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Free Speech, Occupational Speech, and Psychotherapy

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FREE SPEECH, OCCUPATIONAL SPEECH, AND PSYCHOTHERAPY

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I. INTRODUCTION

Psychotherapy, said one of its earliest clients, Anna O, is a “talking cure.”¹ It banishes or lessens mental illness and suffering not with medicine or surgery, but with words. This aspect of psychotherapy raises an interesting set of First Amendment questions. Is verbal communication between a therapist and her client² protected by the First Amendment even though it is part of a healing process, or does government have the same authority to restrict this speech-based healing method as it does to restrict the use of pharmaceuticals or medical

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1. John Launer, *Anna O and the ‘Talking Cure,’* 98 QJM: INT’L J. MED. 465, 465 (2005). Anna O was the pseudonym of Bertha Pappenheim, an Austrian writer who was treated for hysteria by Josef Breuer, a mentor and colleague of Sigmund Freud. Mikkel Borch-Jacobsen, *Bertha Pappenheim (1859-1936): Bertha Pappenheim, the Original Patient of Psychoanalysis*, PSYCHOL. TODAY (Jan. 29, 2012), <https://www.psychologytoday.com/blog/freuds-patients-serial/201201/bertha-pappenheim-1859-1936>.

2. Psychotherapists—and psychotherapy texts—differ in how they refer to individuals who use a therapist’s services. Some psychotherapists and texts describe such individuals as “patients.” Others refer to them as “clients.” Stephen Joseph, *Patients or Clients?*, PSYCHOL. TODAY (Aug. 4, 2013), <https://www.psychologytoday.com/blog/what-doesnt-kill-us/201308/patients-or-clients>. As one article notes, those who use the latter term have often done so to “signify a rejection of [a] medical way of thinking, replacing it with the humanistic language of growth and change.” *Id.* In this Article, I will generally use the term “client,” in part because I want to challenge the notion that constitutional law can treat psychotherapist speech as analogous to physician speech for all purposes.

equipment? If the government may, in some circumstances, restrict the content of what a therapist can permissibly say to her client, under what circumstances may it do so? Must it show that therapists' statements about human psychology are false or harmful to the client? Or may it constitutionally bar even truthful therapist-client communications that raise little risk of harm to the client's physical or mental health, on the grounds that such verbal treatments promote values or behaviors at odds with those of the profession or of the larger society?

In the past two years, these questions have received attention from federal courts, thanks to a high-profile legal controversy over state efforts to protect minors from some psychotherapists' use of "sexual orientation change efforts" ("SOCE").³ California barred psychotherapists from administering SOCE to minors in 2013.⁴ New Jersey did so in the same year.⁵ Illinois,⁶ Oregon,⁷ and Washington D.C.⁸ have now done so, as well. The Obama administration has also weighed in on the dangers of SOCE for gay and transgender teenagers.⁹ And, while the Supreme Court has not yet heard a case on this issue, it has taken note of it. In *Obergefell v. Hodges*, where it held that same-sex couples have a constitutional right to marry,¹⁰ the Court noted that discrimination against gays and lesbians included psychiatrists classifying homosexuality as a "mental disorder" and observed that only in "recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable."¹¹

In the midst of this controversy, federal appellate courts in the Ninth and Third Circuits have confronted the question of whether California and New Jersey, respectively, violated the First Amendment by banning SOCE therapy for clients younger than eighteen-years old.¹²

3. See, e.g., CAL. BUS. & PROF. CODE §§ 865–865.2 (West 2013); *King v. Governor of N.J.*, 767 F.3d 216, 220 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1215 (9th Cir. 2014).

4. CAL. BUS. & PROF. CODE § 865.1.

5. N.J. STAT. ANN. § 45:1–55 (West 2013).

6. See Aditya Agrawal, *Illinois Bans Gay Conversion Therapy for Minors*, TIME (Aug. 21, 2015), <http://time.com/4006675/illinois-bans-gay-conversion-therapy-on-minors>.

7. See Katy Steinmetz, *Oregon Becomes Third State to Ban Conversion Therapy on Minors*, TIME (May 19, 2015), <http://time.com/3889687/oregon-conversion-therapy-ban>.

8. See Aaron C. Davis, *D.C. Bans Gay Conversion Therapy of Minors*, WASH. POST (Dec. 2, 2014), https://www.washingtonpost.com/local/dc-politics/dc-bans-gay-conversion-therapy/2014/12/02/58e6aac4-7a67-11e4-84d4-7c896b90abdc_story.html.

9. See Michael D. Shear, *Obama Calls for End to "Conversion" Therapies for Gay and Transgender Youth*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/2015/04/09/us/politics/obama-to-call-for-end-to-conversion-therapies-for-gay-and-transgender-youth.html?_r=0.

10. 135 S. Ct. 2584, 2607-08 (2015).

11. *Id.* at 2596.

12. See, e.g., *King v. Governor of N.J.*, 767 F.3d 216, 220 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1221 (9th Cir. 2014).

Both found such therapy restrictions constitutional, and had good reasons for recognizing that government must have the power to protect against therapies premised upon the false assumption (criticized in *Obergefell*), that homosexuality is a mental illness.¹³ A physician could not expect the First Amendment to save her from professional discipline or legal liability if she wrongly diagnosed a clearly healthy patient with cancer or a serious autoimmune disease. Similarly, a clinical psychologist does not have a First Amendment right to diagnose a symptom-free client with Obsessive Compulsive Disorder, for example, and then recommend unnecessary therapy sessions. Nor, as the Ninth and Third Circuits both agreed, does she have a First Amendment right to falsely suggest to a client, or the client's family, that homosexuality is a mental disorder¹⁴—something the vast majority of psychologists have recognized as wrong for the more than forty years since homosexuality was removed from the *Diagnostic and Statistical Manual of Mental Disorders*.¹⁵ Nor is there a right to make false claims about the power of talk therapy to change a person's sexual orientation. Neither doctors nor psychotherapists have a First Amendment right to treat a disease that doesn't exist with a treatment that doesn't work.

Yet, behind this shared conclusion was a deep disagreement about psychotherapy's First Amendment status. In the view of the Ninth Circuit, California's talk therapy restriction did not violate the First Amendment because talk therapy is not protected by the First Amendment.¹⁶ In short, the Ninth Circuit held, in *Pickup v. Brown*, such therapy is conduct, not speech.¹⁷ What matters, for First Amendment purposes, is not that the "talking cure" involves talking, but that it aims at curing.¹⁸ Even though "the mechanism used to deliver mental health treatment is the spoken word," it is still professional healing activity.¹⁹ Like administering medicine or surgery, it is designed to transform and heal a person and not simply to inform or communicate with her.²⁰ To be sure, added the Ninth Circuit, free speech law does shield some of the

13. See *King*, 767 F.3d at 232-33, 237-40; *Pickup*, 740 F.3d at 1222, 1231-32.

14. See *King*, 767 F.3d at 221; *Pickup*, 740 F.3d at 1222.

15. See AM. PSYCHOLOGICAL ASS'N, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 22-24 (2009) [hereinafter 2009 APA REPORT], <http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>; see also *King*, 767 F.3d at 221 (recounting findings that sexuality is not a disorder); *Pickup*, 740 F.3d at 1222 (noting that homosexuality "was removed from the Diagnostic and Statistical Manual of Mental Disorders" in 1973).

16. *Pickup*, 740 F.3d at 1230.

17. *Id.* at 1227-29.

18. *Id.* at 1226.

19. *Id.* at 1227.

20. *Id.* at 1229-30 (treating the restriction of "administration of therapies" as a regulation of conduct and stating that the verbal activity regulated is "therapeutic, not symbolic").

things psychotherapists say about mental health.²¹ Such speech is protected not when it is a component of psychotherapy, but rather when it offers information or opinions *about* psychotherapy—to the public, or to an individual client.²²

The Third Circuit, by contrast, had very different reasons for finding New Jersey’s ban on SOCE therapy constitutional in *King v. Governor of New Jersey*.²³ The speech that occurs as psychotherapists deliver talk therapy, the opinion said, may be part of a healing process.²⁴ But it also entails communication of ideas and feelings and, as such, deserves significant constitutional protection from government suppression.²⁵ Just as the government may not interfere with our private conversations, whether to empty them of views it dislikes or compel individuals to voice views that officials favor,²⁶ it may not seize control of the communication that occurs between psychotherapists and their clients and distort it to serve the state’s purposes rather than those of clients. When the government regulates therapy, it therefore cannot—consistent with the First Amendment—seek to “suppress disfavored ideas under the guise of professional regulation.”²⁷ This does not mean that the words used in talk therapy are merely speech. They are also medical and professional tools, the use of which can damage a client if used in a way that falls short of professional standards.²⁸ As a consequence, instead of shutting officials out almost entirely from regulation of psychotherapy, it left them free to enter in many cases where dangers to health require their intervention.²⁹ In the Third Circuit’s view, the harms presented by SOCE therapy to minors constituted such a case. While New Jersey’s ban unquestionably restricted First Amendment speech,³⁰ it did so in ways narrowly tailored to serve the “substantial government interest” of protecting minors from an ineffective treatment with harmful effects.³¹

That both circuits ultimately reached the same result may seem to indicate that the difference between their approaches is insignificant. Whether we call psychotherapist-client communication “conduct” outside the First Amendment, or “speech” within it, it seems—on both

21. *Id.* at 1230.

22. *Id.* (noting that California’s law did not restrain psychologists from “imparting information or disseminating opinions” and suggesting had it done so, it would have violated First Amendment law).

23. 767 F.3d 216, 246-47 (3d Cir. 2014).

24. *Id.* at 224.

25. *Id.*

26. *See id.* at 228.

27. *Id.* at 236.

28. *Id.* at 224, 236-38.

29. *Id.* at 236-38 (discussing the Court’s application of intermediate scrutiny).

30. *Id.* at 229.

31. *Id.* at 233, 234, 237-40.

of these accounts—to be amenable to professional regulation and licensing requirements. Indeed, a recent case on physician speech has even described the Ninth and Third Circuit as adopting essentially the same approach.³² Why worry, then, about how it is categorized for First Amendment purposes if the end result is that states can restrict treatments they find unsafe or otherwise harmful to clients' interests?

First, although these distinct approaches led to the same conclusion here, they may not always do so. Consider a hypothetical state law that takes sides in what some writers call “the dogma eats dogma” battles between different schools of psychotherapy.³³ Adherents of each school have their own distinctive theories and techniques. For those in the psychoanalytic (or psychodynamic) school, a client's emotional or mental struggles often have their roots in unconscious feelings or beliefs forged in childhood experience or other significant episodes in life.³⁴ The therapist's goal is to help the client unearth these hidden sources, come to terms with them, and move beyond them.³⁵ For cognitive-behavioral therapists, by contrast, the focus is often on current thinking patterns rather than past conflicts: They trace psychological problems to how thinking patterns influence behavior, and then focus on changing those thinking patterns.³⁶ For still other schools of therapy, both psychoanalysis and cognitive-behaviorism fall short: Humanistic or existential psychotherapists claim that psychological healing requires “not merely . . . intellectual or behavioral reprogramming,” but “experiential . . . reawakening.”³⁷ According to practitioners of “relational-cultural therapy,” it also requires that therapist and clients alike free themselves from the Western myth of the self-reliant individual and start from the premise that “we grow in relationship[s] throughout our lives” and should focus on understanding and shaping those relationships.³⁸ Other psychotherapists adhere to still other theories

32. *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 896 (11th Cir. 2015) (treating *Pickup* as a case that, like *King*, essentially applied intermediate scrutiny); *see also* Recent Case, *First Amendment—Eleventh Circuit Upholds Florida Law Banning Doctors from Inquiring About Patients' Gun Ownership When Such Inquiry Is Irrelevant to Medical Care.*—*Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195 (11th Cir. 2014), 128 HARV. L. REV. 1045, 1050 (2015) (characterizing the Ninth Circuit as “applying intermediate scrutiny to much of a doctor's speech”).

33. John C. Norcross, *A Primer on Psychotherapy Integration*, in HANDBOOK OF PSYCHOTHERAPY INTEGRATION 3, 3 (John C. Norcross & Marvin R. Goldfried eds., 2d ed. 2005).

34. *See* NANCY MCWILLIAMS, PSYCHOANALYTIC PSYCHOTHERAPY: A PRACTITIONER'S GUIDE 1, 3 (2004).

35. *Id.* at 1-4.

36. Keith S. Dobson & David J. A. Dozois, *Historical and Philosophical Bases of the Cognitive-Behavioral Therapies*, in HANDBOOK OF COGNITIVE-BEHAVIORAL THERAPIES 3, 4-6 (Keith S. Dobson ed., 2d ed. 2001).

