commercial speech does not encompass all speech emanating from a commercial entity or that occurs in the context of for-profit activities.[16] It has been defined by the Court more specifically as "speech that

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[11] People v. Shell, 148 P.3d 162, 173 (Colo. 2006) (en banc) (emphasis in original), *cert. denied*, Shell v. Colo., 550 U.S. 971 (2007) (nonlawyer advised parents in child abuse and neglect proceedings, drafted pleadings for parents in such cases, and attempted to represent parents in proceedings).

[12] *See* Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 646 (2011) ("Attorney advice largely has been ignored by the legal academy, at least in part, because advice is viewed as conduct—not speech . . . ."); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1284 (2005) ("[T]he 'speech as conduct' argument is sometimes made to explain some of the uncharted zones of First Amendment law[ ] . . . such as . . . professional advice to clients."); *see also* Rhode, *supra* note 4, at 63 ("[T]he infrequency with which lower courts have considered the first amendment dimensions of lay activity suggests some implicit tendency to categorize it as conduct rather than expression.").

[13] "[T]he evidence in the record sufficiently supports the hearing master's findings that Shell *offered legal advice*, drafted legal pleadings and attempted to represent another person in a judicial proceeding, all of which constitute the practice of law." *Shell*, 148 P.3d at 170 (emphasis added). Colorado statutory law specifically prohibits "giving advice with respect to the law." *Id.* at 171 (quoting C.R.C.P. 201.3(2)(b)(i) & (ii) (repealed 2014)).

[14] *Shell*, 148 P.3d at 173 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

[15] *Ohralik*, 436 U.S. at 454.

[16] The Court has also pointed out that "[s]ome of our most valued forms of fully protected speech are uttered for a profit." Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 482 (1989) (citing Buckley v. Valeo, 424 U.S. 1 (1976); N.Y. Times, Co. v. Sullivan, 376 U.S. 254 (1964)).

proposes a commercial transaction."[17] The giving of legal advice is not the proposal of a commercial transaction, and so should not be governed by a precedent that applies to commercial speech. The Supreme Court has in fact emphasized that for-profit speech should not be conflated with commercial speech in deciding First Amendment challenges and that what constitutes commercial speech is actually quite limited.[18] Further, the Supreme Court even made clear in *Ohralik* that its holding in the case was not intended to cover legal advice as such.[19] Accordingly, *Ohralik* does not govern the nonlawyer's legal advice in *Shell*.

Further, the Colorado court in *Shell* misdescribes *Ohralik* as "suggesting that the government's regulation of the practice of law is a regulation of conduct, not speech."[20] The court did not cite any particular language from *Ohralik* to support this conclusion.[21] The closest *Ohralik* comes to "suggesting" such a thing is where the Supreme Court says that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[22] But that statement makes the unremarkable point that First Amendment protection is not triggered simply because speech is an element of conduct that may be legitimately regulated by the state. The conduct the Supreme Court was referring to in *Ohralik* was the financial transaction between lawyer and client and the speech initiating it.[23] The speech facilitating a transaction is truly instrumental to the transaction, perhaps more analogous to the writing of numbers on a check than to the expression of ideas. A nonlawyer's legal advice, on the other hand, does not resemble such a transactional use of speech that could reasonably be equated to conduct.

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[17] *Fox*, 492 U.S. at 482 (1989) (emphasis in original) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc., 425 U.S. 748, 761 (1976)); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (defining commercial speech as an "expression related solely to the economic interests of the speaker and its audience").

[18] *Fox*, 492 U.S. at 484–85.

[19] The Court specifically noted that the disciplinary rule it was evaluating "[did] not prohibit a lawyer from giving unsolicited legal advice; it proscribe[d] the acceptance of employment resulting from such advice." *Ohralik*, 436 U.S. at 458.

[20] People v. Shell, 148 P.3d 162, 173 (Colo. 2006) (quoting *Ohralik*, 436 U.S. at 456), *cert. denied*, Shell v. Colo., 550 U.S. 971 (2007).

[21] *Id.*

[22] *Ohralik*, 436 U.S. at 456 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)).

[23] *Id.* at 457.

Although the Supreme Court did find that the state could prohibit the in-person solicitation of legal business that had occurred in *Ohralik*, the Court still concluded that speech was sufficiently involved that the First Amendment was at least implicated. The Court reasoned that even where speech is a "subordinate component" of an activity that is mostly conduct, that "does not remove the speech from the protection of the First Amendment" though "it lowers the level of appropriate judicial scrutiny."[24] Thus, even the transactional speech in *Ohralik* was subject to some degree of First Amendment consideration, rather than simply regarded as conduct exempt from scrutiny, as the court in *Shell* seemed to believe.

The Supreme Court of Colorado's distortion of *Ohralik* led it to problematic reasoning with regard to the speech-conduct distinction. In *Shell*, the court remarked:

> [O]ur ban on the unauthorized practice of law is no different from state laws prohibiting bribery, extortion, or criminal solicitation. Each of these unlawful activities requires some method of communication, and yet it is "well established that speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes."[25]

This comparison is fundamentally flawed. Extortion, bribery, and criminal solicitation all use speech to bring about an end that is itself illegal, whether to extract money against another person's will, to cause a public official to betray the public trust, or to induce another to commit a criminal act. By contrast, giving legal advice involves no "legitimately proscribable nonexpressive conduct."[26] It is speech directed at the achievement of objectives within the legal system, rather than aimed at violating the law. Speech used to further the commission of a crime is not an apt analogy to a nonlawyer's legal advice and so does not provide support for the Colorado court's reasoning.

Even if the giving of legal advice by nonlawyers could reasonably be called conduct, it would still be *expressive* conduct, necessitating application of the First Amendment. A version of the "conduct not, speech" argument was asserted by the government in *Holder v. Humanitarian Law Project* in support of a federal law prohibiting persons from giving material aid to

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[24] *Id.*

[25] *Shell*, 148 P.3d at 173 (citations omitted) (quoting Rice v. Paladin Enter., Inc., 128 F.3d 233, 243 (4th Cir. 1997)).

[26] *Id.*

terrorists, including aid in the form of legal advice.[27] The government argued that "the only thing truly at issue . . . is conduct, not speech."[28] The Supreme Court pointed out that even if the true objective was to regulate conduct, that did not matter if the conduct was nonetheless "related to expression" and if the target of the government regulation was communication accomplished by means of the conduct.[29] The highest level of First Amendment scrutiny was therefore still required for conduct that was expressive.[30] This level of scrutiny would apply to legal advice—if such advice could even be called conduct.

In addition, the Supreme Court has treated legal advice as constituting speech rather than conduct. For example, in *Shaw v. Murphy*, the Court declined, because of prison security concerns, to expand the limited First Amendment rights of prisoners to include the right to use written correspondence to provide legal advice to other prisoners.[31] (The Court had previously concluded that the state could not use UPL restrictions to prevent prisoners from providing each other with legal advice in pursuing their habeas corpus petitions.[32]) In *Shaw*, the Court applied a First Amendment analysis, rather than simply proceeding on the assumption that prisoner correspondence that conveyed legal advice constituted conduct rather than speech and therefore was not covered by the First Amendment.[33] There is no Supreme Court precedent exempting legal advice from constitutional protection on the grounds that it is conduct.

The Colorado court's *Shell* decision does not make a compelling case for the idea that nonlawyers' legal advice amounts to conduct and thus is not protected by the First Amendment. Further, *Ohralik*, the First Amendment precedent upon which the court primarily relied,[34] is not actually applicable to noncommercial speech, and would not in any event justify treating nonlawyers' legal advice as conduct exempt from First Amendment analysis.

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[27] Holder v. Humanitarian Law Project, 561 U.S. 1, 1, 26–28 (2010). For further discussion, see *infra* Section II.B.

[28] *Humanitarian Law Project*, 561 U.S. at 26.

[29] *Id.* at 28 (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)).

[30] *Id.* For further discussion of *Humanitarian Law Project infra*, see Section II.B.

[31] Shaw v. Murphy, 532 U.S. 223, 231 (2001).

[32] Johnson v. Avery, 393 U.S. 483, 484–490 (1969). For further discussion, see *infra* Section II.A.

[33] *Shaw*, 532 U.S. 223.

[34] People v. Shell, 148 P.3d 162, 173 (Colo. 2006), *cert. denied*, Shell v. Colo., 550 U.S. 971 (2007).

B. Legal Advice is not Speech "Incidental" to Conduct

Justice Byron R. White's concurring opinion in *Lowe v. Securities and Exchange Commission* presents a more persuasive variation on the speech-conduct distinction.[35] Justice White proposed that "the professional's speech is incidental to the conduct of the profession," and that "legitimate regulation of professional practice" therefore has an "only incidental impact on speech."[36] In other words, if the practice of law is understood to be conduct, then the practitioner's speech ought to be regarded as concomitant with such conduct, and therefore as not triggering First Amendment speech protections.[37]

Although Justice White was not in the majority in *Lowe*,[38] his concurrence has been influential, echoed by two appellate courts in rejecting First Amendment challenges to UPL restrictions against nonlawyers giving legal advice. The Supreme Court of North Dakota in *State v. Niska* rejected the idea that UPL restrictions violated First Amendment speech rights, using White's theory, because "any resulting limitation on speech is merely incidental and is not directed at suppressing the expression of ideas."[39] Similarly, the Seventh Circuit court reasoned in *Lawline v. American Bar Association*, another case involving the issue, that "[a]ny abridgment of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation."[40]

Although echoing Justice White's conceptualization, neither of these courts offered viable precedent for their rulings.

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[35] *See*, Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 211–236 (1985) (White, J., concurring).

[36] *Id.* at 232 (footnote omitted).

[37] Nonlawyers would not strictly be covered by such an argument. There are important differences in how lawyers and nonlawyers would be evaluated under the First Amendment, some of which are discussed *infra*. For a somewhat different but analogous perspective, see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 844–49 (1999).

[38] Robert Kry has argued that Justice White's position was inconsistent with previous Supreme Court precedent. Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE UNIV. L. REV. 885, 895–96 (2000). For further discussion, see *infra*, notes 46–49 and accompanying text.

[39] State v. Niska, 380 N.W.2d. 646, 649 (1986) (citations omitted). Niska was sanctioned for a number of activities including the giving of legal advice. *Id.* at 648 (nonlawyer advised a person in three civil cases and one criminal case, and also drafted pleadings on that person's behalf). The court stated that "[a]lthough what constitutes the practice of law does not lend itself to an inclusive definition, it clearly includes Niska's drafting of legal instruments and pleadings and *providing legal advice*." *Id.* at 648 (emphasis added).

[40] Lawline v. Am. Bar Ass'n., 956 F.2d 1378, 1381 (1992) (citations omitted), *cert. denied*, 510 U.S. 992 (1993) (nonlawyers—along with lawyers—assisted persons who called hotline by answering legal questions). For example, "non-lawyers at Lawline were giving legal advice to debtors in Chapter 7 bankruptcy proceedings." *Id.* at 1382.

In *Niska*, the Supreme Court of North Dakota cited no fewer than six Supreme Court cases as supporting its holding, none of which are actually relevant to a content-based restriction on speech. Five of the cases cited involved "time, place, and manner" restrictions applicable to access to public forums.[41] UPL restrictions that prohibit nonlawyers from giving legal advice are not time, place, and manner restrictions, as the speaker and type of speech are being restricted, not the time, place, and manner of the speech. The Supreme Court has consistently stated that the time, place, and manner analysis is not permitted for content-based restrictions,[42] like those involving nonlawyers' legal advice.[43]

To support its holding, the *Niska* court also cited *United States v. O'Brien*, in which a defendant burned his draft card in protest of the Vietnam War.[44] It is true that the Supreme Court used language in *O'Brien* about permissible "incidental" effects.[45] The Court explained that where "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[46] However, UPL restrictions against nonlawyers' legal advice regulate speech as such, rather than indirectly impacting communication accomplished by inference from a behavior with which it is inseparably combined, as in *O'Brien*. In citing *O'Brien*, the North Dakota court is not comparing apples and apples.

O'Brien, by its own terms, would not apply to this situation. According to *O'Brien*, when the government's

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[41] *Niska*, 380 N.W.2d at 649 (citing Clark v. Cmty. for Creative Nonviolence, 468 U.S. 288 (1984) (permit for demonstrations on public land); Grayned v. City of Rockford, 408 U.S. 104 (1972) (demonstration in front of public school); Cox v. New Hampshire, 312 U.S. 569 (1941) (march on city hall; opinion summarized by court as showing that "reasonable time, place and manner restrictions [are] valid even though they limit expression.")). The court also cited several other related cases. *See* United States v. Albertini, 472 U.S. 675 (1985) (trespass onto military base), and Members of City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984) (posting of campaign signs on public property), which also involve time, place, and manner restrictions applying to public forums. *Id.* For discussion of time, place, and manner restrictions, see *infra* Section I.C.

[42] *See* Consol. Edison Co. of N. Y. v. Pub. Serv. Comm'n of N. Y., 447 U.S. 530, 536 (1980) ("time, place, or manner" analysis inapplicable where speech is regulated on the basis of content); *see also* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 879–80 (1997) (citing *Consol. Edison Co. of N.Y.*, 447 U.S. at 536) (same).

[43] For a discussion on the prohibition against nonlawyers' legal advice as a content-based restriction, see *infra* Section II.B.

[44] *Niska*, 380 N.W.2d at 649 (citing United States v. O'Brien, 391 U.S. 367 (1968)); *O'Brien*, 391 U.S. at 369.

[45] *O'Brien*, 391 U.S. at 376.

[46] *Id.*

"regulation is not related to expression, then the less stringent standard . . . for regulations of noncommunicative conduct controls."[47] On the other hand, if the regulation *is* related to expression, "then [it is] outside of *O'Brien*'s test," therefore requiring the application of "a more demanding standard."[48] The permission supplied in *O'Brien* for the incidental regulation of conduct applies to "noncommunicative conduct," but nonlawyers' legal advice is neither "noncommunicative" nor "conduct."[49] Further, the regulation in question is related to speech, and thus appears to be outside of the more lenient standard that applies to regulation that only incidentally reaches communication. In short, none of the Supreme Court cases cited by the Supreme Court of North Dakota in *Niska* as justification, including *O'Brien*, are actually relevant to the constitutionality of proscribing nonlawyers' legal advice.

On the other hand, in *Lawline*, the Seventh Circuit justified its position regarding "incidental" regulation by citing *Ohralik*.[50] However, *Ohralik* was a case about commercial speech, and nonlawyers' legal advice is not commercial speech as the Supreme Court has defined it.[51] Even Justice White did not cite to *Ohralik* to support his "incidental" speech theory, presumably because he did not think that case applicable.

Further, what *Ohralik* actually said is different from the proposition for which the Seventh Circuit cites it. *Ohralik* itself does not use any language about the "incidental" restriction of speech. The language upon which the Seventh Circuit court evidently relies[52] remarks that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns."[53] The Supreme Court thus indicated that it was not particularly concerned about the

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[47] Texas v. Johnson, 491 U.S. 397, 403 (1989) (citing *O'Brien*, 391 U.S. at 377).

[48] *Id.* (citing *O'Brien*, 391 U.S. at 377).

[49] For a detailed discussion of this case, see generally Lanctot, *supra* note 4; *see also* Kry, *supra* note 38, at 890 ("Many courts uphold restrictions on professional speech by asserting that the speech is merely incidental to the conduct of the profession. However, this reasoning cannot be squared with the Court's normal approach to expressive conduct cases.") (footnote omitted). Kry's discussion argues that *O'Brien* is not supportive of this approach. *Id.* at 891–85.

[50] Lawline v. Am. Bar Ass'n., 956 F.2d 1378, 1386 (1992) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459, 467–68 (1978)).

[51] *See* discussion *supra* Section I.A.

[52] The court cites pages 459 and 467–68 of *Ohralik*. *Lawline*, 956 F.2d at 1386 (citing *Ohralik*, 436 U.S. at 459, 467–68). The latter citation refers to pages that discuss the importance of the state being able to regulate members of the bar and some facts particular to the *Ohralik* case, the relevance of which are unclear. *Ohralik*, 436 U.S. at 467–68. The former page citation discusses the law, the most relevant-seeming part of which is quoted here. *Id.* at 459.

[53] *Ohralik*, 436 U.S. at 459.

regulation of speech in *Ohralik* because the impact on speech was very limited, not that it was unconcerned because the regulation of speech occurred as an incident to "otherwise legitimate regulation."[54] A *marginal* regulation is one that hardly affects speech, and so does not raise substantial First Amendment concerns. The regulation of a financial transaction accomplished by means of words indeed has only marginal impact on free speech. On the other hand, an *incidental* regulation is not targeted at speech—and so might be an acceptable regulation—but could still be subjected to the highest level of scrutiny if it has a more than marginal impact on speech. The Seventh Circuit is missing the significant difference between the meanings of "marginal" and "incidental" in citing what it sees as support from *Ohralik*.

In fact, a regulation banning speech as an incident to achieving some desirable state interest is not likely to be approved by the Supreme Court unless the speech reached by that regulation is truly marginal in nature. On the same day it decided *Ohralik*, the Supreme Court also decided *In re Primus*, a case that also involved an act of client solicitation and in which much the same interests in regulation were articulated by the state.[55] However, because the client solicitation in *In re Primus* was not specifically directed at instigating a financial transaction (i.e., was not about a behavior the state could regulate), the Supreme Court applied the highest level of First Amendment scrutiny to the regulation.[56] The solicitation of clients in that case was directed at finding plaintiffs for civil rights litigation.[57] The regulation indeed only incidentally reached speech, as the purpose of the regulation was to protect consumers from the harm resulting from in-person business solicitation.[58] But its impact on free speech and association was more than marginal and was accordingly not permitted.[59] *Ohralik*, especially considered in light of *Primus*, does not

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[54] *See Lawline*, 956 F.2d at 1381 ("Any abridgement of the right to free speech is merely the incident of observing an otherwise legitimate regulation.").

[55] *In re* Primus, 436 U.S. 412, 414–20 (1976). The state's regulation was "aimed at the prevention of undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally in solicitation by lawyers of prospective clients." *Id.* at 432.

[56] *Id.* (the state's action must withstand the "exacting scrutiny applicable to limitations on core First Amendment rights." (citing Buckley v. Valeo, 424 U.S. 1, 44–45 (1976))).

[57] *Id.* at 422.

[58] *Id.* at 432 (the purpose of the rules was to prevent "undue influence, overreaching, misrepresentation, invasion of privacy, conflict of interest, lay interference, and other evils that are thought to inhere generally, in solicitation by lawyers of prospective clients").

[59] *Id.* at 433 ("The Disciplinary Rules in question sweep broadly.").

support the Seventh Circuit's theory in *Lawline* that an incidental regulation of speech is subject to anything less than the highest scrutiny.

Justice White's theory about incidental speech in *Lowe* has substantial shortcomings that are elided by *Niska* and *Lawline*. In support of his theory, Justice White mainly offered an analogy: "Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession."[60] This analogy, while more apt than the bribery-extortion comparison offered by the Supreme Court of Colorado in *Shell*,[61] still does not work to justify regulation of nonlawyers' legal advice. For one thing, the speech that constitutes a contract serves to (and is intended to serve to) instantiate a legally-mediated transaction. When a state determines what promises can and cannot be made between contracting parties, those are regulations directed at conduct, even if enforced against descriptions in words of the conduct at issue. (If a contract were not legally binding and giving rise to particular regulable behaviors, the state would have no interest in its words.) Further, a contract does not really, in any event, involve a *lawyer*'s speech; in drafting the contract, the lawyer is not expressing her own views and opinions but selecting language that accomplishes (and expresses) the client's objectives. Thus, the impact of any regulation on the professional's speech in such a situation, where the professional is merely channeling the client's objectives, would in fact be marginal.

Legal advice, by contrast, is speech that is not transactional in nature, and it is very much in the vein of speech that has traditionally been protected by the First Amendment.[62] For example, a criminal defense attorney in consultation with a client might critically evaluate the state of the law with respect to the client's situation, recommend a particular legal strategy (even, perhaps, a controversial one), opine about how certain evidence in the case will be evaluated by the judge, and work through scenarios addressing various possible legal outcomes. Such legal advice is truly the attorney's speech, not merely a

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[60] Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 232 (1985) (White, J., concurring).

[61] *See* discussion *supra* Section I.A.

[62] *See* Halberstam, *supra* note 37, 840–41 ("[A]lthough a professional might be viewed as engaged in the transaction of selling his professional advice, one must, of course, distinguish between the offer of professional services, which is akin to a commercial proposal, and the actual presentation of the professional advice, which is no more a 'commercial transaction' than is the actual writing or reading of a book or newspaper that is available for sale." (footnote omitted)).

"channeling" of client objectives in the manner of contractual draftwork. Justice White's analogy therefore relies upon a similarity between contracts and professional speech that does not hold up, insofar as the giving of legal advice is concerned.

Another problem with Justice White's theory is that it would by extension enable the state to label almost any speech as incidental to some conduct and therefore subject to regulation. Thus, the state might classify journalism and community organizing as professions, and then enact regulations limiting writing for a newspaper or speaking at a community meeting to those it licensed, as involving speech incidental to the carrying out of such professions. But in *Thomas v. Collins*, the U.S. Supreme Court specifically disapproved this kind of end-run around the First Amendment.[63] *Thomas* involved a First Amendment challenge by a person prosecuted for advocating that employees join a union, without his having first registered as a union organizer as required by state law.[64] The state argued that First Amendment considerations were "wholly inapplicable" to its regulation of such "business or economic activity."[65] Agreeing, the Supreme Court of Texas sustained the regulation as a valid exercise of the state's police power, undertaken "'for the protection of the general welfare of the public, and particularly the laboring class,' with special reference to safeguarding laborers from imposture when approached by an alleged organizer."[66] However, the Supreme Court concluded that the state could not use the registration requirement as a means of interfering with speech—even if the state could regulate conduct associated with union organizing, such as the solicitation of payments to the union.[67] In other words, the Supreme Court did not accept the idea that the state could avoid the application of the First Amendment by imposing a registration requirement on speech and then treating the violation of that requirement as involving conduct and not speech. Similarly, making the giving of legal advice conditional upon obtaining a license to practice law does not transform the giving of legal advice without a license into speech incidental to conduct that the state can then proscribe.[68]

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[63] Thomas v. Collins, 323 U.S. 516, 539–43 (1945); *see also* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 150 (2002) (ordinance requiring registration and permit for door-to-door advocacy is unconstitutional).

[64] *Thomas*, 323 U.S. at 516.

[65] *Id.* at 531.

[66] *Id.* at 524 (internal citation omitted) (quoting *Ex parte* Thomas, 174 S.W.2d 958 (Tex. 1943)).

[67] *Id.* at 536–37.

[68] *See* Kry, *supra* note 38, at 889 ("When professional advice-rendering activities are covered by a system of licensure, particularly acute First Amendment

In all fairness, Justice White did recognize this potential problem with his theory. He remarked: "Surely it cannot be said, for example, that if Congress were to . . . establish a licensing scheme under which 'unqualified' writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment."[69] However, he believed he had solved this problem by "locat[ing] the point where regulation of a profession leaves off and prohibitions on speech begin,"[70] which he identified as where the attorney-client relationship or its equivalent is created.[71] Accordingly,

> [w]here the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[72]

White supposed that all speech involved in the practice of law might reasonably be subsumed under the rubric of professional conduct, wherever the professional relationship as described has been established.

But what is the constitutional basis for Justice White's "personal nexus" distinction? It is not located in the First Amendment. Rather, states define what is professional conduct. It is a fly in Justice White's ointment that some states have defined the practice of law more broadly to include legal advice not only to particular individuals but also that occurring through speaking or publishing to a general audience, which Justice White indicated is protected by the First Amendment.[73] A state might even in theory go even further and decide that any and all

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questions arise because the license requirement arguably acts as a prior restraint on speech . . . As the Supreme Court explains, 'Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.' This view reflects the First Amendment's historical motivation: British laws that had sought to impose licensing requirements on the press." (footnotes omitted) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976))).

[69] Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, at 231 (1985) (White, J., concurring).

[70] *Id.* at 232.

[71] *Id.*

[72] *Id.* (omission in original) (quoting Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 720 (1931)).

[73] *See, e.g.*, Shortz v. Yetter, 38 Pa. D. & C. 291, 299 (Pa. Ct. C.P. Luzerne Cty. 1940) (finding that UPL restrictions against nonlawyers giving legal advice allows for banning self-help book written for general public); *see also* Palmer v. Unauthorized Practice Comm. of State Bar of Tex., 438 S.W.2d 374, 375, 377 (Tex. Civ. App. 1969) (same). Other states have at least flirted with the idea of adopting such a broader definition. *See infra* note 103.

authoritative speaking and publishing about the law amounts to the practice of law, and thereby suppress such speech, except where engaged in by the licensed professional. Justice White seemed to assume that there is an a priori or ur- definition of the practice of law, when in fact there is no touchstone by which speech can be dispositively identified as falling or not falling under the rubric of professional conduct. Rather than starting from an idea about what constitutes the practice of law and basing the First Amendment analysis on that perceived definition, the right approach would instead seem to be the opposite: what the First Amendment considers to be speech determines the scope of what the state can regulate as professional conduct.

Even if it could be said that professional speech is integral to professional conduct and can be regulated because of the close association of the speech with professional conduct, that same logic does not apply to speech from a nonprofessional that merely overlaps or resembles the speech of a professional. In such situations, there is no "professional nexus" of the kind described by Justice White. Insofar as a nonlawyer's giving of legal advice is not actually incidental to the practice of law, it would not seem to be covered by White's theory.