37. KIRK J. SCHNEIDER & ORAH T. KRUG, EXISTENTIAL HUMANISTIC THERAPY 6 (Jon Carlson & Matt Englar-Carlson eds., 2010).

38. JUDITH V. JORDAN, RELATIONAL-CULTURAL THERAPY 3-5 (Jon Carlson & Matt Englar-Carlson eds., 2010).

and approaches.³⁹

Would the First Amendment place any barriers in the way of a state law that banned one or more such approaches, while leaving therapists free to offer others? The Ninth Circuit's reasoning in *Pickup* suggests the answer is "no." Just as the Food and Drug Administration ("FDA") may bar certain drugs for relieving pain while permitting others,⁴⁰ and court cases would not find that such a ban violates First Amendment freedoms, so state legislatures are constitutionally permitted to favor one type of talk therapy over another. For the Third Circuit, such a restriction would likely be far more problematic. In favoring one type of therapy over another, the state would be preventing therapists from telling clients their beliefs about the human psyche and preventing clients from seeking out—and drawing guidance from—the psychological school of their choice. Such a scenario would, under the Third Circuit's approach, entail restriction of First Amendment speech.⁴¹

There is a second reason why we should care about whether (and when) talk therapy counts as speech. The Third and Ninth Circuits' disagreement over talk therapy's First Amendment status is part of a much larger judicial debate over whether, and to what extent, the First Amendment protects "the occupational speech" that a client receives from someone she has hired to provide advice or other information based on a particular kind of expertise.⁴² Individuals not only bring their emotional and psychological problems to psychotherapists, they bring health concerns to physicians, legal questions to attorneys, and financial

39. See BRUCE E. WAMPOLD, *THE BASICS OF PSYCHOTHERAPY: AN INTRODUCTION TO THEORY AND PRACTICE* 25 (Jon Carlson & Matt Englar-Carlson eds., 2010) (stating that "there are more than 500 distinct psychotherapeutic theories and the number is growing").

40. See, e.g., News Release, U.S. Food & Drug Admin., FDA Takes Action to Halt Marketing of Unapproved Ergotamine Companies Ordered to Cease Manufacturing and Distribution of Illegal Drugs to Treat Migraine Headaches (Mar. 1, 2007), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2007/ucm108857.htm>.

41. Such partisan government intervention is not entirely hypothetical. During the mid-twentieth century, a faction of the American Medical Association lobbied for—and some state legislatures considered—proposals that would allow psychotherapy only when practiced by licensed physicians, such as psychiatrists. See COMM. ON CLINICAL PSYCHOLOGY OF THE GRP. FOR THE ADVANCEMENT OF PSYCHIATRY, *THE RELATION OF CLINICAL PSYCHOLOGY TO PSYCHIATRY* 3-4 (1949). In recent years, some psychotherapists in Great Britain have worried about proposed regulations that would favor certain therapy approaches over others. See IMPLAUSIBLE PROFESSIONS: ARGUMENTS FOR PLURALISM AND AUTONOMY IN PSYCHOTHERAPY AND COUNSELING 13-14 (Richard House & Nick Totton eds., 2d ed. 2011) [hereinafter IMPLAUSIBLE PROFESSIONS] (arguing against the "top-down, conformist, coercive model used by [the United Kingdom Council for Psychotherapy] in particular is incompatible with the best values of our craft" and describing damage that would be caused by "coercive accreditation models").

42. See Eugene Volokh, *Professional-Client Speech and the First Amendment*, WASH. POST (Nov. 20, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/20/professional-client-speech-and-the-first-amendment> (noting that "[o]ne of the big uncharted zones of First Amendment law (here there be monsters) is professional-client speech").

challenges to accountants. They hire architects to design houses and buildings for them and designers or artists to help them make their homes, workplaces, or websites aesthetically appealing. They hire tour guides to lead them through and inform them about cities or other locales and to provide a sense of their nature and history. All of these services involve communication, but courts have been unsure about the degree to which such communication is protected by the First Amendment. Thus, there have been recent judicial decisions struggling with the questions about whether, and to what extent, the government runs afoul of the First Amendment when it imposes restrictions on interior designers,⁴³ tour guides,⁴⁴ physicians,⁴⁵ and veterinarians.⁴⁶

In this Article, I will suggest that the Third Circuit's debate with the Ninth Circuit over psychotherapy's First Amendment status provides a helpful lens through which we can understand, and give clarity to, the larger debate over occupational speech. In fact, I suggest here, behind the dispute over psychotherapy's First Amendment status—and that of other kinds of occupational speech—lies a much deeper problem of First Amendment theory: How should free speech law deal with realms of human action where government's presence is necessary to assure individuals' health and safety but possibly dangerous to their intellectual liberty and autonomy?

This problem arises in many areas of occupational speech regulation, but is particularly clear when officials restrict talk therapy. On the one hand, if there is any activity that should be staunchly protected against state manipulation, it is the self-exploration that individuals engage in as they try to understand their inner lives. We are shielded from state interference, for example, when we wrestle with religious or philosophical questions in private conversations with friends,⁴⁷ or even in private diary entries.⁴⁸ Or when we seek to explore our emotions by recording a dream we have had or a feeling we have

43. See *Locke v. Shore*, 634 F.3d 1185, 1189, 1191-92 (11th Cir. 2011) (finding licensing requirements for interior designers constitutional).

44. See *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014) (finding tour guide licensing tests constitutional).

45. See *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 868-69, 900-01 (11th Cir. 2015) (finding limiting physician records on gun ownership constitutional).

46. See *Hines v. Alldredge*, 783 F.3d 197, 201-02 (5th Cir.), *cert. denied*, 136 S. Ct. 534 (2015) (upholding a Texas law prohibiting veterinarians from practicing unless she has first examined the animal).

47. See *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (agreeing that “the fear of public disclosure of private conversations might well have a chilling effect on private speech”); see also *id.* at 542-544 (Rehnquist, C.J., dissenting) (recognizing that First Amendment “speech interests” are furthered when “personal conversations be frank and uninhibited”).

48. See Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 123 (2007) (“The ability to keep personal papers and records of associational ties private is a central First Amendment value.”).

experienced. These efforts at self-understanding are protected against state restriction when they occur in living rooms, cafes, or library rooms.⁴⁹ Why, then, should they suddenly become fair targets for state restriction or bans when they occur in a therapist's office? We may find, after all, that some efforts at understanding or transforming our thoughts and feelings cannot succeed unless we recruit the help of a psychologist or other expert,⁵⁰ and such recruiting of help alone does not eliminate our First Amendment interest in being able to reflect upon, and communicate about, our thought patterns.

On the other hand, if government's interference in psychotherapy is sometimes impermissible, there are also times when its failure to intervene would seem irresponsible. Government is not supposed to interfere with our choices about what to say or think, or about what values to hold. But it *is* charged with protecting our health and safety, and, in psychotherapy, such health and safety interests are very often at stake. Among the clients who psychotherapists treat are individuals who have, or could develop, mental conditions that heighten the risk of suicide or violent behavior.⁵¹ As Elyn Saks and Shahrokh Golshan point out, people can "die as a result of suboptimal therapy."⁵² Indeed, many clients who seek therapists' help are not wrestling with deep philosophical questions. They come for the more concrete and limited goal of conquering a particular mental illness.⁵³ A person with an Anxiety Disorder may simply want to banish her anxiety. A person with Obsessive Compulsive Disorder may turn to a psychologist simply to quiet his obsessions and compulsions. In these circumstances, government seems to have just as much reason to regulate psychologists' treatment of mental health as it does to regulate physicians' treatment of bodily health—to assure that in either profession, health practitioners are practicing effective medicine or mental health treatment and are not defrauding or endangering their patients or clients.

The question of psychotherapy's First Amendment status, then, is what kind of First Amendment regime can best adjudicate between, or somehow reconcile, these two conflicting demands—to keep government interference out of the way we shape our psyches with

49. *See id.* at 121-23.

50. *See King v. Governor of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014) (noting that some listeners are unlikely to get access to certain types of expert knowledge except through professional speech).

51. *See, e.g., Klein v. Solomon*, 713 A.2d 764, 766 (R.I. 1998) (concerning a suit against a university psychologist for failing to properly treat a student, who later committed suicide).

52. ELYN R. SAKS & SHAHROKH GOLSHAN, INFORMED CONSENT TO PSYCHOANALYSIS: THE LAW, THE THEORY, AND THE DATA 77 (2013).

53. A primer on brief dynamic therapy noted that, "[m]ost people who are coming for therapy are in emotional pain, and they want to have this pain alleviated as soon as possible. They are not fascinated by their psyches, nor do they seek mental health perfectionism." HANNA LEVENSON, BRIEF DYNAMIC THERAPY 5 (Jon Carlson & Matt Englar-Carlson eds., 2010).

words, while letting it into medical decisions that carry significant health risks? As it turns out, although this challenge is new to judicial review of therapy regulation and to occupational speech regulation more generally, it is not new to First Amendment law. The Supreme Court confronted the issue in the 1992 case of *R.A.V. v. City of St. Paul*.⁵⁴ Officials, it said in that case, receive leeway under the First Amendment to protect individuals from the harms that flow from certain kinds of speech—like the violence or fear triggered by “fighting words” or true threats, the reputation-damaging features of libel, or the risk of fraud or deception raised by certain commercial speech.⁵⁵ But this speech-restricting power is not meant to give officials a blank check. Rather, they are allowed *only* to restrict the component of such speech that causes the harm (of a kind government may protect against).⁵⁶ For example, while government may permissibly restrict libel to prevent the damage it does to reputation, it may not use this reputation-protecting power to restrict “*only* libel critical of the government.”⁵⁷ The latter selective type of libel law would be focused not on libel’s reputation-damaging qualities (which are just as present in libel supporting government as libel critical of it), but rather on the message it carries.

A similar approach can help assure, as the Third Circuit put it, that government does not misuse its power to protect us from fraud or health risks in talk therapy by using it to “suppress disfavored ideas under the guise of professional regulation.”⁵⁸ If government wishes to ban a form of talk therapy, it should be able to assure courts that such a speech restriction is designed to protect clients’ mental health and not prevent them from considering messages that government considers political or cultural heresy.

Part II sets out this First Amendment framework for professional speech regulation in more detail and explains some of the challenges it raises for future cases on psychotherapy or other occupational speech.⁵⁹ Parts III and IV then explain why these challenges cannot be avoided simply by following the Ninth Circuit’s alternative framework (or a variant of it) and classifying talk therapy as “non-speech conduct.”⁶⁰ In Part III, this Article first looks at the Ninth Circuit’s argument that talk therapy is medical treatment—analogueous to prescribing a drug—that just happens to be “deliver[ed]” through “the mechanism” of “the spoken

54. 505 U.S. 377 (1992).

55. *Id.* at 383-85.

56. *See id.*

57. *Id.* at 384.

58. *King v. Governor of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014).

59. *See infra* Part II.

60. *See infra* Part III–IV.

word.”⁶¹ It explains that this analogy is a problematic one, since talk therapy works its changes not simply by imposing them onto a client’s or patient’s physiological functioning, but often by enlightening her about her mental functioning or personal history and persuading her to undertake certain behavioral changes. The cognitive, emotional, and behavioral changes produced by talk therapy are similar, in other words, to changes that rhetoric or other speech produces in other circumstances where it unquestionably receives First Amendment protection.

Part IV then considers another alternative to the approach I sketch in Part I: an approach set forth by Robert Post, which allows for limited protection for occupational speech modeled on that already provided to commercial speech, but only in order to assure that such speech carries accurate information (consistent with professional standards).⁶² On this approach, the state is barred by the First Amendment from interfering with physicians’ or therapists’ communication of expert knowledge to their patients or clients, but remains free to regulate these professional channels of communications so long as it avoids “corrupt[ing] . . . the diffusion of expert knowledge.”⁶³ This Article agrees that the First Amendment should, as Post’s approach requires, protect professional speech from regulation that prohibits professionals from dispensing disciplinary truth, or requires them to voice a false version of it.⁶⁴ But, it argues, this approach is too narrow: It should protect professional-client conversations not only to assure their accuracy, but also to protect the autonomy of the conversations’ participants.⁶⁵ First Amendment law, in other words, should allow the state to wrest control of these conversations from their participants (for example, the therapist and the client) *only* where doing so is necessary to stave off professional deception, incompetence, health risks or some other harm that government has responsibility to protect us from. In other words, to the extent Post’s approach is valid, it should be understood as one instance of the broader holding of *R.A.V.*, which would bar restriction of occupational speech not only where such restriction corrupts (rather than protects) the accuracy of the speech, but also in other circumstances where government lacks adequate harm-based justification for its censorship.

Part V then highlights another reason why an approach rooted in *R.A.V.* is superior to alternatives to regulation of occupational speech—a

61. *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014); *see infra* Part III.

62. *See infra* Part IV.C.

63. ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 47 (2012).

64. *Id.* at 47-48; *see infra* text accompanying notes 332-335, 350-353.

65. *See infra* Part IV.D-E.

reason that focuses specifically on psychotherapy.⁶⁶ Psychotherapy regulations, in particular, require an approach that does more than simply protect the accuracy of communications by therapists to clients. In short, the conversations that occur in psychotherapy are more likely than those in medicine to wander onto philosophical terrain where what works for a particular client is not a matter of disciplinary truth, but rather of that client's own "conception of the good." Psychotherapy, in other words, is more likely than many other professional endeavors to require conversations where government has no business telling individuals what answers to reach: intellectual and emotional struggles, in which—as in many deeply religious or moral meditations—individuals are struggling with questions of how best to live their lives or what type of person to become. Recent scholarly discussions of psychotherapy's First Amendment status tend to ignore or minimize this topic, treating talk therapy as simply a variant of physician speech and subject to the same First Amendment analysis.⁶⁷ But psychotherapy is distinct in ways that have importance for understanding how First Amendment law should apply, and more specifically how *R.A.V.*'s rule confining the government only to legitimate health protection purposes can apply to the realm of psychotherapy, where health protection is sometimes difficult to distinguish from philosophical exploration.