It should be noted that Justice White's formulation constrains lawyers as well as nonlawyers. It would enable a state to limit the legal advice that lawyers give their clients, for example, to forbid lawyers from telling clients about favorable law or legal strategies, as such speech would be "incidental" to the conduct of the practice of law and thus its regulation would not be subject to the First Amendment. Indeed, in *Legal Services Corporation v. Velazquez*, the plaintiff challenged an attempt by Congress to limit the kinds of cases that lawyers receiving funds from the Legal Services Corporation (LSC) could handle, the advice they could give to clients, and the arguments that LSC-funded lawyers could present on behalf of their clients in legal proceedings.[74] The Supreme Court rejected the idea that the government could "[r]estrict[] LSC attorneys in advising their clients"[75] and prevent them from being able to give those clients "full advice."[76] Similarly, in *Florida Bar v. Went for It*, the Supreme Court remarked: "Speech by professionals obviously has many dimensions. There are circumstances in which we will accord

[74] Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 538–39 (2001) ("Under LSC's interpretation, however, grantees could not accept representations designed to change welfare laws, much less argue against the constitutionality or statutory validity of those laws.").

[75] *Id.* at 544.

[76] *Id.* at 546.

speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer."[77] Justice White's theory would essentially withdraw from lawyers any right to have their legal advice protected by the First Amendment when it is professionally offered—a view which as these cases evidence is not generally endorsed by the Court.

Justice White's idea about "incidental" permissible regulation, which influenced the courts in *Niska* and *Lawline*, has no support in Supreme Court jurisprudence or in logic. On the contrary, *Thomas* and *Ohralik* both suggest that the First Amendment is more likely to distinguish speech from associated professional conduct in order to safeguard the speech, rather than to conflate speech with professional conduct in order to restrict it.

C. Legal Advice is not Subject to a Rational Basis Test on the Theory That States Have Broad Authority over the Practice of Law

The state's broad power to regulate the practice of law has been acknowledged by the Supreme Court.[78] The sense that states have exceedingly or exceptionally broad power in this regard has sometimes been seen by state courts as meaning that UPL restrictions are entitled to special deference, even to the point of lowering the scrutiny that applies to First Amendment challenges. That seems to be the theory, in any event, behind the decision in *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil*, in which the Supreme Court of Montana concluded that the state's prohibition against the activities of a nonlawyer, including his giving of legal advice, only had to be rationally justified in order to be upheld under the First Amendment.[79]

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[77] Fla. Bar v. Went for It, 515 U.S. 618, 634 (1995) (citations omitted).

[78] *See, e.g.*, Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) (citations omitted) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'").

[79] Mont. Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil, 147 P.3d 200 (Mont. 2006), *cert. denied*, 549 U.S. 1282 (2007). In appealing a permanent injunction against him for UPL, O'Neil claimed a violation of his "First Amendment rights of freedom of speech, expression, association, petition and privacy." *Id.* at 214. O'Neil had advertised his services as an "independent paralegal." *Id.* at 204. He was accused of attempting to "represent" a party to a divorce, giving "legal advice" and negotiating on behalf of the ex-wife of a person under the guardianship of Adult

In reaching its conclusion, the Montana court relied in part on a Ninth Circuit case that rejected a First Amendment challenge to California's decision to limit an indigent defense panel to members of its own bar.[80] But the out-of-state lawyers in that Ninth Circuit case had a much weaker First Amendment claim with regard to in-court representation than the nonlawyer in *O'Neil* did with regard to the legal advice he dispensed. California's strong interest in husbanding a scarce resource paid for by taxpayer dollars permitted it to put "time, place, and manner restrictions" on speech in the courtroom[81] so long as such restrictions did not prevent the parties (the ones with speech rights in the courtroom) from exercising their rights.[82] By contrast, O'Neil, when giving legal advice, was not imposing upon a publicly-funded tribunal and its interest in conserving taxpayer resources. Further, he was not serving as an intermediary between a party and a court, but rather communicating his own opinions and ideas to another person, directly implicating his own free speech rights. His listener's First Amendment rights were also implicated to the extent she wished to hear his legal advice. The Ninth Circuit decision involved materially different facts and issues, and so the Montana court's reliance on it as precedent was improper in evaluating the legal advice given by the nonlawyer in *O'Neil*.[83]

Protective Services, and preparing materials for divorce proceedings. *Id.* The Supreme Court of Montana made clear that it was upholding the permanent injunction against O'Neil not simply for preparing pleadings and attempting to appear in court but also for the giving of legal advice, as "[t]his Court has long defined the practice of law to include legal services whose product touches legal matters not immediately at issue in court." *Id.* at 215. Accordingly, the Supreme Court of Montana concluded that the lower court's finding that O'Neil's "conduct of drafting pleadings for his customers, *providing them with legal advice* and appearing in court with his customers" could be constitutionally prohibited was "unquestionably" correct. *Id.* (emphasis added).

[80] *Id.* at 214 (citing Russell v. Hug, 275 F.3d 812, 823 (9th Cir. 2002)).

[81] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 n.18 (1980) ("Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, *see, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial."); *see also* Nev. Comm'n on Ethics v. Carrigan, 564 U.S. 117, 127 (2011) (legislative session may limit participants with time, place, and manner restrictions).

[82] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 308 (1984) (Marshall, J., dissenting) (Time, place, and manner restrictions are permissible "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.").

[83] *Accord* Hackin v. State, 427 P.2d 910, 910–12 (Ariz. 1967) (en banc) (per curiam) (affirming conviction and rejecting First Amendment free speech challenge of nonlawyer for UPL for appearing in state habeas proceeding on behalf of indigent prisoner convicted of murder who had been unable to obtain attorney), *appeal dismissed*, 389 U.S. 143 (1967).

The Ninth Circuit had described the out-of-state lawyers challenging California's rule as operating on the mistaken theory that "an individual has a First Amendment right to practice law in any way of his choosing, free even of rationally-based regulation."[84] That challenge had to fail, the Ninth Circuit concluded, because such a "broadly formulated First Amendment argument . . . would[] . . . greatly undermine the power of states to regulate bar membership, when this power has been repeatedly recognized and upheld by the courts."[85] The Montana court used this same theory and language to justify its denial of O'Neil's First Amendment claim.[86] But concluding that nonlawyers are constitutionally entitled to give legal advice would not turn them into members of the bar and so would not intrude upon the state's power to regulate bar membership. Moreover, if in fact the First Amendment protects nonlawyers' legal advice, then it would not be the case that state authority over the bar was being undermined but rather that the proper scope of the state's authority under the Constitution was being recognized. In other words, the First Amendment is superior to professional regulation, rather than being the tail that wags the dog.

In addition to the Ninth Circuit case, the Supreme Court of Montana also cited *Ohralik* as justification for denying O'Neil's First Amendment claim, remarking that "[t]he United States Supreme Court has responded to this question by holding that regulation of the bar 'is a subject only marginally affected with First Amendment concerns.'"[87] But in *Ohralik*, the Supreme Court did not actually say that. It said that "*[a] lawyer's procurement of remunerative employment* is a subject only marginally affected with First Amendment concerns."[88] The former is of course a great deal more sweeping a claim than the latter. The state's prohibition of O'Neil from giving legal advice was not a regulation of a "procurement of remunerative employment," as in *Ohralik*.[89] And the Supreme Court would not even say that regulation of the bar is only marginally affected with First Amendment concerns, as that would hardly be consistent with the various cases in which the Court has found that a state's regulation of the bar violated the First Amendment.[90]

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[84] *Russell*, 275 F.3d at 822 (citation omitted).

[85] *Id.*

[86] Mont. Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil, 147 P.3d 200, 214 (Mont. 2006) (quoting *Russell*, 275 F.3d at 823).

[87] *Id.* (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978)).

[88] *Ohralik*, 436 U.S. at 459 (emphasis added).

[89] *Id. See* discussion *supra* Section I.A.

[90] *See, e.g.*, *In re Primus*, 436 U.S. 412 (1978) (State bar violated First Amendment by sanctioning attorney for soliciting client for the ACLU); United Mine

The Montana court also justified its rejection of O'Neil's First Amendment claim by stating that "[t]he Supreme Court has recognized a First Amendment right to receive legal advice, but that right is limited to clients of duly qualified attorneys consistent with 'the State's interest in high standards of legal ethics,'" citing to *United Mine Workers v. Illinois State Bar Association*.[91] If one read the Montana court's statement too quickly, one might get the impression that the Supreme Court has held that the right to receive legal advice "is limited to the clients of duly qualified attorneys," and might even suppose that the *United Mine Workers* case says or at least suggests such a thing.[92] But it does not.

United Mine Workers does at least use the phrase quoted by the Montana court: "the State's interest in high standards of legal ethics."[93] But it is used in a sentence in which the Supreme Court concluded that a state regulation preventing a union from hiring an attorney on a salaried basis to represent union members' interests "substantially impairs the associational rights of [those members] and is not needed to protect the State's interest in high standards of legal ethics."[94] The Supreme Court observed, "That the States have broad power to regulate the practice of law is, of course, beyond question."[95] It added, "But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms."[96] The Court's decision in *United Mine Workers* does not indicate that the state's broad authority and interest in high standards of professional regulation lead to any diminution of the application of the First Amendment.

Indeed, the Supreme Court's jurisprudence demonstrates that the rational basis test apparently employed by the Supreme Court of Montana in *O'Neil* does not properly apply to First

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Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217 (1967) (State bar violated First Amendment by preventing union from employing attorney to assist union members); Nat'l Ass'n for Advancement of Colored People *v.* Button, 371 U.S. 415, 431 (1962) (professional ethics rule prohibiting solicitation of clients asserting constitutional rights violated First Amendment).

[91] *O'Neil*, 147 P.3d at 214 (citing *United Mine Workers*, 389 U.S. at 225). *Cf.* Janson v. LegalZoom.com, 802 F. Supp. 2d 1053, 1066 (W.D. Mo. 2011) (This case also cites to *United Mine Workers*, stating that "[t]he Supreme Court has recognized a First Amendment right to receive legal advice from duly qualified attorneys, consistent with 'the State's interest in high standards of legal ethics.'" (citing *United Mine Workers*, 389 U.S. at 225)).

[92] *O'Neil*, 334 P.3d at 214 (citing *United Mine Workers*, 389 U.S. at 225).

[93] *Id.*

[94] *United Mine Workers*, 389 U.S. at 218, 225.

[95] *Id.* at 222.

[96] *Id.*

Amendment challenges at all.[97] Even commercial speech, according to the Supreme Court, is subject to a test that "is far different, of course, from the 'rational basis' test used for Fourteenth Amendment equal protection analysis."[98] Under a rational basis test, "it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost."[99] But where commercial speech is challenged under the First Amendment, the Supreme Court "require[s] the government goal to be substantial, and the cost to be carefully calculated."[100] In a situation involving legal advice, as in *O'Neil*, the use of the rational basis test would be an even greater misapplication, as the Supreme Court has indicated that noncommercial speech is more protected under the First Amendment than commercial speech that is transactional in nature.[101] In short, there is no First Amendment theory recognized by the Supreme Court under which a rational basis test would apply to a First Amendment challenge to a regulation prohibiting nonlawyers from giving legal advice.

The idea that states' broad authority over professions means that they can prohibit nonlawyers' legal advice whenever such regulation is rationally-based is not only unsupported but actually contradicted by First Amendment jurisprudence. Accordingly, the Montana court's rationale in *O'Neil* does not provide a sound basis for concluding that nonlawyers' legal advice can be constitutionally prohibited.

D. Nonlawyers' Legal Advice is not Exempt from First Amendment Protection Because of its Private Context or Private Significance

Commentators have suggested that legal advice that is privately conveyed and for a recipient's private use is not the kind of speech that the First Amendment is intended to

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[97] Bd. of Tr. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480–81 (1989).

[98] *Id.*

[99] *Id.*

[100] *Id.*; *see also* Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) ("The *Central Hudson* test is significantly stricter than the rational basis test, however, requiring the Government not only to identify specifically 'a substantial interest to be achieved by [the] restriction on commercial speech,' but also to prove that the regulation 'directly advances' that interest and is 'not more extensive than is necessary to serve that interest.'" (internal citations omitted) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564, 566 (1980))).

[101] City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 426 (1993) ("[C]ommercial speech can be subject to greater governmental regulation than noncommercial speech."). *See* discussion *supra* Section I.A.

protect.[102] Indeed, UPL restrictions often prohibit a nonlawyer from giving legal advice to a particular individual, while allowing the same legal advice if conveyed to the general public.[103] The Supreme Court of Michigan in *State Bar v. Cramer* and the Supreme Court of Florida in *Florida Bar v. Brumbaugh* both focused on this distinction in ruling on nonlawyers' First Amendment claims.[104] And although Justice White's concurrence in *Lowe* employed a similar distinction to establish the dividing line between regulable professional speech and protected free speech,[105] his conceptualization can also be understood as reflecting the idea that the privately-conveyed nature of individual legal advice removes it from the public zone of speech protected by the First Amendment.

In *Cramer*, the nonlawyer defendant provided legal forms and explanatory materials to the general public and also gave specific legal advice to particular individuals through "personal contact."[106] The Michigan court found that only the latter was prohibited by state law,[107] and described the distinction between

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[102] *See* Knake, *supra* note 12, at 645 ("most First Amendment doctrine addresses speech intended for public consumption, while legal advice by definition entails communication intended for private consumption by clients"). *Id.* at 646 ("[a]ttorney advice largely has been ignored by the legal academy, at least in part, . . . because of its inherently private nature").

[103] *See, e.g.*, *Task Force on the Model Definition of the Practice of Law*, AM. B. ASS'N Cmt. 1 (Sept. 18, 2002), http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html [https://perma.cc/TBD9-JF9V] (The comment observed that for "conduct to be considered the practice of law, . . . [it] must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law."). *See* N. Y. Cty. Lawyer's Ass'n v. Dacey, 28 A.D.2d 161 (N.Y. App. Div. 1967) ("Order reversed and petition dismissed with costs on the dissenting opinion at the Appellate Division."), *rev'd* 21 N.Y.2d 694. In *Dacey*, the opinion observed that a nonlawyer's book with forms and instructions intended for a general audience did not involve the practice of law because

> [t]here is no personal contact or relationship with a particular individual, [nor] does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of legal practice—the representation and the advising of a particular person in a particular situation.

Id. at 174. *Compare* Fla. Bar v. Stupica, 300 So. 2d 683, 686 (Fla. 1974) ("package forms" provided by nonlawyer giving legal advice may be banned as UPL); Fla. Bar v Am. Legal & Bus. Forms, 274 So. 2d 225, 226–27 (Fla. 1973) (same), *with* Fla. Bar v. Brumbaugh, 355 So. 2d 1186, (per curiam) (Fla. 1978) at 1194 (nonlawyers "may sell printed material purporting to explain legal practice and procedure to the public in general and . . . may sell sample legal forms" and "[t]o this extent we limit our prior holdings in *Stupica* and *American Legal and Business Forms, Inc.*").

[104] *Brumbaugh*, 355 So.2d at 1194; State Bar v. Cramer, 249 N.W.2d 1, 5–7 (Mich. 1976) (per curiam).

[105] *See* discussion *supra* Section I.B.

[106] *Cramer*, 249 N.W.2d at 5, 8–9 (The nonlawyer in *Cramer* was accused of "selling legal forms and providing advice and counsel necessary to obtaining a divorce.").

[107] *Id.* at 8–9.

the two modes of conveyance as being "significant" to its ruling in favor of First Amendment protection for such speech to the general public but not to particular individuals.[108] However, the court did not explain why the distinction was significant, specifically discuss the merits of Cramer's First Amendment defense,[109] or cite any First Amendment precedent in its opinion.[110] Rather, the court mostly relied on a decision by the Supreme Court of Oregon in a case with similar facts.[111] However, that Oregon case never mentioned the First Amendment. Instead, the Oregon court concluded that the legal advice provided to the general public by the defendant did not fall under the state's definition of the practice of law, while the defendant's "consultation, explanation, recommendation or advice" to individual persons did.[112] In other words, the Oregon case *Cramer* relied on was decided entirely on state law grounds based on the state's definition of the practice of law, and thus would not illuminate the First Amendment claim raised in *Cramer*.

In *Brumbaugh*, the Supreme Court of Florida made a distinction similar to that in *Cramer* in holding that the defendant could "sell printed material purporting to explain legal practice and procedure to the public in general" but could not "engage in advising clients as to the various remedies available to them, or otherwise assist them in preparing those forms."[113] In ruling against the defendant's First Amendment claim, *Brumbaugh* discussed the U.S. Supreme Court's decision in *Bates v. State Bar of Arizona*, which it described as militating against a paternalistic approach to speech and the suppression of the free flow of information.[114] But the Florida court did not explain how it got from this constitutional principle to its particular, seemingly contrary conclusion, nor did it explain how it was using this precedent to support a constitutional distinction between legal advice to the general public as opposed to legal advice to individuals.

The Supreme Court has not in fact distinguished in its First Amendment jurisprudence between speech conveyed to the

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[108] *Id.*

[109] *Id.* at 6. (Cramer contended that "the [UPL] statute and injunctive order deprive[d] her of her first amendment rights.").

[110] The Michigan court did observe that "where a statute does impinge on constitutional rights, it must be 'narrowly drawn to express only the legitimate state interests at stake,'" a proposition for which it cited *Roe v. Wade*. *Id.* at 8 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).

[111] *See id.* (citing Or. State Bar v. Gilchrist, 538 P.2d 913 (Or. 1975)).

[112] *Gilchrist*, 538 P.2d at 919.

[113] Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (1978) (per curiam).

[114] *Id.* at 1193 (citing Bates v. State Bar of Ariz., 433 U.S. 350, 361–62 (1977)).

general public and speech conveyed privately to a particular individual.[115] For example, the Court has expressly stated that where a public employee is terminated from employment in response to speech she communicated to just one individual, that does not lessen its First Amendment protection.[116] This result is

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[115] However, one commentator has argued that the Supreme Court "went to great pains" in *Thomas v. Collins* to distinguish between the organizer's solicitation to the employees as a group and his solicitation of one particular individual, Pat O'Sullivan. Kry, *supra* note 38, at 898–99. Kry observes:

> The Court never offered a compelling explanation as to why an invitation to enlist in a union is a form of protected speech when delivered to many, but a form of professional conduct when delivered to one. While it ultimately declined to rule on the constitutional dimensions of the latter, it clearly felt that there was a significant difference between the two. Was this because the Court felt that the meaning of the speech itself depends on whether it is delivered to a group of people or to a single person? Or was it because the nature of the speaker-listener relationship is different in a fashion that somehow affects the analysis? The Court did not attempt to answer these questions.

Id. at 899 (footnote omitted). However, the Court does not actually make a distinction in *Thomas* between speech delivered to many and speech delivered to one. The full passage from *Thomas* to which Kry refers reads as follows:

> Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed. In that context, such solicitation would be quite different from the solicitation involved here. It would be free speech plus conduct akin to the activities which were present, and which it was said the State might regulate, in *Schneider v. State*, *supra*, and *Cantwell v. Connecticut*, *supra*. That, however, must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly. In this case, the separation was not maintained. If what Thomas did, in soliciting Pat O'Sullivan, was subject to such a restriction, as to which we express no opinion, that act was intertwined with the speech and the general invitation in the penalty which was imposed for violating the restraining order. Since the penalty must be taken to have rested as much on the speech and the general invitation as on the specific one, and the former clearly were immune, the judgment cannot stand.

Thomas v. Collins, 323 U.S. 516, 540–41 (1945). The distinction the Court makes is between the financial transaction that can be regulated by the state (as "free speech plus conduct"), where a "reasonable registration or identification requirement may be imposed," and free speech as such (whether to many or just Pat O'Sullivan) that cannot be regulated. *Id.* at 540. Accordingly, the Court's approach in *Thomas* is consistent with its approach in *Ohralik*, and does not imply that lesser First Amendment protection applies to speech directed at a single individual.

[116] Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 412–13 (1979) (This case involved an alleged unconstitutional retaliation for a public employee's speech. The Court considered whether speech communicated privately was entitled to First Amendment protection.). The Court's conclusion was unequivocal:

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

not surprising. Even when speech is "privately" communicated, it has in a sense entered the public domain—it has been made "public" to at least one other party—indeed, such would qualify as a "publication" for a defamation suit.[117]

Further, the idea that the government is generally allowed to regulate privately-conveyed speech is not something the Supreme Court seems likely to endorse. In *United States v. Alvarez*, a case involving a defendant who publicly lied about receiving a military award and thereby violated a congressional statute forbidding such false statements, the plurality expressed concern that the statute would reach both "public *and private* conversation,"[118] that it "would apply with equal force to personal, whispered conversations within a home."[119] Rather than suggesting that lesser First Amendment protection applies to privately-conveyed speech, the plurality implied that regulation of such speech (even when conveying falsehoods) would be particularly problematic because of its intrusiveness. In any event, as the Court has pointed out, the First Amendment forbids laws abridging the freedom of speech, without specifying that the speech has to be conveyed in a public way before receiving such protection.[120] It is difficult to see how the *Cramer* and *Brumbaugh* courts make the distinction that they do between different forms of legal advice, given that the Supreme Court has specifically rejected the idea that the size of the audience for speech affects its First Amendment protection.

It is true that privately-conveyed speech may cause harm that is harder to detect and address than does publicly-conveyed speech. The Supreme Court justified the prophylactic rule in *Ohralik* in part because in-person solicitation of clients by lawyers occurs in an interaction that is "not visible or otherwise open to public scrutiny."[121] The private character of that speech made it "virtually immune to effective oversight and regulation

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Id. at 415–16. The Court reaffirmed this perspective more recently in *Garcetti v. Ceballos* (2006), again finding that the private nature of a communication does not determine whether it is protected by the First Amendment. Garcetti v. Ceballos, 547 U.S. 410, 420 (2006) ("That Ceballos expressed his views inside his office, rather than publicly, is not dispositive.").

[117] *See, e.g.*, GA. CODE ANN. § 51-5-3) ("A libel is published as soon as it is communicated to any person other than the party libeled."); Fiore v. Rogero, 144 So.2d 99, 102 (Fla. Dist. Ct. App. 1962) ("Publication is sufficiently accomplished . . . by the communication of the slander to only one person other than the person defamed." (citation omitted)); Brauer v. Globe Newspaper Co., 217 N.E.2d 736, 739 (Mass. 1966) ("It is enough [for libel] that it is communicated to a single individual other than the one defamed." (quoting RESTATEMENT OF TORTS § 577 (AM. LAW INST. 1938))).

[118] U.S. v. Alvarez, 567 U.S. 709, 712–13, 718 (2012) (emphasis added).

[119] *Id.* at 722.

[120] *Givhan*, 439 U.S. at 415–16 (the First Amendment itself does not indicate freedom of speech is lost where speech is communicated to only one other person).

[121] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 466 (1978).

by the State."[122] However, the state could proscribe the speech in *Ohralik* not because it occurred in a private interaction but because it was associated with a financial transaction that the state could regulate.[123] The fact that the speech occurred outside of public scrutiny merely made the state's grounds for regulation of the speech associated with such conduct more persuasive.[124] Indeed, in a similar case, *In re Primus*, the private nature of the lawyer's contact with his solicited client did not prevent the Court from applying the highest level of First Amendment scrutiny to the state's regulation, as the speech in question did not primarily consummate a financial transaction.[125] It appears that the fact that privately-conveyed speech may lead to harms that are harder to detect and address does not reduce the applicable First Amendment scrutiny, though it may count in favor of the state's interest in regulation. It should be noted, moreover, that any analysis regarding privately-conveyed speech should not begin by ruling out such speech from First Amendment consideration, as the courts did in *Cramer* and *Brumbaugh*.

It is also true that whether speech is about matters of concern to the general public, as opposed to matters of purely private interest, sometimes affects First Amendment analysis. The Supreme Court has indicated that greater First Amendment protection applies to speech involving "matters of public concern."[126] For example, where a public employee is terminated

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[122] *Id.*

[123] *Id.* at 457.

[124] After determining that the situation involved an "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component," the Court concluded that it "does not remove the speech from the protection of the First Amendment, . . . [though] it lowers the level of appropriate judicial scrutiny." *Id.* at 457. Given the lower level of scrutiny, state interests were therefore relevant to the legitimacy of the regulation, and the Court went on to consider those state interests. *Id.* at 460.

[125] *In re* Primus, 436 U.S. 412, 415–16, 428 (1978). The lawyer in *Primus* contacted a potential client with a personal letter advising her of the possibility of representation by the American Civil Liberties Union in a lawsuit. *Id.* at 415–17. The Court distinguished between *Ohralik* and *Primus* based on the type of speech involved, not whether the speech was privately or publicly conveyed: "The approach we adopt today in *Ohralik*, . . . that the State may proscribe in-person solicitation for pecuniary gain under circumstances likely to result in adverse consequences, cannot be applied to appellant's activity [in *Primus*]." *Id.* at 434. The Court in *Primus* required not merely the risk of harm but actual harm to the potential client ("Although a showing of potential danger may suffice in the former context [in *Ohralik*], appellant may not be disciplined unless her activity in fact involved the type of misconduct at which South Carolina's broad prohibition is said to be directed."). *Id.* The Court did make the point that the kind of client contact engaged in in *Primus* gave the state more ability to police abuses: "the fact that there was a written communication lessens substantially the difficulty of policing solicitation practices that do offend valid rules of professional conduct." *Id.* at 435–36. But the privacy of the contact did not lessen the level of scrutiny applying to the speech.