II. TALK THERAPY AND OCCUPATIONAL SPEECH AS A FIRST AMENDMENT BOUNDARY PROBLEM

A. *Constitutional Protection for Realms of Autonomy*

Our intuitions about whether talk therapy should be constitutionally shielded from government restriction may well differ from case to case. Consider two examples. First, imagine that a particular psychotherapist insists (without supporting studies or other evidence) that she has developed a talk therapy method that will entirely cure Alzheimer's⁶⁸—not merely improve quality of life or cognitive skill in an Alzheimer's patient, but completely reverse and eliminate the cellular changes that lead to the dementia associated with the disease. She aggressively markets this talk therapy to older individuals recently diagnosed with

66. See *infra* Part IV.

67. But see Warren Geoffrey Tucker, *It's Not Called Conduct Therapy; Talk Therapy as a Protected Form of Speech Under the First Amendment*, 23 WM. & MARY BILL RTS. J. 885, 886-87, 903-05 (2015) (emphasizing respects in which psychotherapists' interactions with clients are different from those which doctors have with their patients).

68. See *Current Alzheimer's Treatments*, ALZHEIMER'S ASS'N, http://www.alz.org/research/science/alzheimers_disease_treatments.asp (last visited Feb. 23, 2016) (noting that "Alzheimer's medications can temporarily slow the worsening of symptoms and improve quality of life for those with Alzheimer's" but that "there is no cure").

Alzheimer's. Should the government be able to stop her from doing so, even though it would be preventing a therapist from communicating with a willing client? Many people would likely say "yes." What the psychotherapist is offering here is therapeutic "snake oil." It does not do what the therapist claims it will do and does not produce the kind of mental change the client is seeking. Especially when the target audience for such a treatment are individuals who are desperate to cure an incurable condition, and perhaps also made more vulnerable to fraudulent practices by the onset of the Alzheimer's itself, the government should be able to intervene.

By contrast, imagine a different kind of government limit on psychotherapy—one that is designed to protect clients not from therapy's failures, but from its successes. Imagine that officials become concerned that certain variants of humanistic psychotherapy are encouraging individualism and non-conformity, instead of helping individuals become better adjusted and more loyal to their community.⁶⁹ Or that certain variants of psychoanalysis are leading individuals to think too critically or negatively about their parents' values and behavior. Or that certain kinds of relational-cultural therapy are inappropriate in treating psychotherapy as a forum for exploring "questions about social change as well as personal change,"⁷⁰ or taking an overly critical stance towards American culture's emphasis on self-reliance.⁷¹

May the government constitutionally ban such therapy not on the ground that it predictably fails to achieve its goals, but because even if it does what the client wants, it promotes goals which are, in the government's view, the wrong kinds of goals? Intuitively, such a therapy restriction seems deeply at odds with First Amendment values. The government may not censor the private advice we give to friends, whether verbally or in e-mails or text messages.⁷² Nor may it compel us to change that advice so that it carries the government's views rather than our own.⁷³ Why should it be able to do so in restricting the communications we have with psychotherapists? Indeed, the Supreme Court has said that government may not seek to assert control over "an

69. See Louis Hoffman et al., *Humanistic Psychology and Multiculturalism: History, Current Status, and Advancements*, in THE HANDBOOK OF HUMANISTIC PSYCHOLOGY: THEORY, RESEARCH, AND PRACTICE 41, 51 (Kirk J. Schneider et al. eds., 2d ed. 2015) (noting that humanistic psychology has an "individualistic" focus and that "conformity is generally discussed in pathological terms"); Donald E. Polkinghorne, *The Self and Humanistic Psychology*, in THE HANDBOOK OF HUMANISTIC PSYCHOLOGY: THEORY, RESEARCH, AND PRACTICE, *supra*, at 87, 90-91 (noting the harmful effect attributed to "the press of social conformity").

70. JORDAN, *supra* note 38, at 96-97.

71. *Id.* at 2-3 (noting that relational-cultural therapy departs from the ideal of "standing on your own two feet" and instead emphasizes the importance of relationship where individuals depend on each other).

72. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548-49 (2001).

73. See *id.*

existing medium of expression” and reshape it to meet government ends rather than those of the speakers and listeners that use it.⁷⁴ It may not, for example, stop lawyers from developing sound legal arguments because legislators (or their constituents) dislike such arguments or the legal change they might produce.⁷⁵ Nor should it be able to stop psychologists from providing advice that an individual finds helpful on the ground that the legislators (or their constituents) dislike the beliefs conveyed by such therapy, or the insights or feelings it generates.

These examples suggest that a satisfactory constitutional framework for regulation of psychotherapy should give government: (1) sufficient room to protect therapy users from fraud and serious harms that might result from psychotherapists’ errors; but (2) *without giving it* authority to reshape therapy to serve its own ideological ends (by barring clients from making autonomous choices about communications they find valuable for their own psychological healing or development). Psychotherapy, in other words, should be safeguarded by a selective First Amendment barrier. When ideologically-driven officials try to mold psychotherapy or other professional speech to reflect political or cultural orthodoxy, the Constitution’s speech protection should block such interference. When, however, officials insist not on political or cultural conformity but on professional competency, free speech law should let them regulate.

This is, as explained in the Introduction, precisely the position on psychotherapy’s First Amendment status that the Third Circuit took in *King*.⁷⁶ Instead of insulating psychotherapist speech (or other professionals’ speech) inside the First Amendment fortress that the judiciary erects around public debate—by securing it behind the almost impassable wall of “strict scrutiny”—the Third Circuit instead provides it with the weaker, more permeable judicial shielding of “intermediate scrutiny.”⁷⁷ This shielding is “intermediate” because instead of shutting officials out almost entirely, it leaves them free to enter in many cases where health or other dangers require their intervention.⁷⁸

This solution is, in fact, one instance of a solution to a much deeper First Amendment puzzle, one which has implications not only for First Amendment status of psychotherapy, but also for that of other

74. *Id.* at 543.

75. *See, e.g., id.* at 544.

76. *See King v. Governor of N.J.*, 767 F.3d 216, 234-36 (3d Cir. 2014). Eugene Volokh has also suggested, much more briefly, a similar framework under which government could regulate professionals to protect clients but not to target ideas within professional exchanges in other respects. *See Eugene Volokh, Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation Alerting Utterances” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1343-45 (2005).

77. *King*, 767 F.3d at 233-35.

78. *See id.* at 234-35.

occupational speech. As noted earlier, free speech law often has to deal with realms of human action where government's presence is necessary to assure individuals' health and safety, but is simultaneously dangerous to their intellectual liberty and autonomy.⁷⁹ This is a challenge that faces many kinds of occupational speech regulation, but is particularly stark when officials wish to restrict what a therapist can discuss with her client.

The Constitution, as the Court has emphasized, carves out spaces for Americans where "the State" is not a "dominant presence," and where it is up to each individual—rather than those who exercise collective political power—to make decisions about the nature of that space (and its contents).⁸⁰ For example, it is generally up to me, not government officials or political majorities, to decide what I will think or say, or what religious principles shall guide me. "Liberty" presumes that each individual (not state officials or those whom they represent) will be sovereign in the realm of "thought, belief, [and] expression," and also in decisions regarding "certain intimate conduct."⁸¹ Understood this way, freedom of expression is one part of a larger system of constitutional protection that is intended to secure an "autonomy of self."⁸²

This system of constitutional liberties did not originate with the Constitution. One finds it in the earlier liberal theory of John Locke, who argued that the "civil magistrate" could legitimately make and enforce laws with respect to our outward actions and possessions, but had to leave to each person the right to make decisions regarding his own inner life.⁸³ For Locke, this line was essentially a line between political power, on the one hand, and religious conscience and belief on the other. On the one side was the civil magistrate whose power extended only to "civil interests" such as protection of "life, liberty, health, and indolency of body; and the possession of outward things such as money, lands, houses, furniture, and the like."⁸⁴ On the other was the "care of souls," which was necessarily the responsibility of the individual himself—since our religious commitments were a matter solely of the "inward persuasion of the mind," a realm where the "outward force" of the state necessarily had no power.⁸⁵ For Locke, this inward realm, and the responsibility for "care of the soul" that came with it, was essentially

79. See *supra* text accompanying notes 42-58.

80. *Lawrence v. Texas*, 539 U.S. 558, 562, 573-74 (2003).

81. *Id.* at 562.

82. *Id.*

83. JOHN LOCKE, A LETTER CONCERNING TOLERATION (Charles L. Sherman ed., William Popple trans., 1689), reprinted in 33 GREAT BOOKS OF THE WESTERN WORLD 3 (Mortimer J. Adler et al. eds., 2d ed. 1990).

84. *Id.*

85. *Id.*

about religious thought and practice.⁸⁶ It was ultimately about obtaining salvation. In modern times, by contrast, the care of the soul often takes on a secular form—one that includes private reflection and meditation of a non-theological nature, and one that may well draw upon psychotherapy. It is thus not only religion but—as Kent Greenawalt notes—a much wider realm of human activity that falls into a realm that contemporary constitutional law, following Locke, has reserved for the autonomy of self and insulated against state control.⁸⁷

Psychotherapy poses a challenge to First Amendment law in large part because, rather than being entirely within or outside such a constitutionally-secured space for individual autonomy, it falls partly within and partly outside of it. As noted earlier, psychotherapy is in some respects deeply personal. Like religious or spiritual exploration, psychotherapy is often, as the noted therapist and writer Irwin Yalom puts it, “a deep and comprehensive exploration into the course and meaning of one’s life.”⁸⁸ Such explorations, of course, fall squarely within the realm of “thought, belief, and expression” that the First Amendment secures against majoritarian control. It is not the business of the state or its officials to tell a person what should give her life meaning or purpose.

On the other hand, while it is not the state’s prerogative to tell a person what kind of values or beliefs she (or her therapist) should view as meaningful or valuable, it *is* the state’s responsibility to inform her what kind of mental health treatments are dangerous or ineffective and, perhaps, at times, to bar such treatments altogether where a warning fails to provide sufficient protection. Especially where the cost of therapeutic failure might be a deep and crippling depression or suicidal feelings, government has a right to insist that the therapy be competently-delivered and based in the right kind of expertise and evidence.⁸⁹

The challenge raised by psychotherapy for First Amendment law, then, is that the expressive activity that occurs in psychotherapy straddles both sides of the important constitutional boundary line that, as Steven Heyman puts it, divides the outward realm of the state from “the inward life of the individual.”⁹⁰ The central question is what kind of First Amendment regime can best reconcile these two conflicting demands—to keep government interference out of the way we shape our mental life

86. *Id.*

87. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 30 (1989); *see also* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 147-50 (1989).

88. IRVIN D. YALOM, THE GIFT OF THERAPY: AN OPEN LETTER TO A NEW GENERATION OF THERAPISTS AND THEIR PATIENTS 125 (2009).

89. *See, e.g.*, Klein v. Solomon, 713 A.2d 764, 766 (R.I. 1998).

90. Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutral Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 657 (2002).

with conversation and other discussion, while letting it into medical practices with significant stakes for our mental health? How, in other words, can First Amendment law simultaneously allow the state to regulate the aspects of psychotherapy that are its business, while keeping it out of those aspects that should remain a sphere of individual autonomy?

The case I discussed in the Introduction—*R.A.V.*—provides one doctrinal solution to his challenge.⁹¹ It provides a solution to the challenge of how courts should analyze situations where government regulates—and must regulate—an activity that falls on both sides of the boundary line between inward life of the individual and the outward realm of the state.⁹² *R.A.V.* essentially instructs courts to assure that when government does so regulate, it should stay (as much as possible) on its own side of this line.⁹³

More specifically, *R.A.V.* sets out a “choice of scrutiny” rule: It tells courts to apply a level of scrutiny that matches where officials are aiming their regulatory power.⁹⁴ It does so against the background of a more extensive doctrinal framework for applying different kinds of judicial scrutiny. When a government restriction is one that intrudes into a sphere of human life that the Constitution reserves for individual autonomy, courts typically begin with the presumption that such government intrusion is unconstitutional.⁹⁵ They then abandon this presumption (and uphold the government restriction) only in the rare circumstance where the government can overcome strict scrutiny. That is, government must show that it is acting to achieve a “compelling government interest” and that its measure is absolutely necessary to achieve that interest.⁹⁶ For example, courts apply such strict scrutiny to—and almost always strike down—laws that burden speech on the basis of its viewpoint or topic.⁹⁷ By contrast, where government is acting in a sphere in which state power is typically acceptable, then *any* legitimate goal will be sufficient (even if it is far less important than a compelling interest) and *any* means for achieving that goal will be

91. See *supra* text accompanying notes 54-67.

92. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384-90 (1992).

93. See *id.*

94. See *id.*

95. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812-13, 816-17 (2000); *R.A.V.*, 505 U.S. at 382.

96. See *Playboy*, 529 U.S. at 813 (noting that content-based restrictions on speech are generally subject to strict scrutiny, which requires that the regulation be “narrowly tailored to promote a compelling Government interest” and “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative”).

97. See *id.*; *R.A.V.*, 505 U.S. at 382, 391; *Startzell v. City of Philadelphia*, 533 F.3d 183, 193 (3d Cir. 2008); see also PAUL HOROWITZ, *FIRST AMENDMENT INSTITUTIONS* 32-33 (2013) (pointing to “content neutrality” as the central focus of First Amendment doctrine).

permissible (so long as they are rational).⁹⁸ If government regulates commercial interactions, for example, courts will almost always find such a measure constitutional unless the government lacks any “rational basis” for its action.⁹⁹

Of course, this line between the realm of strict scrutiny (where the government generally cannot regulate) and the realm of rational basis (where it can usually regulate freely) is not determinative when the activity regulated by government is, like psychotherapy, an activity that extends across both realms. Talk therapy, moreover, is not the only kind of speech that cuts across this boundary line. As the Court pointed out in *R.A.V.*, the same problem arises whenever the government makes laws restricting types of speech that raise certain types of harms: Certain kinds of speech receive less than full First Amendment protection because they do not simply convey ideas or feelings—they *also* (in doing so) create certain kinds of risks or harms.¹⁰⁰ Fighting words, for example, predictably generate physical violence.¹⁰¹ Libel damages individuals’ reputations, and can make it difficult for them to obtain a loan, or a job, or some other benefit.¹⁰² Advertising not only conveys messages about particular products or services, it also provides individuals with a foundation for making crucial decisions, for example, about what kind of a car will provide them and their families with safe transportation, or what kind of food products will further their health rather than harming it.¹⁰³ Such speech, in other words, has important and sometimes immediate effects not just on the ideas people choose to believe, but also on individuals’ physical or financial welfare, or (in the case of violent threats) their ability to function free of crippling fear. It thus affects not only the internal realm of ideas but, in John Locke’s words, the realm of “life, liberty, health, and indolency of body, and the

98. See, e.g., *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 981-82 (N.D. Cal. 2012) (“Under the rational basis review, a law must be rationally related to the furtherance of a legitimate governmental interest.”).

99. See *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1, 9 (1st Cir. 2012) (“[R]ational basis review [is] conventionally applied in routine matters of commercial, tax and like regulation.”).

100. See *R.A.V.*, 505 U.S. at 385-86.

101. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982) (stating that fighting words are unprotected because they “provoke immediate violence”); *Cannon v. City and County of Denver*, 998 F.2d 867, 872 (10th Cir. 1993) (noting the “state interest” in restricting fighting words is “the avoidance of violence and breach of the peace which may be threatened by the use of” such words).

102. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) (finding that the First Amendment should allow states to “retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual”).

103. See O. Lou Reed, *Nonspeechlike Advertising and the First Amendment: A Refinement and Application of Nonverbal Communication and the Freedom of Speech*, 1994 WIS. L. REV. 1025, 1031 (noting the possibility that certain advertising can “lead[] to addiction, disease, and death, with significant societal consequences”).

possession of outward things.”¹⁰⁴ The problem is that this gives government the opportunity to *pretend* it is protecting individuals’ against health risks or fraud, when it is really shielding them from the ideas or messages that the government (or those whom it favors) simply opposes. *R.A.V.* thus instructs courts to look carefully at the government interest underlying the law, and to set the level of scrutiny accordingly.¹⁰⁵

Consider how this framework guided the Court in *R.A.V.* itself: A group of teenagers had burned a cross outside the home of an African-American family and were subsequently arrested for violating a St. Paul ordinance that made it a crime to burn a cross, display a swastika, or otherwise use symbols or language “which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”¹⁰⁶ The Court assumed (in accordance with the decision it was reviewing) that this ordinance criminalized only a kind of speech it called “fighting words”¹⁰⁷—words which “by their very utterance inflict injury or tend to incite an immediate breach of the peace.”¹⁰⁸ Because such expression predictably triggers violence, it is—despite its expressive qualities—very much the government’s business and thus “in the outward realm of the state.”¹⁰⁹ Government may normally have no business telling us what to believe or say, but it does have a responsibility to protect individuals from violence and this may require it to regulate expression that predictably (and intentionally) generates such violence. Thus, in 1942, the Court decided that, unlike most of what we say or write, fighting words are a fair target for government restriction,¹¹⁰ and, as it later made clear, can thus be restricted any time government has a rational basis for doing so.¹¹¹

Still, said the Court in *R.A.V.*, the leeway that government receives to regulate such violence-generating speech is a kind of limited license.¹¹² It exists *only* for the limited purpose of dealing with fighting words’ likelihood of generating violence.¹¹³ If, said the Court, officials

104. LOCKE, *supra* note 83, at 3.

105. *R.A.V.*, 505 U.S. at 384-90.

106. *Id.* at 380 (quoting ST. PAUL, MINN. LEGIS. CODE § 292 (1990)).

107. *Id.* at 381.

108. *Id.* at 413 (White, J., concurring) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

109. See Heyman, *supra* note 90, at 657.

110. *Chaplinsky*, 315 U.S. at 572-74.

111. As Justice White’s concurrence in *R.A.V.* pointed out, even though fighting words generally receive no First Amendment protection, the Equal Protection Clause of the Constitution nonetheless requires the government have a rational basis to punish an individual who uses them. *R.A.V.*, 505 U.S. at 406 (White, J., concurring) (noting that “the Equal Protection Clause requires that the regulation of unprotected speech be rationally related to a legitimate government interest”).

112. *Id.* at 391-92 (majority opinion).

113. *Id.* at 391.

censor these words not to prevent violence, but rather to censor ideas the government finds erroneous or objectionable, such ideological suppression brings government into the realm of verbal conduct reserved for the autonomy of self¹¹⁴—and thus into the realm where government is subject to strict scrutiny. In other words, as the Court explained in *R.A.V.*, “a particular instance of speech can be proscribable on the basis of one feature . . . but not on the basis of another.”¹¹⁵ And on the account I am giving here, the proscribable feature of the speech is some aspect of it that places it in the realm of the state—its direct effect, for example, on physical safety.

This aspect of First Amendment doctrine has not played a significant role in the Court’s case law on professional speech regulation. But it was a key part of the Third Circuit’s analysis in *King*.¹¹⁶ Just as the government is allowed more leeway than the First Amendment normally allows to restrict fighting words in order to deal with their violent effects, the government is allowed more speech restricting power than that which it usually receives when it protects the important health and safety interests at stake in professional speech.¹¹⁷ But the Third Circuit was not willing to allow it such leeway until it first confirmed that the New Jersey law was aimed at the part of talk therapy that made it proscribable—namely, the aspect of talk therapy that raised possible health or financial harms for a therapy client.¹¹⁸ The government is left with leeway to restrict professional speech, including talk therapy, not just for any government purpose it deems important, but rather to further the *specific purpose* of “protecting [citizens] from ineffective and/or harmful professional services.”¹¹⁹ That, found the Third Circuit, was precisely the purpose that New Jersey had when it sought to shield minors from the potential harms of SOCE.¹²⁰

To be sure, in order for courts to apply *R.A.V.*, courts need to be able to tell what is “proscribable” in a category of speech such as true threats or libel. They need to be able to tell the part of the speech content that *is* the business of the state and thus fair game for regulation or restriction. In fact, this is especially important because government—according to *R.A.V.*—may selectively punish only a subset of fighting words, or of libel, or of obscenity, so long as such selectivity is based upon “the very reason the entire class of speech at issue is

114. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *R.A.V.*, 505 U.S. at 391-93.

115. *R.A.V.*, 505 U.S. at 385.

116. *See King v. Governor of N.J.*, 767 F.3d 216, 236-37 (2014).

117. *Id.* at 229.

118. *Id.* at 237.

119. *Id.*

120. *Id.* at 237-38.

proscribable.”¹²¹ For example, a state can decide that (given its limited resources) it will punish only the most obscene instances of obscenity—those which “involve[] the most lascivious displays of sexual activity.”¹²² But it may not selectively punish certain instances of obscenity on some other basis, such as targeting “only that obscenity which includes offensive political messages.”¹²³

At times, perhaps, it will be a simple matter for courts to identify the “reason the entire class of speech at issue is proscribable,” and then use that to differentiate between permissible and impermissible selectivity in speech restrictions. The reason true threats are excluded from First Amendment coverage, for example, is because the state needs to be left with power to “protec[t] individuals from the fear of violence, from the disruption that fear engenders.”¹²⁴ Where a true threat restriction is based on offering such protection against violence, it is legitimate. Where it instead targets true threats for some other reasons, such as silencing policy stances contained within some of them, then it is illegitimate. In other cases, however, it is less clear. As I have argued before, for example, the Justices appear to disagree about what qualities of commercial speech make it more proscribable than other speech, with some Justices emphasizing the extent that commercial speech lacks the value one finds in political speech, and others emphasizing “the risk of fraud” it raises, as well as other specific harms that flow from it.¹²⁵

If, as I said above and the Third Circuit appeared to assume in *King*, talk therapy restrictions will generally only be permissible (or given a pass from strict scrutiny) when they target the “proscribable” component of talk therapy, then courts have to be able to identify what it is that makes it—or other occupational speech—proscribable. I argue below that it lies in the extent to which clients justifiably rely, and often have no choice but to rely, on the professional experts’ judgments: Laws on professional licensing or malpractice must be able to limit (to some extent) what professionals say to their clients where doing so is necessary to protect the clients whose health and safety depend on the accuracy of that advice,¹²⁶ or where clients rely on a professional’s continued adherence to certain recognized rules or norms of their profession, such as commitments to confidentiality. Where the state instead tries to restrict a psychotherapist or other professional’s speech

121. *R.A.V.*, 505 U.S. at 388.

122. *Id.*

123. *Id.*

124. *Id.*

125. Marc Jonathan Blitz, *The Pandora’s Box of 21st Century Commercial Speech Doctrine: Sorrell, R.A.V., and Purpose-Constrained Scrutiny*, 19 NEXUS: CHAPMAN’S J.L. & POL’Y 19, 45-48 (2013-2014).

126. *See infra* Part IV.

because of some other kind of disagreement with its content, its restriction will, as a general matter, merit strict scrutiny.

*B. Intermediate Scrutiny as an Alternative for—or Supplement to—
Choice of Scrutiny*

There are at least three additional important questions that the Third Circuit did not address, but might be important in future cases on psychotherapy regulation (and perhaps also, other regulation of professional speech). One is precisely how *R.A.V.*'s choice of scrutiny rules fit together with the Court's application of what is called intermediate scrutiny. Psychotherapy, as noted before, falls into a gray zone of sorts—a realm of activity that deals both with individuals' private and internal beliefs (where the state has no business telling them what to do) and their health and financial well-being (that the state is charged with protecting). In other cases where courts encounter such a gray zone, they often sidestep the difficult challenge integral to applying *R.A.V.*'s framework: they avoid having to say whether the government is focused on its own business, or is interfering with individual autonomy. They instead apply a level of scrutiny that lies somewhere in between the two extremes. This intermediate level of scrutiny is not met when government pursues *any* legitimate goal. Rather, government's goal must be a "substantial" or "important" one, because more minor government interests do not justify the risks to liberty that arise when government regulates activity where our autonomy is very much at stake.¹²⁷ But, given that such substantial interests may often need protection, courts will not insist they rise to the level of a compelling interest—since such a compelling interest requirement does not merely make government regulation more difficult, it makes it virtually impossible. Likewise, the means the government chooses must have more than a rational relationship to its goals.¹²⁸ They need not be as precisely targeted to these goals as strict scrutiny demands, but they should be narrowly-focused enough not to do "substantially more" damage to expressive freedom than is necessary.¹²⁹

Applying this intermediate level of scrutiny, one might argue, spares courts the need to engage in a difficult inquiry about the government interests or motives underlying a speech restriction. Indeed, perhaps for this reason, First Amendment law applies intermediate scrutiny in a number of different circumstances where government

127. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 186-87 (1997); *King*, 767 F.3d at 237.

128. See *King*, 767 F.3d at 237; see also *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (noting that laws subject to strict scrutiny because they regulate content are "presumed invalid").