[126] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451–52 (2011) (speech on matters of public concern entitled to particular First Amendment protection); *see also* Connick v.

for engaging in speech involving a matter of only personal interest, the First Amendment is not violated, though it would be a First Amendment violation if the termination was for speech involving a matter of public concern.[127] And a person cannot usually be found liable for defamation where the speech at issue involves a matter of public concern, though she can be found liable for such speech that involves a matter of private concern.[128] However, the distinction between speech involving matters of public and private concern seems to be used mainly for the purpose of determining when the First Amendment can be used as a sword or shield in disputes that are essentially tortious in nature,[129] and does not suggest that speech involving matters of private concern is otherwise open to state regulation.

Indeed, the Supreme Court has stated that there is no general basis for denying full First Amendment protection to speech involving matters of private concern. The Court has repeatedly made the point that the government cannot "generally prohibit or punish, in its capacity as sovereign, speech on the ground that it does not touch upon matters of public concern."[130] Although speech on matters of public concern may occupy the "highest rung of the hierarchy of First Amendment values,"[131] the Court has also pointed out that First Amendment protection is not limited to speech on the highest rung.[132] As the

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Myers, 461 U.S. 138, 147 (1983) (greater First Amendment protection available to speech involving matters of public concern than speech involving matters of private concern).

[127] *Compare Connick*, 461 U.S. at 145 ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (quoting Nat'l Ass'n for Advancement of Colored People v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)))), *with* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) ("[S]peech on matters of purely private concern is of less First Amendment concern." (citing *Connick*, 461 U.S. at 146–47)). Accordingly, "when a public employee speaks not as a citizen on matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." *Connick*, 461 U.S. at 147 (citations omitted).

[128] *See Snyder*, 562 U.S. 443, (speech on matters of public concern is protected from liability as defamation).

[129] The Supreme Court has exhibited concern that public employment should not give a public employee the ability to "constitutionalize" employment disputes, but has also preserved the employee's right to pursue a positive constitutional cause of action where a matter of public concern is involved. *Connick*, 461 U.S. at 154. *See Connick*, 461 U.S. at 147 ("[A]n employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street.").

[130] Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600 (2008) (citing *Connick*, 461 U.S. at 147).

[131] *Claiborne Hardware Co.*, 458 U.S. at 913 (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)).

[132] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763 n.17 (1976) ("[I]n some circumstances speech of an entirely private and economic

Court observed in *Thomas*, "[g]reat secular causes, [along] with small[er] ones, are guarded" by the First Amendment.[133] Artistic expression,[134] commercial advertisements,[135] video games,[136] and even untruthful boasts of military commendations[137] are generally free from government prohibition and punishment, even though the Court has not viewed these as involving or likely to involve matters of public concern.

Supporting this conclusion is the Court's jurisprudence in cases protecting speech that affects associational interests, even where such speech involves matters of private concern. For example, where states have sought to prevent organizations from hiring attorneys to pursue members' workers compensation claims or other personal legal matters, the Court has ruled that such regulation impermissibly interferes with First Amendment associational freedoms.[138] The Court was not swayed by the argument that the First Amendment ought not to apply because the legal assistance did not involve political speech or matters of public concern.[139] Since associational rights are derivative of explicit First Amendment rights,[140] such a result is consistent with the idea that speech involving matters of private concern is generally entitled to full First Amendment protection.

In any event, the UPL regulations at issue in *Cramer* and *Brumbaugh* do not make a distinction based on whether a nonlawyer's legal advice deals with a matter of public concern. The advice about divorce given by the nonlawyers in these two cases arguably involved the same matter of private concern whether offered to a group in a public forum or to a particular individual. State UPL restrictions are only concerned with the *context* in which the legal advice is conveyed and provide no

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character enjoys the protection of the First Amendment."); United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 223 (1967) ("[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political.").

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

134 *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 818 (2000) ("[E]sthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree.").

135 *See infra* note 183.

136 *See* Brown v. Entm't. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

137 *See* United States v. Alvarez, 567 U.S. 709, 724–29 (2012).

138 *See, e.g.*, United Transp. Union v. State Bar of Mich., 401 U.S. 576, 578-79 (1971); United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 223 (1967); Bhd. of R.R. Trainmen v. Virginia *ex rel* Va. St. Bar, 377 U.S. 1, 8 (1964).

139 *United Mine Workers*, 389 U.S. at 223 ("The litigation in question is, of course, not bound up with political matters of acute social moment, . . . but the First Amendment does not protect speech . . . only to the extent it can be characterized as political.").

140 Associational freedom is "an implicit guarantee of the First Amendment." *In re* Primus, 436 U.S. 412, 438 n.32 (1978) (citing Healy v. James, 408 U.S. 169, 181 (1972)).

greater protection for legal advice involving matters of public concern than matters of private concern.[141]

It would in fact be difficult for state UPL prohibitions to make a distinction based on whether the legal advice of a nonlawyer involves a matter of public concern. This difficulty is inherent in the very concept of "public concern."[142] Some people who pursue lawsuits, which, after all, take place in the public justice system, view their legal matters as not only personally important but also vested with some more general social significance.[143] For example, a person who challenges a denial of public assistance may be at the same time pursuing a personal source of income and trying to bring attention to an issue or problem of "poverty law," as may be the lawyer or nonlawyer who assists her.[144] The distinction the Supreme Court has made between matters of private and public concern might be workable in the context of assessing liability in a defamation or wrongful discharge case. But a UPL restriction that was applicable against nonlawyers' legal advice in situations involving matters of private concern but not public concern would put a state in the untenable position of determining what is a legitimate matter of public concern and what is not.[145]

The fact that legal advice is not publicly communicated does not, under existing precedent, remove it from First Amendment protection. The courts in cases like *Cramer* and *Brumbaugh* have imported into First Amendment analysis the distinction often made in state UPL regulations between legal advice to the general public and to particular individuals, without explaining what makes it relevant. In fact, the Supreme Court has expressly repudiated the idea that the size of the audience for a communication affects constitutional protection,

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[141] *See supra* notes 106–114 and accompanying text.

[142] *See* Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("We noted a short time ago[] . . . that 'the boundaries of the public concern test are not well defined.' . . . [T]hat remains true today." (quoting San Diego v. Roe, 543 U.S. 77, 83 (2004))).

[143] *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963), where the Court observes: "In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment . . . . It is thus a form of political expression." *Id.* at 429; *see also In re* Primus, 436 U.S. at 427–28.

[144] *See, e.g.*, Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1241 (2007) ("As a form of practice with transformative aspirations, poverty law might . . . be taken to mean one or more of the alternative models of lawyering pursued by some poverty lawyers that generally reject the hierarchies of the conventional lawyer-client relationship, favor work in alliance with social change movements, community organizations, and client groups, and envision a more facilitative and collaborative role for the attorney." (footnote omitted)).

[145] *Cf.* Brown v. Entm't. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.").

and has protected matters of private concern nearly as aggressively as matters of public concern.[146]

II. FIRST AMENDMENT ANALYSIS

Although courts and commentators have not given an adequate justification for their conclusion that UPL restrictions suppressing and punishing nonlawyers' legal advice do not violate the First Amendment Free Speech Clause, that does not mean that such restrictions are necessarily unconstitutional. The Supreme Court has not directly addressed the issue of the First Amendment protection of nonlawyers' legal advice,[147] so any constitutional analysis must be done inferentially. However, the Supreme Court's First Amendment jurisprudence indicates that UPL rules that prohibit nonlawyers from giving legal advice are probably unconstitutional, because they are content-based restrictions that do not appear to serve a compelling state interest, and most especially are not narrowly drawn to achieve that interest.

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[146] *See, e.g.*, Engquist v. Or. Dep't of Agric., 553 U.S. 591, 6100 (2008), 610; *United Mine Workers*, 389 at 223.

[147] The closest the Supreme Court has ever come is probably Fla. Bar v. Furman, 376 So. 2d 378 (Fla. 1979) (per curiam), *appeal dismissed*, Furman v. Fla. Bar, 444 U.S. 1061 (1980). Furman had allegedly "engaged in the unauthorized practice of law by giving legal advice and by rendering legal services in connection with marriage dissolutions and adoptions." *Id.* at 379. She took the position that the UPL restrictions "violate[d] the first amendment to the United States Constitution by restricting her right to disseminate and the right of her customers to receive information which would allow indigent litigants access to the state's domestic relations courts." *Id.* When the Court dismissed her appeal, it amounted to a decision on the merits because of the jurisdictional statute in effect at the time (28 U.S.C. § 1257 (1970)), which the Court had interpreted as meaning that dismissals of appeals amounted to decisions on the merits of the case, functioning as binding precedent for lower courts. *See* Hicks v. Miranda, 422 U.S. 332, 343–45 (1975). But it is difficult to say what exactly is the precedential content of such decisions, as the Court itself acknowledged. *See id.* at 345 n.14 ("[a]scertaining the reach and content of summary actions may itself present issues of real substance"). The only court that has considered the impact of the Supreme Court's dismissal in *Furman* concluded that it was not a binding precedent on the constitutional issues raised in the case, because of the varying possible understandings of the question being posed. Dunn v. Fla. Bar, 726 F. Supp. 1261, 1271 (M.D. Fla. 1988). Indeed, the jurisdictional statement for the *Furman* appeal was not styled as a claim about the free speech rights of nonlawyers and so a dismissal would not qualify in any event as setting precedent on that issue. (In an email of 10/28/12, Alan Morrison, who represented Furman, confirmed that theirs was not a speech-based First Amendment argument but a right of petition-based argument. Email from Alan Morrison to author (Oct. 28, 2012) (on file with author)). Further, the statutory jurisdiction of the Supreme Court changed in 1988 to make such cases subject to certiorari review only. *See* Act of June 27, 1988, Pub. L. No. 100–352, § 3, 102 Stat. 662 (codified as amended at 28 U.S.C. § 1257 (2012)). Cases in which certiorari is denied are not decisions on the merits, and have no precedential significance. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 94 n.11 (1983) ("[D]enials of certiorari have no precedential force."). In any event, the courts that have addressed the First Amendment free speech rights of nonlawyers have not cited the dismissal of the appeal in *Furman* as any kind of precedent on the issue.

A. The Court's View of Nonlawyers who Give Legal Advice

It seems likely from the denial of certiorari in a number of cases discussed in this article that the Supreme Court has not been eager to grapple with the First Amendment implications of nonlawyers giving legal advice.[148] It is possible that the Supreme Court's apparent reluctance has empowered lower courts to get away with the skeletal and problematic rulings in this area that have been described in this article.

On the other hand, the Supreme Court has not generally been hostile to the idea of nonlawyers giving legal advice. In *NAACP v. Button*, for example, some of the petitioners accused of violating a state professional regulation against the solicitation of legal business were nonlawyers who gave legal advice to persons with potential civil rights lawsuits.[149] The Court was not only sensitive to the impact the UPL statute had on these nonlawyers but also supportive of their right to express their views and opinions on the law to potential legal clients.[150] That does not, of course, indicate how nonlawyers' legal advice in general would fare under a First Amendment free speech analysis. It does suggest at least that any state regulation of nonlawyers' legal advice that involves political speech and associational rights would probably violate the First Amendment rights of nonlawyers as well as lawyers.

The Supreme Court also took the side of nonlawyers in *Johnson v. Avery*, when it found that the state could not use its professional licensing provisions to prevent prisoners from giving other prisoners legal advice and assistance in the preparation of their habeas corpus petitions.[151] The Court disagreed that "the interest of the State . . . in limiting the practice of law to licensed attorneys justified whatever burden

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[148] *See* discussion *supra* Section 1.A (discussing People v. Shell, 148 P3d 162 (Colo. 2006), *cert denied*, 550 U.S. 971 (2007)); discussion *supra* Section I.B (discussing Lawline v. Am. Bar Ass'n, 956 F.2d 1378 (7th Cir. 1992), *cert. denied*, 510 U.S. 992 (1993)); discussion *supra* Section I.C (discussing Mont. Supreme Court Comm'n on Unauthorized Practice of Law. v. O'Neil, 147 P.3d 200 (Mont. 2006), *cert. denied*, 549 U.S. 1282 (2007)); *see also* discussion *supra* Section I.D (discussing State Bar v. Cramer, 249 N.W.2d 1 (Mich. 1976) (per curiam)).

[149] Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 434–35 (1963).

[150] The Supreme Court noted that "even mere NAACP members or sympathizers would understandably hesitate, at an NAACP meeting or on any other occasion, to . . . acquaint persons with what they believe to be their legal rights and . . . [advise] them to assert their rights by commencing or further prosecuting a suit," as "lawyers and nonlawyers alike" would face criminal prosecution under the statute. *Id.* at 434–35 (internal quotation marks omitted).