129. See *Ashcroft*, 542 U.S. at 665-66.

operates right at the boundary line between regulable conduct and protected expression. In symbolic conduct, for example, a message or other expressive content is conveyed not through written or spoken words, but rather through conduct, such as burning a flag or a draft card.¹³⁰ The non-speech part of this conduct (burning something), is conduct the state can typically regulate, subject only to rational basis review.¹³¹ The communicative part of it (the message of protest), the state cannot restrict under the First Amendment, unless it meets strict scrutiny. The framework that the Court developed in *United States v. O'Brien* thus splits the difference and lets the state regulate it subject to intermediate scrutiny.¹³² Government may prohibit the burning of draft cards, for example, if its action is otherwise constitutional and is not suppressing speech. But even then, it can only do so if it pursues the kind of end required under intermediate scrutiny (a significant one) with the types of means allowed under such scrutiny (means which avoid restricting substantially more speech than necessary).¹³³ A similar test applies when government regulates the “time, place, and manner” of speech instead of its content. Assuming the government’s claim of content-neutrality is justified, it may regulate the time, place, and manner of speech whenever this restriction is “narrowly tailored to a significant government interest” and “leave[s] open[] ample alternative channels of communication” (an additional factor not in *O'Brien*’s version of intermediate scrutiny).¹³⁴

Intermediate scrutiny also applies in one common circumstance when government is permitted by the Court to regulate speech on the basis of its content: In commercial interactions, the state is barred from simply targeting commercial messages it dislikes (because it is up to each seller what to say about a product and each buyer how to respond). But it may nonetheless regulate such commercial communication because, as the Court said in *Edenfield v. Fane*, “[c]ommercial speech . . . is ‘linked inextricably’ with the commercial arrangement that it proposes.”¹³⁵ As in symbolic conduct restrictions, the government’s goal must be substantial or significant, and its means of achieving this

130. *United States v. O'Brien*, 391 U.S. 367, 369, 370, 376-77 (1968).

131. *Id.* at 375-77.

132. *Id.* at 377.

133. *Id.*

134. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that “time, place, and manner” regulations are constitutional when they “are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information”). To be sure, applying intermediate scrutiny may well leave considerable uncertainty, since courts can (and have) varied in how skeptically they scrutinize government’s claim that a particular interest is substantial, or that the means of achieving it are narrowly-tailored enough.

135. *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)).

goal must not restrict substantially more speech than necessary.¹³⁶ These means must also “directly advance” the government’s goal. The government does, however, get substantially more leeway to regulate advertising that is false or misleading, or advocates illegal conduct; in that case, it is subject only to rational basis.¹³⁷

Why not, then, follow this example in occupational speech cases? Indeed, the Third Circuit already has. In addition to applying *R.A.V.*’s choice of scrutiny rule, *King* also applied to occupational speech restriction—and particularly to restriction of psychotherapy—the same form of intermediate scrutiny that the Court applies in commercial speech cases.¹³⁸ Applying this test to New Jersey’s restriction on providing SOCE therapy to minors, the Third Circuit found that the ban was aimed at a substantial government interest (protecting the mental health of minors), directly advanced that interest (by barring a therapy which the vast majority of psychologists view as a threat to minors’ mental health, without offering any benefits), and did so without causing substantially more damage than necessary to expressive freedom.¹³⁹

To be sure, the Third Circuit did not apply intermediate scrutiny *instead* of *R.A.V.*’s choice of scrutiny rule. Rather, it *combined* these two parts of First Amendment doctrine. It applied intermediate scrutiny to New Jersey’s restriction on talk therapy, but did so only *after* first assuring itself—as *R.A.V.* requires—that New Jersey’s restriction had a purpose that justified state restriction of occupational speech—namely, a *specific purpose* of “protecting . . . citizens from ineffective or harmful professional services.”¹⁴⁰ And, this makes sense. If the Third Circuit were instead willing to allow government to restrict psychotherapy on the basis of *any* substantial government purpose, this would produce intuitively strange results. Imagine, for example, that, in the interest of conserving resources, New Jersey compelled therapists to encourage their clients to carpool or otherwise reduce their use of carbon fuels. Such an interest in conserving energy would likely count as a substantial government interest of the kind needed to satisfy intermediate scrutiny. In fact, the Supreme Court has classified it as such in a leading commercial speech case.¹⁴¹ But, it is has little to do with the function of psychotherapy. Any attempt by government to use its speech-compelling power to graft an energy conservation message into therapy should thus merit strict rather than intermediate scrutiny under an *R.A.V.* analysis. In

136. *Id.*

137. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563-64 (1980).

138. *King v. Governor of N.J.*, 767 F.3d 216, 233-34, 237 (3d Cir. 2014).

139. *Id.* at 237-40.

140. *Id.* at 235.

141. *Cent. Hudson*, 447 U.S. at 568.

other words, the state should be authorized to interfere in our conversations with therapists not only when it has a *substantial* interest, but also an interest of the *right kind*—namely, the kind of health- or consumer-protection interest that justifies the state’s entry into what would otherwise be an inappropriate setting for its regulatory power.

In fact, *King* is hardly the only case where one finds such a two-step inquiry wherein a court first asks (as it does in *R.A.V.*) (1) whether the government has the right kind of goal or interest, and (2) then asks, in applying intermediate scrutiny, whether this goal or interest is substantial or significant enough, and was pursued in a narrowly tailored fashion to advance the goal or interest without doing unnecessary damage to expressive freedom. The same two-step inquiry is built into the black letter law tests that the Court has crafted for evaluating the constitutionality of content-neutral speech regulation.¹⁴² The four-prong test that the Supreme Court set out for analyzing symbolic conduct in *O’Brien* is, as I have noted above, generally characterized as a form of intermediate scrutiny. But it has a *R.A.V.*-style choice of scrutiny rule built into it which effectively instructs a court to ask whether strict scrutiny should apply instead.¹⁴³ Normally, government need not overcome the almost insuperable barrier of strict scrutiny to regulate symbolic conduct. It need only overcome the lower hurdle of intermediate scrutiny. But the government gets the benefit of this more generous intermediate scrutiny standard, under *O’Brien*, only if its interest is “unrelated to the suppression of free expression.”¹⁴⁴ If the government’s interest in punishing a draft card burning is not to prevent the protester’s threat to safety or destruction of property, but to silence him, then it will be subject to strict scrutiny, just as when its purpose in punishing fighting words is not to prevent violence, but to empty discussion of certain ideas.¹⁴⁵

A choice of scrutiny rule is likewise built into the Court’s test for time, place, and manner regulation: When the state regulates where, when, or how speech can take place, it is normally subject to

142. *Int’l Women’s Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 361, 369 (5th Cir. 2010).

143. *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968). In fact, the *R.A.V.* majority took note of this component content-neutral speech restriction itself—and noted that the choice of scrutiny rule was analogous to it. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) (finding that “nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses”—and indicating the fighting word likewise cannot be restricted on the basis of non-proscribable ideas in it).

144. *See O’Brien*, 391 U.S. at 377.

145. *See Texas v. Johnson*, 491 U.S. 397, 399-400, 403, 410 (1989) (applying strict rather than intermediate scrutiny to a Texas law punishing the burning of an American flag because it suppressed symbolic expression on the basis of the ideas it expressed and was thus “outside of *O’Brien*’s test”).

intermediate rather than strict scrutiny. But that is *only* true where its time, place, and manner regulation is genuinely content-neutral.¹⁴⁶ Where it instead aims at the content of speech, rather than something other than content (such as decibel level), then it is subject to strict scrutiny.¹⁴⁷

Intermediate scrutiny and *R.A.V.*'s choice of scrutiny rule thus, together, provided the Third Circuit—and can provide other courts—with a First Amendment framework it could use to meet the challenge of distinguishing legitimate regulation of psychotherapy from censorship in “the guise of professional regulation.”¹⁴⁸ A legitimate regulation of psychotherapy must have the kind of purpose or interest necessary to justify such regulation under *R.A.V.* (a purpose or interest in protecting against “ineffective or harmful” therapy) and would be narrowly tailored to achieving an instance of such a purpose that was “substantial” and not insignificant.¹⁴⁹

C. The Alternative to Strict Scrutiny: Intermediate Scrutiny or Rational Basis?

There are two other important questions that the Third Circuit did not address, but which will likely be important in future cases on psychotherapy regulation or other regulation of occupational speech—at least if such cases follow the Third Circuit's lead (as this Article argues they should) and apply *R.A.V.*

One question is what kind of options should exist in the choice of scrutiny that *R.A.V.* instructs courts to make. In *King*, the Third Circuit decided that such a choice was a choice between intermediate and strict scrutiny: When government's purpose in regulating talk therapy was simply to impose on such conversations the ideology of its choice, it would be subject to strict scrutiny (and likely be held unconstitutional).¹⁵⁰ When government's purpose is instead to “protect[] its citizens from ineffective or harmful professional services,”¹⁵¹ it is subject to intermediate scrutiny.¹⁵² This kind of two-track option, between strict and intermediate scrutiny, is certainly one choice of scrutiny scenario that arises in the First Amendment context. As mentioned above, this choice is built into the black letter tests the court

146. See *Int'l Women's Day*, 619 F.3d at 354, 359, 369 (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (holding that time, place, and manner permitting requirements are constitutional, but if content-based, they are subject to strict scrutiny)).

147. *Id.* at 354.

148. *King v. Governor of N.J.*, 767 F.3d 216, 236-37 (3d Cir. 2014).

149. *Id.* at 237.

150. *Id.* at 235.

151. *Id.*

152. *Id.* at 234-35 (applying intermediate scrutiny).

applies to speech restrictions that are purportedly content-neutral.¹⁵³

However, in other cases, the choice of scrutiny that *R.A.V.* asks courts to make in First Amendment cases is not a choice between strict scrutiny and intermediate scrutiny, but rather between strict scrutiny and rational basis. In other words, where government's purposes in speech regulation are of the right kind, the court's skepticism toward that regulation drops not merely to an intermediate level—where the government measure might survive a somewhat skeptical judicial evaluation—but to minimal scrutiny or rational basis, where the government's regulation is virtually guaranteed to be found constitutional. Consider, for example, how the Court analyzes a situation where government targets speech that constitutes a “true threat,” that is a “statement[] where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹⁵⁴ So long as the government's interest in targeting such a true threat is a interest of the right kind—so long as the government is restricting such a threat in order to prevent the violent intimidation inherent in it¹⁵⁵—then its restriction will be constitutional as long as it has a rational basis.¹⁵⁶ The government will not need to show—as it would under intermediate scrutiny—that its ban on true threats is narrowly tailored to the achievement of a substantial or significant interest.¹⁵⁷ This may be, in part, because the Court treats the interest in preventing such intimidation as inherently significant. But, in any event, it does not require government to make the showings normally required under intermediate scrutiny.

The two possible levels of scrutiny in this case, therefore, are rational basis review (for situations where the government is genuinely focused on protecting against intimidation) and strict scrutiny (for situations where the government is using its power of restricting true threats as a pretext for ideological suppression of particular views). A court, in other words, will either adopt an extraordinarily skeptical view about the constitutionality of the government's speech measure or—where the government has the right kind of purpose—a highly-deferential stance. There is no middle-ground level of intermediate scrutiny needed here.

153. See *supra* Part II.B.

154. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

155. *Id.* at 359-60 (stating that true threats laws are permissible because the state's interest in protecting “prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders’”).

156. See Christopher P. Guzelian, *False Speech: Quagmire?*, 51 SAN DIEGO L. REV. 19, 55 (2014) (noting that unprotected categories of speech can be punished if “the sanctioning law survives rational basis review”).

157. See *Black*, 538 U.S. at 358-60.

One might likewise argue that, when a government's professional regulation has the appropriate kind of purpose (as is demanded by *R.A.V.*) and can thus escape from the nearly-impossible challenge of having to satisfy strict scrutiny, professional regulators should then be subject only to rational basis. Indeed, one might argue that so long as government regulators of occupational speech can show—to the court's satisfaction—that they are *not* aiming at ideological suppression, then they need (and deserve) the extensive leeway and high-level of deference that comes with rational basis review. As Robert Post points out, a constitutional framework or theory that “immediately converts every effort to regulate professional practice into a constitutional question is surely suspect [since] professional practices are subject to many regulations, like ordinary malpractice law, that do not” raise First Amendment questions.¹⁵⁸ As the Ninth Circuit similarly emphasized in its analysis of psychotherapy in *Pickup*, “doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care.”¹⁵⁹ A framework that subjects most occupational speech to rational basis—except when there are “red flags” indicating that the professional regulation is really ideological suppression in disguise—might avoid destabilizing existing professional regulatory regimes.

However, there are at least some kinds of occupational speech regulations—and I will discuss them more specifically below¹⁶⁰—that should be subject to the tougher test of intermediate scrutiny, and I argue that restrictions of psychotherapy must often be among them. When *even a justifiable* restriction (that is, one aimed at protecting our health or other interests the government has responsibility for protecting) inevitably does collateral damage to core First Amendment interests - and might well do so in circumstances where government interests are not substantial enough to justify such damage - then courts should apply intermediate scrutiny to assure this damage is not significantly greater than it has to be. This, for example, is perhaps why courts apply intermediate scrutiny, and not rational basis, to content-neutral restrictions, such as laws designed to assure the free flow of traffic. A content-neutral requirement that protestors obtain a permit before using a park for a protest does not merit strict scrutiny, because it is not aimed at silencing the protest—rather, it is simply assuring that the park can also be used by other speakers (or visitors) for other purposes at other times.¹⁶¹ However, a regulation that limits these protestors' speech far

158. POST, *supra* note 63, at 51.

159. *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014).