[151] Johnson v. Avery, 393 U.S. 483, 490 (1969).

the regulation might place on access to federal habeas corpus."[152] The Court emphasized that treating such lay assistance as UPL would essentially deprive inmates of their ability to seek redress, and agreed with the district court's conclusion that "for all practical purposes, if such prisoners cannot have the assistance of a 'jail-house lawyer,' their possibly valid constitutional claims will never be heard in any court."[153] The Supreme Court thus refused to endorse the idea that the state could limit the provision of legal advice to attorneys only, and suggested that practical impediments to obtaining the assistance of a lawyer might justify the resort to nonlawyers, notwithstanding UPL regulations to the contrary.

In *Shaw v. Murphy*, the Court did decline to expand the right of prisoners to give other prisoners legal advice to include correspondence between prisoners.[154] However, in that case, the state's expressed interest was not the regulation of professional practice, as in *Johnson*, but the "legitimate penological objectives of the corrections system."[155] Further, the state cited examples of communications deleterious to prison discipline and safety that had occurred by means of the pretext of inmate legal advice in written correspondence.[156] The Court indicated that the First Amendment did apply to the situation, but ultimately found that prisoners were subject to great limitations upon their exercise of First Amendment rights because of the state's security needs.[157]

With its emphasis on prison security, *Shaw* does not undermine the sense in *Button* and *Johnson* that the First Amendment applies to nonlawyers' legal advice and that professional regulation may not provide adequate grounds for interfering with such speech.[158] Of course, these cases are not indicative of a general perspective and might represent limited exceptions to some general rule yet to be articulated by the Supreme Court. But if there is a trend to be found in the Court's closest encounters with the issue (other than a trend of avoidance), it is toward seeing such speech as protected by the First Amendment.

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[152] *Id.* at 485.

[153] *Id.* at 487 (quoting Johnson v. Avery, 252 F. Supp. 783, 784 (M.D. Tenn. 1966)).

[154] Shaw v. Murphy, 532 U.S. 223 (2001).

[155] *Id.* at 229 (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

[156] *Shaw*, 532 U.S. at 231.

[157] *Id.* at 229.

[158] *See Shaw*, 532 U.S. at 231 ("Augmenting First Amendment protection for inmate legal advice would undermine prison officials' ability to address 'complex and intractable' problems of prison administration." (quoting Turner v. Safley, 482 U.S. 78, 84 (1987))).

B. The Applicable Analysis

The Supreme Court would likely regard UPL restrictions on nonlawyers' legal advice as content-based and therefore subject to the most exacting First Amendment scrutiny. That a content-based analysis applies is indicated by the Court's treatment of legal advice in *Holder v. Humanitarian Law Project*.[159] That case involved a federal statute that forbade persons from giving material aid, including aid in the form of "expert advice or assistance," to foreign terrorist organizations.[160] The Court specifically discussed the fact that legal advice was among the kinds of "expert advice or assistance" forbidden by the statute.[161] The government made arguments in that case that resemble those used by some courts in finding that nonlawyers' legal advice is not protected by the First Amendment, including asserting the proposition that legal advice is conduct, not speech.[162] Nonetheless, the Court concluded that the federal statute

> regulates speech on the basis of its content. . . . If plaintiffs' 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—then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.[163]

This analysis would seem to indicate that a state law that prohibits a nonlawyer from communicating legal advice and knowledge likewise involves a content-based restriction.[164] As in *Humanitarian Law Project*, the nonlawyer subject to prosecution for UPL is free to speak to another person about anything that does not relate to the law or that only generally relates to the law; it is only advice derived from specialized knowledge of the law that the nonlawyer is forbidden to communicate. Such "[c]ontent-based restrictions are presumptively invalid" unless the speech falls into some category the Court has recognized as subject to traditional limitation, such as obscenity, defamation, and

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[159] Holder v. Humanitarian Law Project, 561 U.S. 1, 4–5 (2010).

[160] *Id.* at 8–9 (quoting 18 U.S.C. §§ 2339A(b)(3), 2339B(g)(4) (2012)).

[161] *Id.* at 36–37 (the Court indicated that the "plaintiffs propose to 'train members of [the] [alleged foreign terrorist organization] on how to use humanitarian and international law to peacefully resolve disputes.'" (quoting Humanitarian Law Project v. Mukasey, 522 F.3d 916, 921 n.1 (9th Cir. 2009))).

[162] *See* discussion *supra* Section I.A.

[163] *Humanitarian Law Project*, 561 U.S. at 27 (citations omitted).

[164] This principle also seems to indicate that Justice White's theory in *Lowe*, that the state could prohibit speech it identified as professional speech, would itself amount to a content-based restriction. Lowe v. Sec. & Exch. Comm'n, 472 U.S. 181, 232 (1985) (White, J., concurring).

"fighting words."[165] And the Court has remarked that "[i]t is rare that a regulation restricting speech because of its content will ever be permissible."[166]

Further, UPL restrictions against nonlawyers' legal advice also discriminate against speech based on the identity of the speaker. Lawyers are permitted by the state to give legal advice, while nonlawyers are not. Such viewpoint discrimination is also presumptively invalid.[167] As the Court has observed, not only are content-based restrictions constitutionally problematic but "[p]rohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others."[168] That the UPL restrictions against nonlawyers' legal advice are based on both content and the identity of the speaker makes it particularly likely that they would not be upheld: "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory."[169]

In order for a content-based restriction to be upheld, it must pass strict scrutiny—it must be "justified by a compelling government interest" and the regulation must be "narrowly drawn to serve that interest."[170] It is unlikely that UPL restrictions against nonlawyers' legal advice could pass the compelling government interest requirement and almost certainly would not pass the requirement that the restriction be narrowly drawn to achieve that interest.

C. Compelling State Interest?

Courts have frequently identified the general purpose of UPL restrictions as the protection of consumers.[171] For example, in *Brumbaugh*, the Florida court explained more specifically

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[165] R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (citations omitted) (quoting Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942)); *see also* Brown v. Entm't. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

[166] United States v. Playboy Entm't. Grp., 529 U.S. 801, 818 (2000).

[167] *See* Sorrell v. IMS Health, Inc., 564 U.S. 552, 557, 571 (2011) (statute allowing some persons to purchase and use information about doctors' prescribing habits but not allowing certain pharmaceutical company representatives to do so was unconstitutional insofar as it targeted particular speakers).

[168] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)).

[169] *Sorrell*, 564 U.S. at 571.

[170] *Brown*, 564 U.S. at 799 (citation omitted).

[171] *See* State v. Niska, 380 N.W.2d 646, 649 (N.D. 1986) ("The State has an interest in licensing attorneys and making them the exclusive practitioners in their field in order to protect the unwary and uninformed from injury at the hands of unqualified persons performing legal services."); State Bar v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976) (per curiam) ("Laymen are excluded from law practice, whatever law practice may be, solely to protect the public." (quoting Or. State Bar v. Sec. Escrows, Inc., 377 P.2d 334, 338 (Or. 1962))).

that legal advice from nonlawyers can be prohibited without violating the First Amendment because of the "tendency" of persons to place their reliance on those offering individualized legal advice.[172]

However, the state interest in preventing consumer reliance may be weaker with nonlawyers' legal advice than with legal assistance of other kinds. The consumer arguably places more reliance on a nonlawyer who drafts a legal document on the consumer's behalf or who acts as her representative in a legal proceeding, as in those situations the nonlawyer engages in independent action to achieve the consumer's interests. On the other hand, where a nonlawyer simply gives the consumer legal advice, more control and responsibility remain with the consumer to evaluate and implement the advice. Accordingly, the state may have less of a compelling interest in regulating the giving of legal advice by nonlawyers than other activities considered part of the practice of law.

In addition, the state's interest presumably lies in preventing *detrimental* reliance, not reliance that actually benefits the consumer. But UPL restrictions against nonlawyers' legal advice indiscriminately prevent *all* reliance. It is not evident that detrimental reliance occurs always or even frequently.[173] In fact, in none of the cases described in this article does the court indicate that the nonlawyer put the person assisted into a worse situation as a result of giving legal advice than the person would have been in without such advice. In *Brumbaugh*, for example, the Florida court noted that "[d]uring the past two years respondent has assisted several hundred customers in obtaining their own divorces."[174] Consumers may rely on legal advice from nonlawyers because it happens to be the best information available to them or available at an affordable price, not because they are misled as to its relative reliability. To the extent that UPL restrictions against nonlawyers' legal advice are intended to protect consumers, they are seriously overinclusive, as they deprive consumers of good as well as bad legal advice.[175]

Nonetheless, it could be said that the state has an interest in having consumers obtain higher-quality legal advice from lawyers rather than lower-quality legal advice from nonlawyers. However, the First Amendment typically does not

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[172] Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1193–94 (Fla. 1978).

[173] *See infra* Section II.D; *infra* Part III (discussion of how state can decrease the risk of detrimental reliance).

[174] *Brumbaugh*, 355 So. 2d at 1191.

[175] *See Brown*, 564 U.S at 805 (state interests "must be pursued by means that are neither seriously underinclusive nor seriously overinclusive").

permit the state to make the choice for people of what speech they may hear or decide to listen to. The Supreme Court has stated that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented."[176] The state cannot prohibit speech "simply on the basis that some speech is not worth it"[177] nor "deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration."[178] In our society, people receive advice all the time that could pose some risk to them and that the government might prefer they not hear—that urges them to forego the vaccination of their children, tells them how to wire an electrical socket themselves, or encourages them to make millions investing in real estate. The Court has not generally allowed the state to paternalistically restrain speech on the grounds that it presents some risk or is not as good as other speech.

The state does have an interest in protecting those consumers who might be expected to misperceive nonlawyers' legal advice as having a high level of trustworthiness and value as a result of its resemblance to professional speech.[179] Consumers' limited understanding of the law and the legal profession leaves them less capable of evaluating the quality of speech about the law and perhaps more prone to trusting an appearance of expertise. Nonetheless, in situations where nonlawyers do not engage in misrepresentation,[180] the likelihood that consumers will overestimate nonlawyers' legal advice does not seem high. Most states apparently already trust that consumers will understand that when a nonlawyer gives legal advice to a general audience, such advice is not equivalent to the advice of a licensed attorney, since in most states such speech is generally considered exempt from regulation.[181] In spite of the Supreme Court of Florida's

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[176] Edenfield v. Fane, 507 U.S. 761, 767 (1993).

[177] United States v. Stevens, 559 U.S. 460, 470 (2010).

[178] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 341 (2010).

[179] *See, e.g.*, Kry, *supra* note 38, at 967 ("Because state governments have historically granted personalized advice monopolies to professionals whose speech the government regulates, the public assumes that personalized speech is inherently trustworthy, whether or not it is rendered by a professional." (footnote omitted)).

[180] In all the cases discussed in this article except *O'Neil*, there was no accusation of misrepresentation. O'Neil presented his credentials in a misleading way by advertising as an "independent paralegal" in the "attorney" section of the yellow pages and describing himself as a "member" of the family law section of the state bar when he was in fact an "associate member." Mont. Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil, 147 P.3d 200, 204–05 (Mont. 2006).

[181] State law generally permits nonlawyers to give legal advice to a general audience, although not to particular individuals. *See* discussion *supra* Section I.D. The Florida court in *Brumbaugh* stated regarding the materials on divorce that the nonlawyer had prepared that "[w]e must assume that our citizens will generally use such

assumption in *Brumbaugh*, it seems unlikely that consumers would imagine advice from a nonlawyer as somehow taking on an aura of much greater value and reliability merely because it is addressed to them personally as opposed to offered to a general audience. But some presumably small number of vulnerable consumers would be protected from misunderstanding nonlawyers' legal advice by a regulation that prevents them from ever hearing it. Speech that would not be problematic for most people to hear is not, however, usually censorable on the ground that it could harm the vulnerable few.[182]

It may be that there is a compelling state interest in preventing nonlawyers from giving legal advice, but it is not obvious that such is the case.

D. Narrowly Drawn?

The more difficult part of the test for the state to meet is the requirement that its regulation of speech be "narrowly drawn." Blanket bans of the kind that apply to nonlawyers' legal advice present particular difficulties in meeting this requirement. Indeed, the Supreme Court has seldom allowed for blanket bans, even in commercial speech cases.[183] And the Court has held that when the

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publications for what they are worth in the preparation of their cases, and further assume that most persons will not rely on these materials in the same way they would rely on the advice of an attorney or other persons holding themselves out as having expertise in the area." Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1193 (Fla. 1978).

[182] To prohibit all legal advice from nonlawyers because of a risk to more vulnerable consumers is something like banning all speech because children might hear it. *See, e.g.*, Reno v. Am. Civil Liberties Union, 521 U.S. 844 (1997), in which the Supreme Court declined to protect vulnerable children by censoring the speech that adults could hear. In *Reno*, the Court emphasized that government may not "reduc[e] the adult population . . . to . . . only what is fit for children," and noted that it had previously refused to censor mail that might fall into the hands of minors, on the grounds that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.* at 875 (quoting Denver Area Educ. Telecomm. Consortium v. Fed. Commc'ns. Comm'n, 518 U. S. 727, 759 (1996); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74–75 (1983)). The Court also likened such regulations as "burn[ing] the house to roast the pig." *Id.* at 882 (quoting Sable Comm. of Cal., Inc. v. Fed. Commc'ns. Comm'n, 492 U.S. 115, 127 (1989)).