160. See *infra* Parts III.A, IV.E.

161. See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294-99 (1984).

more than necessary is likely to do unnecessary damage to a core First Amendment interest (in this case, engaging in political speech) and should thus be subject to intermediate scrutiny.¹⁶² I will argue below that restrictions on psychotherapy should generally be subject to intermediate scrutiny for the same reason. Government restriction on what people can say to their therapists (and what their therapists can say to them) undercuts individuals' interests in forming their own beliefs and values free from government interference.¹⁶³

*D. Deference or Skepticism for Government's
Account of a Law's Purposes*

There is another question that this type of analysis raises: I said earlier that *R.A.V.*'s choice of scrutiny tells courts to apply a level of scrutiny that matches where officials are aiming their regulatory power.¹⁶⁴ But how is a court to tell where officials are aiming their power? Do they look solely at a statute's or regulation's text? Or can they engage in more probing inquiry of what motives caused the legislature to enact that text, or cause regulators to apply it in a certain manner?

The Court itself has long taken the position that the focus should be on a statute's text and design, and not on the unstated purposes that may have motivated its passage. In *O'Brien*, it insisted that when a government statute had a stated purpose unrelated to the suppression of free expression, the Court would likely take the government at its word: "It is a familiar principle of constitutional law," it said, "that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."¹⁶⁵ The Court added that "[i]nquiries into congressional motives or purposes are a hazardous matter."¹⁶⁶

That said, it is not clear that this entirely rules out a concern about Congress's underlying purposes. As Justice Kagan has argued, the distinction between an inquiry focused on statutory text (and operation) and one focused on purpose may not be as stark as it at first appears. She argues that "notwithstanding the Court's protestations in *O'Brien*," the Court's First Amendment doctrine is often focused on "the discovery of improper governmental motives"¹⁶⁷—and that this focus best explains its reasoning in *R.A.V.*¹⁶⁸ But, she argues, courts generally "discover

162. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

163. See *infra* Parts III.A, IV.E.

164. See text accompanying note 94.

165. *O'Brien*, 391 U.S. at 383.

166. *Id.*

167. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

168. *Id.* at 422-23.

improper purpose directly”: they use “prox[ies]” that involve applying certain doctrinal tests (like a strong presumption against content discrimination) to a statute’s text and design.¹⁶⁹

In any event, whether a court looks only at statutory text and operation, or also tries to ferret out hidden purposes, there is also a question of how readily should courts defer to the government’s characterization of the interests that underlie the text (or that motivated it to enact that text). For example, when New Jersey, California or another state assures a court that, its ban on a certain kind of psychotherapy has to do with its harm it causes to clients relying upon it, and not simply dislike for the ideas conveyed by it, how skeptical should courts be of such government claims? Should courts strongly defer the legislature’s claims that its targeting of a certain type of therapy has a valid basis? Or should it instead give legislators’ explanations a hard look and perhaps decide that legislators’ claims that they are tackling a serious health or safety risk may just be a pretext for ideological suppression?

In *O’Brien*, the Court seemed quite deferential to the government’s insistence that a statute which penalized the burning of draft registration cards—and only draft registration cards—had a legitimate purpose. It showed such deference even though Congress enacted the statute realizing that the Vietnam War protesters were burning draft cards to express protest.

In its 2011 decision from *Sorrell v. IMS Health*, by contrast, the Court was far from willing to take the Vermont legislature’s claims of its statutory purpose at face value.¹⁷⁰ Vermont had barred pharmacies or data mining companies from selling or disclosing certain information to drug marketers.¹⁷¹ Although it claimed that this ban on sharing prescription information with drug companies was imposed to protect patient and doctor privacy, the Court found this explanation dubious.¹⁷² For one thing, Vermont had itself claimed—in the law’s text—that its purpose was not solely to protect patient and doctor privacy but also to counter “hasty and excessive reliance on brand-name drugs” instead of generic alternatives (the use of which would bring down overall healthcare costs).¹⁷³ For another, the law’s design seemed to undermine lawmakers’ claims that it was largely geared toward protecting privacy; although it kept sensitive medical information out of the hands of drug marketers, it left precisely the same sensitive medical information available to many others who might want to sift through it (academic researchers, for example). Its evident purpose—according to the Court—

169. *Id.* at 458.

170. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2662-65, 2672 (2011).

171. *Id.* at 2660-61.

172. *Id.* at 2659-61, 2669-70.

173. *Id.* at 2661, 2670.

was thus not to pass an even-handed data protection law, but rather to keep prescription data from being used in drug companies' marketing efforts.¹⁷⁴ As a consequence, the Court said the Vermont law merited "heightened scrutiny" and not the lower, intermediate level of scrutiny that applies to commercial regulations that target "a risk of fraud," or have some other appropriate basis for regulating commercial speech.¹⁷⁵

The Court, to be sure, avoided an intensive search for unstated motives. As in *O'Brien*, it focused on the statute's text and operation. It examined what kind of speech about pharmaceuticals it burdened and what kind of speech it left unrestricted. But, in doing so, it was far from willing to simply accept Vermont's claim that the speech restriction furthered a valid privacy protection interest.

It is not entirely clear which of these possible stances on deference the Third Circuit viewed itself as taking when applying *R.A.V.* On the one hand, it took little time to conclude that New Jersey's purpose was to protect minors from a serious danger in SOCE therapy—suggesting that it heavily deferred to New Jersey's insistence that its law was aimed at preventing mental health harm, not as using its coercive power to take sides (and force psychotherapists to take the state's side) in ideological debates.¹⁷⁶ On the other hand, there was evidence available to the court that seemed to corroborate New Jersey's claim that the mental health of minors was at stake: The psychological and medical organizations that New Jersey had relied upon, for example, had condemned SOCE therapy with unusual "urgency and solidarity," and the American Psychological Association ("APA") had cited evidence of potential harms.¹⁷⁷

In any event, should courts continue to apply *R.A.V.* to occupational speech going forward—and insist that government restriction of therapy be genuinely focused on protecting against "ineffective or harmful" therapy. They will have to decide how much skepticism they will bring to government's predictable assurances that its interests are of the right kind. And there are at least three principles suggested by *R.A.V.*, or the cases applying it, that can serve as starting points for guiding such an analysis.

First, courts should not be willing to set aside strict scrutiny at all unless it is clear that there is some kind of speech harm at stake—some kind of impact the speech has on the outward realm of the state that justifies state interference in speech of a kind normally unacceptable under the First Amendment.¹⁷⁸ In the case of commercial speech, for example, the Court has said this is a "risk of fraud" or some other harm

174. *Id.* at 2662-63, 2670-71.

175. *Id.* at 2667-68, 2672.

176. *King v. Governor of N.J.*, 767 F.3d 216, 221-22, 236-40 (3d Cir. 2014).

177. *Id.* at 238.

178. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

to consumers that the court has recognized as a basis for commercial speech regulation.¹⁷⁹ In the realm of occupational speech, I will argue below, it is the damage that can result when incompetence or dishonesty undermines the reliance that individuals place in their mental health treatment provider, or their doctor, lawyer, or accountant.¹⁸⁰ On the other hand, in some occupational speech relationships—for example, when individuals hire a graphic designer—such threats to health and safety are minimal.

Second, where reliance interests are at stake, courts should likely defer to professional regulations that are generated by institutions which they have good reason to believe understand and act in accordance with the relevant professional norms.¹⁸¹ For example, state legislatures typically authorize a Psychology Board to license practicing psychologists, and set forth standards of professional conduct that, among other things, often subject licensed psychologists to the APA's Code of Ethics.¹⁸² It would be odd for a professional board to be subject to a plausible First Amendment challenge if it sought to discipline a psychologist, for example, for treating a child without the consent of one of the parents, or for failing to provide "competent diagnosis, counseling, [or] treatment . . . in keeping with the usual and customary practice in this State."¹⁸³ Thus, the typical conduct of such a board in regulating the speech of professionals subject to it should be strongly presumed to be consistent with the purpose of safeguarding the client's interests at stake in a professional regulation. Paul Horwitz suggests that the actions that a profession takes with respect to its own members should—where they involve speech restriction—typically be viewed through the lens of what he calls "the institutional First Amendment."¹⁸⁴ In his view, when certain institutions play a key role in the ecology of public discourse—institutions such as newspapers, libraries, universities, and churches—they should receive significant deference from courts with respect to the speech that occurs within their boundaries.¹⁸⁵ Professional speech, suggests Horwitz, also likely fits this description. This should probably matter a great deal to how courts apply *R.A.V.* in assessing whether a professional regulation serves the health, safety, or other interest that makes such a restriction of speech content permissible under the First Amendment.¹⁸⁶ In other words,

179. *Id.* at 388-89.

180. *See infra* Parts III-IV.

181. *E.g.*, *King v. Governor of N.J.*, 767 F.3d 216, 238 (3d Cir. 2014); *see R.A.V.*, 505 U.S. at 387-89.

182. *See, e.g.*, N.C. GEN. STAT. § 90-270.15 (2014).

183. *Id.* § 90-270.15(15).

184. HORWITZ, *supra* note 97, at 125-26, 248-49.

185. *Id.*

186. *Id.* at 248-49.

where government regulations of professional speech are promulgated by professional communities themselves, this should provide a safe harbor of a sort. Such a safe harbor makes less sense, however, if a professional body's judgments—rather than representing a consensus within the profession—represents one view among many conflicting views held by the relevant type of expert.

Third, even where a safe harbor does apply, it should only provide a presumption of a legitimate purpose. This presumption should be set aside when there exist what Mark and Nat Joseph Stern describe, in the commercial speech context, as “facial indicia of aims” other than protecting consumer or client interests—indicia that “official suppression of ideas is afoot.”¹⁸⁷ One such indication is discussed by the Court in *Sorrell*: When a regulation of commercial speech seems strangely selective—when it targets not *all* speech that raises a risk of privacy harm, for example, but *only* that portion of it that takes a disfavored position in a public debate—there is reason to suspect that government is using its commercial speech power not to protect consumers but rather to silence “disfavored speakers” in order to move public discussion in the state’s “preferred direction.”¹⁸⁸ The same kind of problem may arise in psychotherapy: Imagine that a state bars psychotherapists from using a controversial therapy technique unless it has been shown (by certain kinds of studies) to be effective. But the same state makes no effort to ban other less controversial therapy techniques for which there is a similar lack of empirical support. In such a situation, the state should at least be expected by courts to explain why it is targeting only talk therapy with a certain content.

III. ANALOGIZING TALK THERAPY TO MEDICAL TREATMENT

There is, to be sure, a simpler way for courts to reconcile the two seemingly conflicting imperatives in therapy regulation that I discussed earlier—(1) honoring the First Amendment requirement of keeping the government *out* of the way we shape our psyches with words, while (2) letting it *into* medical decisions that carry significant health risks—that is, to make one side of this tension disappear. In a sense, this is what the Ninth Circuit did in *Pickup*. We do not need to worry, it argued, that in restricting what is said in talk therapy, government will be unconstitutionally restricting First Amendment speech—because what is said in talk therapy simply is not “speech” of the kind the First Amendment protects. It is professional “conduct.”¹⁸⁹ The words spoken

187. Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1188 (2013).

188. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2662-63 (2011).

189. *Pickup v. Brown*, 740 F.3d 1208, 1223-32 (9th Cir. 2014).

in a therapist's office are simply vehicles for medical treatment, not for the exchange of ideas. So like any other form of professional conduct, it can be restricted by the state as long as the restriction can overcome the very low hurdle of rational basis review—that is, as long as it was rationally related to a legitimate government objective.¹⁹⁰ Intermediate scrutiny of the kind later applied by the Third Circuit has no place. Nor, the Ninth Circuit seemed to assume, is there any need to check—before applying rational basis rather than heightened scrutiny—whether the government's interests or purposes in regulating therapy are interests or purposes of the right kind—as *R.A.V.* requires when the government tackles certain kinds of speech harms.¹⁹¹ The harms regulated by the government restrictions of talk therapy are not, in the Ninth Circuit's view, harms that arise from, or are related to, communication of ideas. They are harms threatened by a certain kind of professional conduct, namely, fraudulent or incompetent medical treatment—and so, rational basis is the appropriate level of review regardless of the government's purposes or interests.¹⁹² It is thus helpful to look more closely at the Ninth Circuit's position to see if it presents a plausible alternative path.

A. Psychotherapy Licensing and Sexual Orientation Change Efforts

In the past two years, the most prominent decisions on psychotherapy have dealt with SOCE.¹⁹³ The Ninth Circuit's decision in *Pickup*, for example, addressed this question. But the Ninth Circuit first asked if talk therapy was speech over a decade earlier—in a 2000 case on California's licensing requirements for those who wished to practice “psychology” and hold themselves out as “psychologists.”¹⁹⁴ The case dealt with *California's Business and Professions Code* provision specifying that any person can qualify for a license in California only if they have obtained “a doctorate, or a degree deemed equivalent, in psychology or a related field such as educational psychology.”¹⁹⁵ The Code also required all applicants to have “at least two years of supervised professional experience under the direction of a licensed psychologist.”¹⁹⁶ In *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* (“NAAP”), three individuals challenged the constitutionality of these requirements.¹⁹⁷

190. *Id.* at 1231.