[183] For example, the Court recently struck down a ban on the advertisement of "compounded drugs," which the government argued had "complicated risks" that could not be fully explained in advertisements, misleading consumers as to their safety. Thompson v. W. States Med. Ctr., 535 U.S. 357, 386–87 (2002). The Court also has not permitted blanket bans on advertising that the state claimed was particularly prone to abuse or involved abuses that were difficult to police. The Court has remarked in such a case that

> broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force. We are not persuaded that identifying deceptive or manipulative uses of [such] advertising is so intrinsically burdensome that the State is entitled to forgo that task in favor

state burdens constitutionally-protected activities, it must choose the "least restrictive means among available, effective alternatives,"[184] an approach that militates against blanket bans. *Ohralik* may be the preferred precedent of courts to address the situation of nonlawyers' legal advice because it is one of the very few Supreme Court decisions that have ever permitted a blanket ban on commercial speech. In fact, since *Ohralik*, the Court has repeatedly struck down blanket bans on attorney commercial speech and has described the *Ohralik* decision as depending on unique circumstances.[185]

Yet, in considering First Amendment challenges to UPL restrictions against nonlawyers' legal advice, courts do take the position that such restrictions are narrowly drawn or no more restrictive than necessary. For example, the Supreme Court of Montana specifically concluded in *O'Neil* that the State's UPL restrictions were

> narrowly tailored to target only the provision of legal services in Montana by individuals who have not proven through examination and admission to the bar that they "are qualified and possess a familiarity with [Montana] law." There remain ample alternative channels for providing legal services to O'Neil's customers—the thousands of licensed attorneys in Montana.[186]

The court seems to be saying that because the UPL restrictions only target nonlawyers, those regulations are therefore narrowly drawn to achieve the state's interest. However, a narrowly drawn regulation would instead be one that reached no more

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> of the more convenient but far more restrictive alternative of a blanket ban . . . .

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 649 (1985).

[184] Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2002).

[185] *See* Edenfield v. Fane, 507 U.S. 761, 774 (1993) ("*Ohralik*'s holding was narrow and depended upon certain 'unique features of in-person solicitation by lawyers' that were present in the circumstances of that case." (quoting *Zauderer*, 471 U.S. at 641)); *see also* Justice O'Connor's dissent in *Edenfield*, which accused the Court of finding "increasingly unprofessional forms of attorney advertising to be protected speech." *Id.* at 778 (O'Connor, J., dissenting); "Despite Justice O'Conner's [sic] plea for professionalism, commercial speech still trumps most advertising limitations imposed on members of a learned profession." Ralph H. Brock, *"This Court Took a Wrong Turn with* Bates*": Why the Supreme Court Should Revisit Lawyer Advertising*, 7 FIRST AMEND. L. REV. 145, 169 (2009); R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO ARTS & ENT. L.J. 953, 1024 (2007) (Noting that the Supreme Court has struck down various bans against lawyer advertising since 1980, and "since that time, the Court has yet to find a regulated claim in professional services advertising either inherently or actually misleading and, accordingly, devoid of First Amendment protection." (emphasis omitted)).

[186] Mont. Supreme Court Comm'n on the Unauthorized Practice of Law v. O'Neil, 147 P.3d 200, 214–15 (Mont. 2006) (quoting and citing Mothershed v. Justices of Supreme Court, 410 F.3d 602, 611–12 (9th Cir. 2005)).

widely than necessary to achieve the state's interests, not one that was specific as to whose speech was prohibited. The asserted fact that Montana has thousands of lawyers also does not make the state's regulation narrowly drawn; whether O'Neil's free speech rights have been violated is not answered by referring to the existence of others who may speak freely on the same matters. Indeed, that would amount to a speaker-based discrimination which the Supreme Court has indicated is highly problematic.[187] And if the Montana court is suggesting that O'Neil's customers' right to receive speech is taken care of by the existence of such other speakers, that conclusion does not address O'Neil's customers' right to hear *his* speech. (It further assumes that those customers all can and should be required to pay for lawyers in order to hear legal advice.) The Montana court's rationale for its decision does not describe a narrowly-drawn regulation in the sense in which the Supreme Court understands that concept.

Similarly, the Supreme Court of North Dakota concluded in *Niska* that the state's UPL statute "curtails no more speech than is essential to accomplish its purpose" and added that "[t]here are numerous modes of communication not encompassing the practice of law available for Niska to express his views."[188] The implication is that because Niska was not prohibited from all communications about the law—just the ones he actually wanted to make—the state's regulation was narrowly drawn. However, the U.S. Supreme Court has indicated that "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."[189] Or, as the Court has also put it, "[t]he First Amendment protects [persons'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."[190] And "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[191] In short, the state is not generally permitted to select the speaker's audience or mode of communication.[192] The North Dakota court

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187 *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).

188 State v. Niska, 380 N.W.2d 646, 650 (N.D. 1986).

189 Riley v. Nat'l Fed'n of the Blind of N.C., 487 U.S. 781, 790–91 (1988).

190 Meyer v. Grant, 486 U.S. 414, 424 (1988).

191 Schneider v. State (Town of Irvington), 308 U.S. 147, 163 (1939).

192 *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 879 (1997) (Supreme Court rejecting the idea that restrictions on particular internet sites were constitutional because speakers would still have other internet sites for engaging in speech). According to the Court, such a "position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books." *Id.* at 880.

accordingly does not present an adequate explanation in *Niska* of why the state regulation should be considered narrowly drawn to achieve the state interest.

Moreover, blanket bans on nonlawyers' legal advice are part of a panoply of measures used by states to address the threat of UPL to consumers, raising the possibility that the state's interest is in fact already adequately addressed by other regulations. For example, states impose licensing requirements on lawyers, which help consumers assess what kinds of legal advice to rely on and what market value to assign to legal advice from varying sources. It would therefore seem that the state already achieves much of its interest simply by withholding licensure, and many of the benefits that come with licensure, from those persons who do not meet state standards, and also by making consumers aware of which persons do meet such standards.[193] Further, states criminalize the behavior of falsely holding oneself out as a lawyer,[194] which helps achieve the state's interest in protecting consumers by deterring and punishing those nonlawyers who would deceive consumers as to their qualifications.

In light of measures states already take and could take going forward, the blanket ban on nonlawyers' legal advice that applies in most jurisdictions does not seem to be narrowly drawn to achieve the state's interest. It represents, in fact, the broadest possible means of addressing the risks posed by nonlawyers' legal advice. Such paternalistic and prophylactic bans have seldom been accepted by the Supreme Court. Even if it could be said that UPL restrictions against nonlawyers' legal advice achieve a compelling state interest, it seems unlikely that they would be found to be narrowly drawn to achieve that interest.

III. ENFORCING THE FIRST AMENDMENT TO IMPROVE ACCESS TO JUSTICE WHILE PROTECTING CONSUMERS

Meaningful access to justice is important because people need to have the ability to resolve their legal disputes and

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[193] In *Alvarez*, the Supreme Court suggested that the state could achieve its interest, in preventing people from falsely claiming that they had received a military medal, by simply setting up a database that listed medal recipients, against which false claims could be checked. 567 U.S. 709, 728 (2012). The bar of every state has listings of attorneys that the public can access. *See, e.g.*, *Attorney Search*, N.Y ST. UNIFIED CT. SYS., https://iapps.courts.state.ny.us/attorney/AttorneySearch [https://perma.cc/6NY4-H8BL].

[194] *See, e.g.*, TENN. CODE ANN. § 39-16-302 (2017) ("Impersonation of licensed professional. (a) It is unlawful for any person who is not licensed to do so, to practice or pretend to be licensed to practice a profession for which a license certifying the qualifications of the licensee to practice the profession is required. (b) A violation of this section is a Class E felony.").

enforce their legal rights. But the fact is that many—and perhaps most—people with civil legal problems must handle them entirely on their own, without representation or guidance, despite the byzantine complexity of the legal system.[195] Few free and affordable lawyers are available to assist them,[196] and judges and court clerks rigorously refrain from offering direction.[197] Nonlawyers who might fill the gap are stymied from doing so by UPL restrictions enforced by substantial civil and criminal penalties.[198] It is no wonder that the unrepresented have difficulty obtaining outcomes that comport with the law.[199]

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[195] *See, e.g.*, HANNAH E.M. LIEBERMAN & PAULA HANNAFORD-AGOR,, TRENDS IN STATE COURT: SPECIAL FOCUS ON FAMILY LAW AND COURT COMMUNICATIONS 90–91 (2016), http://www.ncsc.org/~/media/Microsites/Files/Trends%202016/Meeting-the-challenges.ashx [https://perma.cc/936G-F9C3] (research conducted of ten urban counties in 2012–2013 showed that in only 16 percent of debt collection cases were defendants represented by counsel (compared to 98 percent of plaintiffs), 13 percent of defendants in landlord tenant cases (compared to 80 percent of plaintiffs), and 13 percent of small claims cases (compared to 76 percent of plaintiffs)).

[196] In constant dollars, Legal Services Corporation funding has declined from a high of over $866 million in 1979 to a low of under $341 million in 2013. *See Funding History*, LEGAL SERVICES CORP., http://archive.lsc.gov/congress/funding/funding-history [https://perma.cc/L292-QCWC]. The current administration is not likely to fund the LSC at even its recent lower levels. At the same time, funding provided by interest on lawyers' trust accounts (IOLTA), which has been used to fund lawyers for the poor, drastically declined over the last few years, from $371 million in 2007 to $93.2 million in 2011. *See* Terry Carter, *IOLTA programs find new funding to support legal services*, ABA J., (Mar. 2013), http://www.abajournal.com/magazine/article/iolta_programs_find_new_funding_to_support_legal_services/ [https://perma.cc/FG9X-ETUM]; *see also* I. Glenn Cohen, *Rationing Legal Services*, 5 J. OF LEGAL ANALYSIS 221, 221–22 (2013) (describing cuts to Legal Services Corporation funding as well as reductions in other sources of funding for legal services to the poor).

[197] Many states' court websites make clear that clerks are not allowed to give legal advice. *See, e.g.*, *How Court Staff Can And Cannot Assist With Your Case*, IND. JUD. BRANCH, http://www.in.gov/judiciary/selfservice/2392.htm [https://perma.cc/M38K-G98N] (In Indiana, court clerks "cannot provide legal advice or legal interpretations. Only a lawyer can give . . . legal advice."). Judges likewise consider themselves constrained from providing legal advice. *See, e.g.*, Robert Bacharach & Lyn Entzeroth, *Judicial Advocacy in Pro Se Litigation: A Return to Neutrality*, 42 IND. L. REV. 19, 42 n.136 (2009) ("[G]iving legal advice is prohibited by multiple canons of judicial conduct" and "a judge cannot ethically give legal advice to any of the parties, regardless of whether they are pro se." (citing Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999))); Engler, *supra*, at 1988 ("The rules primarily prohibit . . . court players from giving legal advice to unrepresented litigants.").

[198] *See, e.g.*, People v. Shell, 148 P.3d 162 (2006), *cert. denied*, Shell v. Colo., 550 U.S. 971 (2007) (criminal contempt and fine of $6,000); *see also* CAL. BUS. & PROF. CODE § 6126(a) (2011) ("Any person . . . practicing law who is not an active member of the State Bar[] . . . is guilty of a misdemeanor punishable by one year in a county jail or a fine of up to one thousand dollars ($1000), or by both."); FLA. STAT. § 454.23 (2004) ("Any person not licensed or otherwise authorized to practice law in this state who practices law in this state . . . commits a felony of the third degree . . . ."); 42 PA. C.S. § 2524(a) (1976) ("[A]ny person, . . . who within this Commonwealth shall practice law . . . without being an attorney at law . . . commits a misdemeanor of the third degree upon a first violation.").

[199] *See, e.g.*, Michele Cotton, *When Judges Don't Follow the Law: Research and Recommendations*, 19 CUNY L. REV. 57 (2015).

The organized bar is, of course, far from indifferent to the long-standing and serious problems with access to justice experienced by the unrepresented. But its proposed solutions have focused on improving the availability of lawyers, such as through civil *Gideon* rules or rulings.[200] These efforts have been widely unavailing—no doubt because of their substantial cost—and so have not actually improved the situation of the unrepresented.[201] A few bar-approved experiments are now being undertaken that involve nonlawyers,[202] but none change the basic dynamic that only a lawyer can provide legal advice. More significant improvements in access to justice could be accomplished if courts could be persuaded to enforce the First Amendment and recognize that nonlawyers are entitled to give legal advice.[203] Such recognition would enable trained and knowledgeable nonlawyers to give the unrepresented more substantial guidance on how to enforce their legal rights by allowing them to provide legal advice tailored to a person's situation.