191. *Id.* at 1225-26.

192. *Id.* at 1228-31.

193. *Id.* at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc).

194. *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1046-47 (9th Cir. 2000).

195. *Id.* at 1047.

196. *Id.*

197. *Id.* at 1046.

Two had only master's degrees in psychology, along with other certificates or clinical training experiences of other kinds.¹⁹⁸ Another was a physician who had obtained psychological training at an institute that did not award doctorate degrees.¹⁹⁹ They were joined in this challenge by the National Association for the Advancement of Psychoanalysis ("NAAP"), a professional organization which claimed that California's licensing laws unreasonably burdened its members' opportunity to offer, and clients' right to receive, psychotherapy.²⁰⁰

The Ninth Circuit had little difficulty in *NAAP* finding the California licensing requirement constitutional.²⁰¹ Before turning to the plaintiffs' free speech challenge to the licensing requirements, it addressed a different constitutional argument of the plaintiffs based on the Fourteenth Amendment's guarantee that individuals will not be deprived of liberty without "due process of law."²⁰² This clause bars the government from imposing certain kinds of restrictions on individual autonomy. Officials may not interfere in certain "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."²⁰³ For example, as the Court stated in *Griswold v. Connecticut*, the state generally does not belong in the "sacred precincts of marital bedrooms."²⁰⁴ Such a sphere of "intimate conduct," as the Court later said in *Lawrence v. Texas*, is one of the spheres where the Constitution prevents the state from being a "dominant presence."²⁰⁵

If the state generally has little say in what citizens may do in their bedrooms, why should it have substantially more say over how they choose to shape their thoughts and feelings?²⁰⁶ The Ninth Circuit's reply in *NAAP* was brief. The psychotherapist's professional relationship with her client, it said, is quite different from the "close knit" relationships sheltered by the Fourteenth Amendment's Due Process Clause.²⁰⁷ It is not akin to marriage or another family relationship that the state has no role in micromanaging. It is a business and professional relationship of

198. *Id.* at 1048.

199. *Id.*

200. *Id.*

201. *Id.* at 1056.

202. *Id.* at 1049-50.

203. *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003).

204. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

205. *Lawrence*, 539 U.S. at 562.

206. *See Jaffee v. Redmond*, 518 U.S. 1, 10 (1996) (recognizing a federal psychotherapist-patient privilege and observing that "[e]ffective psychotherapy . . . depends on an atmosphere of confidence and trust," allowing for "frank and complete disclosure of facts" about "sensitive . . . problems").

207. *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000).

the kind states have long had authority to closely regulate.²⁰⁸

Although my focus here is on First Amendment free speech rights rather than Fourteenth Amendment due process rights, it is worth briefly noting that this answer is at best incomplete. Our due process rights not only protect our entry into intimate *relationships*—they protect our right to engage in “certain intimate *conduct*.”²⁰⁹ This intimate conduct often occurs in close-knit relationships. But at least some of it may occur in (and require access to) professional relationships with people outside of one’s circle of friends and families. The constitutional right to terminate a pregnancy, as one district court opinion recently stressed, cannot be exercised “without a medical professional.”²¹⁰ In this respect, due process rights mirror rights in other constitutional amendments. In the same opinion, the court noted that “[t]he right to keep and bear arms means little if there is no one from whom to acquire the handgun or ammunition.”²¹¹ The right to exercise free speech on the Internet would likely suffer significantly if government could restrict what services customers can purchase from web designers or blogging platforms.²¹² A constitutional liberty thus does not vanish as soon as the person exercising it recruits the help of a business or professional. The Court has said that the Due Process Clause and other provisions of the Bill of Rights secure, against government interference, a space for autonomy of the self.²¹³ If this autonomy of self includes a right to understand or alter that self, our exercise of such conduct may be shielded against state interference even when we do so with the help of a psychologist rather than relying on private reflection or on conversations with friends and family. This suggests that *NAAP*’s due process analysis, which the Ninth Circuit cited and endorsed again in 2013, is at the very least insufficient.

The other constitutional challenge raised by the plaintiffs to California’s licensing requirement was a First Amendment challenge—and this one gave the Ninth Circuit more pause in upholding California’s law.²¹⁴ On the one hand, it said, although talk therapy involves speech, this does not mean that government restriction of it will typically raise a First Amendment problem.²¹⁵ Rather, it observed that one can find

208. *Id.* at 1050-52.

209. *See Lawrence*, 539 U.S. at 562 (emphasis added).

210. *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1379 (M.D. Ala. 2014).

211. *Id.*

212. *See* Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297 (2014) (noting that government can exercise control over First Amendment speech by controlling “web-hosting services” and numerous other aspects of the “digital infrastructure that people use to communicate”).

213. *Lawrence*, 539 U.S. at 562.

214. *Nat’l Ass’n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000).

215. *Id.* at 1054.

“some kernel of expression in almost every activity a person undertakes,”²¹⁶ but that cannot plausibly mean that a person moves through life with a First Amendment shield around her every action.²¹⁷ Where, as in talk therapy, speech is a vehicle not for communication of ideas, but rather for the “treatment of emotional suffering and depression,” the First Amendment does not place it beyond the state’s regulatory power.²¹⁸

On the other hand, the Ninth Circuit also noted, communications between a psychotherapist and a client *do* receive “*some* constitutional protection” under the First Amendment.²¹⁹ The court was not entirely clear about the nature of such free speech protection for therapy. But it seemed to suggest that government regulators might well run afoul of First Amendment requirements when they go beyond establishing safety-minded entry and ethics requirements for therapists, and attempt to micromanage the content of therapists’ conversations with clients.²²⁰ California’s licensing requirements, stressed the court, “do not dictate what can be said between psychologists and patients during treatment.”²²¹ Nothing, the court insisted, suggests that psychotherapists’ communications were being “suppressed” by California “based on [their] message” or because of officials’ “disagreement with [any] psychoanalytical theories.”²²² Rather, these licensing requirements were content-neutral attempts to assure “public health, safety, and welfare,” not attempts to target certain disfavored schools of thought within psychotherapy.²²³

This guidance for analyzing psychotherapy restrictions, however, seems incomplete.²²⁴ The licensing requirements in *NAAP* were arguably content-neutral, but state regulation of professional conduct designed to protect health and safety may well be content-based. If a malpractice law penalizes a doctor for giving advice at odds with professional standards, such a penalty is based on the content of the ideas that the doctor expresses, and the lack of agreement between these ideas and the views of the medical establishment. One way to make room for such content-based restriction would be for the Ninth Circuit to replace its own suggested First Amendment intermediate scrutiny with that later adopted

216. *Id.* (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

217. *Id.* at 1054.

218. *Id.*

219. *Id.* (emphasis added) (quoting *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 459 (1978)); *see also id.* (stating that “[t]he communication that occurs during psychoanalysis is entitled to constitutional protection”).

220. *Id.* at 1055.

221. *Id.*

222. *Id.* at 1055-56.

223. *Id.* at 1056.

224. *Id.* at 1055-56.

by the Third Circuit. Instead of implausibly insisting that officials always avoid targeting talk therapy's content, even when that content raises dangers to health and safety, it could (as the Third Circuit later did) permit the state to target such harmful content, but only in ways that target what makes it harmful to health, safety, or financial welfare, and not in ways that target ideas the state simply finds objectionable.²²⁵ This is, as the Third Circuit noted, a form of intermediate scrutiny (and also an inquiry of the kind made in *R.A.V.*).²²⁶ But it does not demand complete content-neutrality. Rather, like the intermediate scrutiny applied to commercial speech, it permits some content-based restriction of speech (namely, that aimed at a substantial government interest, such as health and safety protection) while forbidding others.²²⁷

This was not, however, the approach that the Ninth Circuit took in clarifying *NAAP*'s framework. It returned to the question of talk therapy's First Amendment status thirteen years later in *Pickup*. In finding that California's bill banning SOCE therapy for minors did not violate the First Amendment rights of therapists or their clients, the Ninth Circuit softened its earlier suggestion that state regulation of psychotherapy treatment itself must remain scrupulously content-neutral and *entirely* avoid restricting "what can be said between psychologists and patients."²²⁸ *NAAP*'s strict warning against this kind of government speech restriction, it said, applies only to a therapist's communications *about* psychotherapy, not speech that was an integral part of talk therapy treatment itself.²²⁹ The latter kind of treatment constituting speech is medical conduct. So like any other form of professional conduct, it can be restricted by the state as long as the restriction can overcome the very low hurdle of rational basis review—that is, as long as it is rationally related to a legitimate government objective.²³⁰

The Ninth Circuit's argument, however, is both problematic and ambivalent. It is problematic because it seems to cut against the strong intuition (discussed earlier)²³¹ that government would be acting at odds with important First Amendment values if—for ideological reasons—it barred therapists from taking certain approaches or drawing upon certain theories. Whatever shortcomings it may have had, the Ninth Circuit's discussion in *NAAP* took note of this concern: The First Amendment, it

225. *King v. Governor of N.J.*, 767 F.3d 216, 237 (3d Cir. 2014).

226. *Id.*

227. *Id.* at 234.

228. *See Pickup v. Brown*, 740 F.3d 1208, 1226, 1231 (9th Cir. 2014) (citing Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1055 (9th Cir. 2000)).

229. *Id.* at 1231 (noting that a regulation of "only treatment itself" should not be deemed to be inconsistent with the Ninth Circuit's earlier suggestion that the state may not restrict what can be said between psychologists and patients).

230. *Id.*

231. *See supra* text accompanying notes 33-41.

assumed, would stand in the officials who censored therapy because of their disdain for its message or because of their “disagreement with any psychoanalytical theories” underlying it.²³² Its discussion in *Pickup*, by contrast, seemed to dramatically lower the barriers against such an ideological attack on talk therapy—at least when such an attack was aimed at talk therapy itself and not at conversations describing it.

Perhaps for this reason, some discomfort with implications of rational basis review is evident even in *Pickup* itself. The opinion oddly suggests that rational basis review might—in this context—be tougher than it usually is.²³³ For example, in a footnote, the court emphasized:

We need not and do not decide whether the legislature would have acted rationally had it banned SOCE for adults. One could argue that children under the age of 18 are especially vulnerable with respect to sexual identity and that their parents’ judgment may be clouded by this emotionally charged issue as well. The considerations with respect to adults may be different.²³⁴

This language suggests that a therapy restriction may fail rational basis if—unlike that of California—it bars SOCE for *all* therapy clients and not just clients who are minors. This is odd for a number of reasons. First, as Robert Post has pointed out, rational basis is such “a deferential standard of review” that it “grant[s] the political system virtually unchecked discretion to” restrict occupational speech.²³⁵ In warning that government may perhaps hit a constitutional roadblock in extending its SOCE therapy ban to adults, the Ninth Circuit thus seemed to strangely suggest that there are somehow meaningful checks on the discretion that rational basis review typically leaves “virtually unchecked.”²³⁶

Second, there is another reason it is hard to see how a state legislature could possibly flunk rational basis if it extended its ban on SOCE therapy to adults. The 2009 APA Report that California and New Jersey heavily relied upon in banning SOCE therapy for minors would almost certainly provide just as strong a basis for forbidding it for adults. That is because the 2009 APA Report’s evidence of harm and ineffectiveness came primarily from studies of how *adult clients* fared in that therapy.²³⁷

The Ninth Circuit also took pains—at the beginning of its discussion—to emphasize just how limited California’s restriction of SOCE was. The court said, “[i]mportantly,” the restriction not only

232. *Nat’l Ass’n for Advancement of Psychoanalysis*, 228 F.3d at 1056.

233. *See Pickup*, 740 F.3d at 1232 n.8.

234. *Id.*

235. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 986 (2007).

236. *See Pickup*, 740 F.3d at 1232 n.8; Post, *supra* note 235, at 986.

237. 2009 APA REPORT, *supra* note 15, at 3, 44–45.

allowed therapists to continue talking with minors and parents about this banned therapy—it also left “mental health providers” free to continue “administering SOCE to any person who is 18 years of age or older,” allowed unlicensed counselors, such as religious counselors, to continue providing SOCE even to minors, and allowed psychotherapists to steer interested minors (or their families) to these unlicensed counselors or to other states for SOCE treatment.²³⁸ It is unclear why, if the government needed to satisfy only rational basis, it was also “importan[t]” to the Ninth Circuit’s decision that the restriction at issue left adults, and even minors in some circumstances, with opportunities to continue finding and using SOCE therapy.

This suggests that, although the Ninth Circuit insisted it was applying rational basis, it may have wanted to warn state legislators and regulators that a different, more all-encompassing talk therapy restriction may not receive as generous a reception from the judiciary—and the rational basis review that applies to such restrictions on what therapists and clients discuss during treatment may be a tougher-than-ordinary form of rational basis. It may, much like intermediate scrutiny, filter out restrictions on therapy that are based on the wrong kinds of government interests, like ideological disagreements with psychotherapy theories that have already won acceptance among a large number of practitioners.