Those who support existing restrictions often take the position that they are necessary to protect consumers.[204] The fear is that persons with civil legal problems will be harmed by the

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[200] *See, e.g.*, Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Evictions Proceedings*, 25 TOURO L. REV. 187, 204–06, 217 (2009); Michael Millemann, *Mandatory Pro Bono in Civil Cases: A Partial Answer to the Right Question*, 49 MD. L. REV. 18, 27, 47–48 (1990); Andrew Scherer, *Why People Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L., POLICY, & ETHICS J. 699, 728 (2006).

[201] *See, e.g.*, Frase v. Barnhart, 840 A.2d 114 (Md. 2003) (court declined to address issue of appointed counsel raised by plaintiff and amici in case involving child custody dispute); King v. King, 174 P.3d 659 (Wash. 2007) (no right to counsel under State constitution in divorce case affecting mother's custody and visitation rights to her children); In the Matter of the Petition to Establish a Right to Counsel in Civil Cases, 2012 WI 14 (Feb. 24, 2012), http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=78599 [https://perma.cc/7S4S-RXVB] (order of the Supreme Court of Wisconsin denying petition to establish right to counsel in civil cases); *see also* Turner v. Rogers, 564 U.S. 431 (2011) (no constitutional right to appointed counsel for civil contempt).

[202] *See, e.g.*, efforts described in AM. B. ASS'N. COMM'N ON THE FUTURE OF LEGAL SERVICES, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 119–24 (2016).

[203] Recognizing a constitutional right to give legal advice would not necessarily enable nonlawyers to provide all kinds of legal assistance, as they would still be prohibited by existing UPL regulations from drafting legal documents for persons or representing persons in court. These other activities arguably have weaker First Amendment claims and could perhaps be justifiably reserved to lawyers.

[204] *See, e.g.*, Dauphin County B. Assoc. v. Mazzacaro, 351 A.2d 229, 233 (Pa. 1976) ("[T]he object of the legislation forbidding practice to laymen is not to secure to lawyers a monopoly, however deserved, but, by preventing the intrusion of inexpert and unlearned persons in the practice of law, to assure to the public adequate protection in the pursuit of justice." (quoting Shortz v. Farrel, 193 A. 20, 24 (Pa. 1937))); Doe v. McMaster, 585 S.E.2d 773, 775 n.3 (S.C. 2003) ("[T]his Court grounds its unauthorized practice rules in the State's ability to protect consumers in the state and not as a method to enhance the business opportunities for lawyers.").

advice of nonlawyers.[205] But the existing blanket bans on nonlawyers giving legal advice are not only inimical to the First Amendment but also are not the only or best way of accomplishing the meaningful goal of protecting consumers. Existing UPL restrictions sweep broadly: they prevent even knowledgeable and capable nonlawyers from assisting the unrepresented. Indeed, the U.S. Department of Justice and Federal Trade Commission have taken the position that UPL restrictions prohibit legal assistance from nonlawyers in some situations where consumers would benefit.[206] A number of prominent legal scholars have likewise criticized UPL restrictions for interfering with access to justice.[207]

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[205] *See, e.g.*, Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 12 (2004) (describing entrusting government benefits, landlord-tenant disputes, and consumer claims "to a corps of paraprofessionals" as involving "extraordinary dangers."); *see also* Ginn v. Farley, 403 A.2d 858, 861 (Md. Ct. Spec. App. 1979) (likening a nonlawyer providing legal assistance as like an amateur performing "brain surgery").

[206] *See* Letter from Hewitt Pate, Acting Assistant Attorney General et al. to Task Force on the Model Definition of the Practice of Law (Dec. 20, 2002), https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law [https://perma.cc/SR3C-92EJ] (concerning the American Bar Association's plan to adopt a definition that stated that "a person is presumed to be practicing law when engaging in any of the following conduct on behalf of another" including "[g]iving advice or counsel to persons as to their legal rights or responsibilities"). The DOJ and FTC

> urge[d] the ABA not to adopt the current proposed Definition, which, in our judgment, is overbroad and could restrain competition between lawyers and nonlawyers to provide similar services to American consumers. If adopted by state governments, the proposed Definition is likely to raise costs for consumers and limit their competitive choices. There is no evidence before the ABA of which we are aware that consumers are hurt by this competition and there is substantial evidence that they benefit from it.

Id.

[207] *See* Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 885–86 (2009) ("Almost all of the scholarly experts and commissions that have studied the issue have recommended increased opportunities for [lay] assistance. Almost all of the major decisions by judges and bar associations have ignored those recommendations." (footnote omitted)); *see also* David Vladeck, *Hard Choices: Thoughts for New Lawyers*, 10 KAN. J.L. & PUB. POL'Y 351, 356 (2001) ("[T]he Bar has refused to address the problem [of unmet needs for legal services] by easing restrictions on non-lawyer practice. Concerns about the quality of lay assistance cannot be the real answer because study after study has shown that trained lay advocates can effectively represent people in standardized legal proceedings—and even in complex ones when they are specially trained." (footnotes omitted)); Gillian Hadfield, *Making legal aid more accessible and affordable*, WASH. POST (Mar. 12, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/11/AR2010031103654.html [https://perma.cc/4LE4-7DL6] ("The United States stands largely alone in advanced-market democracies in drastically restricting where and how people can get help with their legal problems. In all states, under rules created by bar associations and state supreme courts, only people with law degrees and who are admitted to the state bar can provide legal advice and services of any kind. . . . The United States urgently needs to expand capacity for non-lawyers to meet the legal needs of ordinary Americans in innovative and less costly ways."); Laurence H. Tribe, Senior Counselor for Access to Justice, Speech at the ABA Pro Bono Publico Awards Luncheon (Aug. 9, 2010), http://www.justice.gov/atj/opa/pr/speeches/2010/atj-speech-100809.html [https://perma.cc/83WX-D7S7] ("[E]ven if all the lawyers in

States and their bar associations do, of course, have legitimate concerns about the risks and problems associated with nonlawyers giving legal advice. It is no doubt true that nonlawyers are less likely than lawyers to give accurate, complete, and reliable legal advice, and that consumers might at times rely on such advice to their detriment.[208] Nonetheless, it is not difficult to imagine situations where consumers would benefit from having access to the advice of trained nonlawyers. Such nonlawyers might sometimes give high-quality legal advice for free or for a more affordable price than lawyers, and consumers would therefore benefit from having access to it. The legal advice of nonlawyers, even where it is not of high quality, might still help the persons who receive it, because they cannot afford or otherwise obtain the higher-quality advice of a lawyer, and the advice they receive from the nonlawyer is still of sufficient quality to put them in a better position than if they had not received it. For some legal matters, a person might rationally prefer a nonlawyer's legal advice, even if taking such advice is somewhat riskier, because a lawyer's legal help may cost too much in relation to the incremental benefits in risk-reduction that it provides.

Moreover, there is an important difference between a paternalistic regulation that purports to know what speech is appropriate for another person to hear—thereby reducing the person's autonomy to make such a decision for herself—and a protective regulation that ensures that the speech a person hears does not mislead or deceive—a regulation which actually enhances the efficacy of a person's exercise of autonomy. Accordingly, when it comes to the legal advice of nonlawyers, the government can and should prohibit misleading and deceptive speech, but not prevent the conveyance of speech that is merely likely to be of lesser quality. False advertising, misrepresentation, and other speech that victimizes consumers can be addressed and arguably already are addressed under consumer protection laws, without imposing the blanket bans and special form of prior

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this room rededicated themselves to pro bono work, and we increased funding for civil legal services five-fold, we still wouldn't have enough lawyers to meet all the needs of the poor and working class. . . . Work with your state bar associations to make sure that rules of professional practice more realistically reflect the requirements for meeting people's desperate need for legal help—help that can come from those with background and training different from our own.").

[208] But it is important to appreciate that the mere fact that such speech is likely to be of lower quality than lawyers' speech does not render it regulable. So-called "low-value speech" is in fact generally protected by the First Amendment. As the Supreme Court has observed, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." Edenfield v. Fane, 507 U.S. 761, 767 (1993).

restraint that are accomplished by the restrictions on nonlawyer speech invoked by attorney licensing provisions.

But it seems unlikely that allowing nonlawyers to give legal advice will worsen the situation of the unrepresented, and it is quite possible that it will benefit them. It is not as if the unrepresented are not already getting advice about their legal problems; they are probably conferring with friends, family, neighbors, and coworkers, and taking into account whatever impressions those persons have to offer. The law's embargo on legal advice from any person except a lawyer guarantees that the only sort of help the unrepresented receive will be random and haphazard.[209] Even untrained nonlawyers becoming part of the situation is not likely to do much to worsen it. However, enforcement of nonlawyers' free speech right to give legal advice would also permit the introduction of trained and knowledgeable nonlawyers into the picture and allow them to convey better assistance to the unrepresented and help counteract misinformation.

In short, a nonlawyer's legal advice, while no doubt inferior to a lawyer's legal advice in most situations, may still be of substantial value to consumers. It makes little practical or logical sense to say that because a lawyer's legal advice is generally more valuable, a consumer cannot be allowed to make a rational choice to hear a nonlawyer's legal advice that is valuable enough in the consumer's estimation.

There are, moreover, steps a state could take short of a blanket ban against nonlawyers' legal advice to improve the ability of consumers to make optimal decisions when pursuing legal matters. The state could require nonlawyers to issue disclaimers and warnings to consumers who receive legal advice, which would ensure that consumers have specific notice of the risks of such advice. That would enable consumers to make more informed decisions. Allowing legal advice from nonlawyers but requiring such warnings and disclaimers has in fact been recommended by the U.S. Department of Justice and Federal Trade Commission[210] and adopted by the District of Columbia as the right regulatory approach.[211]

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[209] For example, allowing social justice organizations, community groups, and universities to train persons to provide legal advice to the unrepresented could give consumers better sources of assistance than they get through the informal consultations they have with the untrained.

[210] *See, e.g.*, Letter from Thomas O. Barnett, Assistant Attorney General, to Susan Gray, Office of the Director of State Courts (Dec. 10, 2007) https://www.justice.gov/atr/comments-petition-supreme-court-rule-07-09. [https://perma.cc/4UV5-LY8A]

[211] D.C. CT. APP. RULE 49(b)(2) apparently allows nonlawyers to give legal advice as long as they provide appropriate warnings to consumers. The Commentary to § 49(b)(2) explains that a prior version of the rule defined the practice of law

The education of the public about the risks of nonlawyer legal advice is another measure that states can take short of a blanket ban on nonlawyers giving legal advice. In *Bates*, the Supreme Court suggested that the bar underestimated the public's ability to evaluate lawyer advertising, but added that "[i]f the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective."[212] Likewise, the bar has the incentive and the ability to inform the public of the risks associated with nonlawyers' legal advice, and to ensure that consumers understand the difference between the legal advice of lawyers and nonlawyers.

First Amendment jurisprudence indicates that even where there are benefits from regulation, speech will be protected so long as other feasible means exist to reduce the harms that regulation seeks to address. And in such a situation the burden then falls on the state to use those other means, rather than simply subject the potentially problematic speech to a blanket ban. The risk posed to consumers by allowing nonlawyers to give legal advice could be minimized through these less sweeping measures, while enabling unrepresented persons to pursue their civil legal claims with more information and guidance than are currently available to them.

CONCLUSION

Appellate courts that have considered free speech challenges to the UPL restrictions on nonlawyers giving legal advice have uniformly rejected such challenges—although based on a wide variety of unconvincing rationales. Further, the best reading of the Supreme Court's First Amendment jurisprudence

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"broadly . . . , embracing every activity in which a person provides services to another relating to legal rights." *Id.* Under the revision, "[t]he presumption that one's engagement in one of the enumerated activities is the 'practice of law' may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent." *Id.* Accordingly, a nonlawyer may give legal advice if proper warnings are given. However,

> [i]t is not sufficient for a person . . . merely to give notice that he is not a lawyer while engaging in conduct that is likely to mislead consumers into believing he is a licensed attorney at law. Where consumers continue to seek services after such notice, the provider must take special care to assure that they understand that the person they are consulting does not have the authority and competence to render professional legal services in the District of Columbia.

Id.

[212] Bates v. State Bar, 433 U.S. 350, 375 (1977).

indicates that the blanket bans that most states have instituted against nonlawyers giving legal advice probably violate the Free Speech Clause.

These failures to protect free speech are impediments to improving access to justice. The Supreme Court's jurisprudence charts a course that would enable the benefits of speech about how to use the law to become more widely available and accessible to those who most need it, while still allowing for the regulation that provides consumers with substantial protection from misleading and deceptive speech from nonlawyers. That course is both more consistent with First Amendment doctrine and more respectful of what it is that the First Amendment attempts to achieve, the greater access of everyone to the marketplace of information and ideas.