There is another problematic feature of the Ninth Circuit’s argument for applying rational basis to talk therapy restrictions—and it is not just that it applied this standard, but how it justified doing so. The court said therapist-client speech was not First Amendment speech because it was “therapeutic, not symbolic.”²³⁹ And, an act that “‘symbolizes nothing,’ even if employing language, is not ‘an act of communication’” and thus not protected by free speech law.²⁴⁰

The claim that communications in talk therapy symbolize nothing is a puzzling one, and it is implausible to understand the Ninth Circuit as taking the position that comments made by a therapist have no meaning. Consider the following example of a therapist-client exchange from one guide to cognitive behavioral therapy:

Therapist: “So, Pamela, how have you been feeling this week?”

Pamela: “Just really sad . . . as usual. It seems like I’m always feeling that way.”

Therapist: “Did anything in particular trigger this sad feeling this weekend?”

Pamela: “Yes, I had to go to my cousin’s wedding, and it was

238. *Pickup*, 740 F.3d at 1223.

239. *Id.* at 1230.

240. *Id.*

really difficult because I started thinking about how I will never get married.”

Therapist: “Pamela, that’s what we call an automatic thought. It’s something that just pops into our heads over and over again without our really thinking about it or examining the truth of the thought. It affects the way we feel and act in a negative way. Maybe we should look at some of your automatic thoughts a little closer.”

Therapist: “So, let’s write down this automatic thought that you are having. ‘I will never get married.’ Your going to your cousin’s wedding was the situation that triggered the thought, ‘I will never get married.’”

Pamela: “Yes, that’s true.”

Therapist: “When you were at the wedding and that thought came to you, how did you feel?”

Pamela: “I felt really sad and hopeless.”

Therapist: “So, can you see how our thoughts can affect our mood and change the way we are feeling?”

Pamela: “Yeah, I guess if I hadn’t had that thought, I wouldn’t have felt so bad.”²⁴¹

In a sense, of course, this communicative exchange is all part of the cognitive-behavioral *treatment* provided by the therapist. The therapist and the client’s expectations are that, as they jointly discuss and analyze the client’s thoughts, they will empower her to develop a greater awareness of how these thoughts (and the feelings accompanying them) come into being, and how to change them. On the other hand, the discussion of automatic thoughts surely informs the patient—both about the nature of the therapy that she is undergoing, and also about the nature of her depression. It does so by using words to symbolize certain aspects of the world—such as thoughts, feelings, and the events that trigger these thoughts (such as the wedding Pamela attended). So, while the speech is therapeutic, it is simultaneously symbolic. Moreover, in this case, the therapist’s speech also communicates a message (that automatic thoughts occur and can be irrational) – a message that would be thwarted by a government restriction that targeted this type of exchange or, more broadly, that barred cognitive-behavioral therapy altogether.

We can sharpen this objection by borrowing a part of the Third Circuit’s argument for intermediate scrutiny. In the course of that argument, the Third Circuit offered the following analogy to explain why, in its view, talk therapy *is* First Amendment speech:

241. JEFFREY A. CULLY & ANDRA L. TETEN, A THERAPIST’S GUIDE TO BRIEF COGNITIVE BEHAVIORAL THERAPY 46 (2008).

Consider a sophomore psychology major who tells a fellow student that he can reduce same-sex attractions by avoiding effeminate behaviors and developing a closer relationship with his father. Surely this advice is not “conduct” merely because it seeks to apply “principles” the sophomore recently learned in a behavioral psychology course. Yet it would be strange indeed to conclude that the same words, spoken with the same intent, somehow become “conduct” when the speaker is a licensed counselor. That the counselor is speaking as a licensed professional may affect the level of First Amendment protection her speech enjoys, but this fact does not transmogrify her words into “conduct.”²⁴²

Why do the same words that clearly *are* symbolic—and *do* receive First Amendment protection—when spoken by a friend cease to be symbolic when spoken by a therapist? The most plausible way to read the Ninth Circuit’s statement that the words are “therapeutic rather than symbolic” is not that the words are inherently without meaning, but rather that they perform a function different from words that merely communicate ideas.

B. Talk Therapy as the Functional Equivalent of Conduct

The answer on which the Ninth Circuit appears to place the most weight is that, although talk therapy takes the form of speech, it is actually the functional equivalent of prescribing or administering a drug to a patient.²⁴³ A doctor administering medication to a patient is not, in doing so, communicating with that patient. She is not offering ideas or suggestions to the patient which the patient is free to accept or reject. She is, rather, directing the patient to ingest chemicals that will predictably transform the patient’s physiological functioning in certain ways. Even if the patient refuses to believe the medicine will work, the medicine will nonetheless have physiological effects: Antibiotics will kill harmful bacteria inside the patient’s body, for example, regardless of what the patient thinks about the treatment.

Talk therapy, one might argue, is similar. It changes a therapy client’s brain functioning not simply by communicating ideas and suggestions, but often by imposing changes on her that she does not even realize are occurring. The Ninth Circuit made an argument akin to this. It compared a psychotherapist’s use of talk therapy to a doctor’s prescription of a drug.²⁴⁴ In doing so, it drew upon its earlier decision in *Conant v. Walter*.²⁴⁵ In *Conant*, the federal government argued that,

242. *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014).

243. *See Pickup*, 740 F.3d at 1229.

244. *Id.*

245. 309 F.3d 629 (9th Cir. 2002).

since it had the power to punish the use, or prescription, of marijuana, even for medical purposes, it also had the power to punish a doctor for advising a patient that its use would, in the doctor's medical judgment, be beneficial.²⁴⁶ The Ninth Circuit, however, disagreed. It found that the government's attempt to control the discussion between the doctor and her patient "strike[s] at core First Amendment interests of doctors and patients."²⁴⁷ The court said, "[a]n integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients."²⁴⁸

Recounting this defense of physician speech in *Pickup*, it then emphasized that its argument in *Conant* did not give the doctor a First Amendment right to prescribe medical marijuana to the patient (given that doing so was illegal).²⁴⁹ The First Amendment right there was a right to talk about a medicine or drug, not to prescribe or administer it. Similarly, the court said in *Pickup*, a psychotherapist has a First Amendment right to talk *about* therapeutic treatment, not to administer it.²⁵⁰ The latter is like prescribing or administering a drug, an act which does not merely confer information to the person receiving it, but causes changes in her physiology or psyche that would otherwise not occur.²⁵¹

As Judge O'Scannlain pointed out in dissenting from the Ninth Circuit's refusal to rehear *Pickup* en banc, the analogy between a therapist's spoken words and a doctor's written prescription is a weak one: "[B]y writing a prescription, a physician's words have an independent legal effect: ordinarily, it entitles the patient to a controlled chemical substance he otherwise would have no right to possess."²⁵² What the therapist says in talk therapy has no such "independent legal effect."

There are, however, at least some considerations that—at first glance—appear to weigh in favor of the Ninth Circuit's insistence that psychotherapist speech should be seen as akin to administering pharmacological or other medical treatment. First, some studies have found that talk therapy aimed at treating depression often has effects on the brain similar to those caused by antidepressants or psychiatric medications.²⁵³ Moreover, as Neil Levy suggests, some of the statements

246. *Id.* at 632-34.

247. *Id.* at 636.

248. *Id.*

249. *Pickup v. Brown*, 740 F.3d 1208, 1226-27 (9th Cir. 2014).

250. *Id.* at 1227.

251. *Id.* at 1229 (analogizing the speech of psychotherapists during treatment to a doctor's "speak[ing] the words necessary to provide or administer the banned drug" in *Conant*, 309 F.3d at 637-38).

252. *Id.* at 1219 (O'Scannlain, J., dissenting from denial of rehearing en banc).

253. See JOHN E. DOWLING, *CREATING MIND: HOW THE BRAIN WORKS* 59 (1998) (noting that "[t]here is evidence that psychotherapy can alter brain chemistry" by causing release of

a psychotherapist makes to a client in treatment are designed not simply to convey ideas to the client, but rather to change the patient's mental operations in more subtle ways—sometimes outside the client's consciousness.²⁵⁴ He notes that, “traditional means” of therapy “include many techniques that are not addressed to the rational agent.”²⁵⁵ For example, in psychodynamic or psychoanalytic therapy, the therapist often expects that her relationship with a client will produce an intense form of “transference” whereby the feelings that the client has toward their parents or other people in life will be unconsciously directed toward the therapist, where they can be more clearly revealed and analyzed.²⁵⁶ And, even in forms of therapy that do not focus on transference, some argue, what is crucial is that there be a successful “therapeutic alliance” or working relationship between therapist and patient wherein both are committed, and believe in, the technique being used.²⁵⁷ In fact, according to Bruce Wampold, the existence of such a relationship (and the joint commitment to a common approach) is more crucial for the success of therapy than the substance of the particular approach.²⁵⁸ One might thus argue that what is most significant for the change produced by therapy is *not* that the therapist or client exchange certain ideas, but rather that they form a bond within which *any* such exchange of psychological ideas (whether it fits the psychodynamic approach, the cognitive-behavior approach, or any other approach) will have therapeutic effects, so long as therapist and client both believe in its efficacy. The psychotherapist and client's words, then, are significant not for the ideas they carry, but as a force that bonds them into a certain kind of goal-oriented partnership.

These features of psychotherapist speech, however, do not, taken alone, distinguish it from other speech that is clearly protected by the First Amendment. Our brain functioning, for example, is altered not just by the speech that occurs during psychological counseling. It is changed by speech in other contexts. A person's brain wiring is transformed to some degree, for example, when she becomes fearful of performing for an audience of any kind after such a performance is mocked or criticized by peers.²⁵⁹ Indeed, criticism of this kind can leave emotional scars that

neurotransmitters or neuromodulators); Richard A. Friedman, *Like Drugs, Talk Therapy Can Change Brain Chemistry*, N.Y. TIMES (Aug. 27, 2002), <http://www.nytimes.com/2002/08/27/health/behavior-like-drugs-talk-therapy-can-change-brain-chemistry.html> (discussing studies showing “that pharmacotherapy and psychotherapy can produce remarkably similar effects on functional brain activity”).

254. NEIL LEVY, *NEUROETHICS: CHALLENGES FOR THE 21ST CENTURY* 69-70, 130 (2007).

255. *Id.* at 250.

256. LEVENSON, *supra* note 53, at 23-25.

257. WAMPOLD, *supra* note 39, at 51-55, 96-99.

258. *Id.* at 54-55, 95-99.

259. See Kirsten Weir, *The Pain of Social Rejection: As Far as the Brain Is Concerned, a*

have deep and lasting effects on a person's outlook and behavior. But that does not mean that such criticism ceases to be speech for First Amendment purposes.

Likewise, the fact that speech is sometimes calculated to affect people by appealing to their emotions rather than their rational understanding does not disqualify such speech from First Amendment protection.²⁶⁰ Politicians will often appeal to people's emotions to win support. A movie or other work of art (or a video game, for that matter) will draw audiences (or gamers) in not by presenting a list of reasons that they should be interested, but by generating excitement—sometimes with techniques of which the audience is not fully aware. Such art or entertainment still counts as First Amendment speech, and still receives First Amendment protection.²⁶¹ So, too, will words spoken in the context of intense friendships or romantic relationships. Indeed, Jerome and Julia Frank argue that psychotherapists' use of communication is very similar to that of "rhetoricians" because "both . . . rely on the stimulation of emotions and on what rhetoricians term 'argument' as methods for transforming meanings"²⁶² and, if anything, it is rhetoricians who are more likely to intentionally generate certain emotions in their audiences (and are generally more adept at doing so).²⁶³

This does not mean that the professional context of the therapeutic speech is irrelevant. Perhaps there is something that justifies classifying as "conduct" the mind- or brain-altering speech that occurs in a therapist's office even if one continues to label as "speech" words with similar effects outside of that professional relationship. As the Ninth Circuit emphasized, the Supreme Court in *Giboney v. Empire Storage & Ice Co.*, specifically noted that "prohibitions of conduct have 'never been deemed an abridgement of freedom of speech . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language.'"²⁶⁴ If, for example, a person orders an associate to carry out a murder-for-hire, he will not be able to rely on the First Amendment to argue that his order was speech rather than conduct, and thus insulated from government penalty.

Broken Heart May Not Be So Different from a Broken Arm, MONITOR ON PSYCHOL., Apr. 2012, at 50, 51-53.

260. See Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2422 (2014) (pointing out that argument generally has an emotional dimension and that "[i]f emotional appeals are manipulative, then all appeals are manipulative").

261. T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 548 (1979).

262. JEROME D. FRANK & JULIA B. FRANK, *PERSUASION AND HEALING: A COMPARATIVE STUDY OF PSYCHOTHERAPY* 68 (3d ed. 1991).

263. *Id.* at 69.

264. See *Pickup v. Brown*, 740 F.3d 1208, 1226 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

However, simply citing *Giboney*, and then noting that speech is part of “mental health treatment,” is not sufficient to justify treating it as conduct. As Eugene Volokh has argued,²⁶⁵ numerous courts and scholars have attempted to use *Giboney* as the springboard for less-than-complete arguments for excluding certain speech from First Amendment coverage. Whereas a crime boss’s order to commit a murder, or engage in a bank robbery, is speech that triggers physical violence, the psychological changes triggered by psychotherapy discussion are similar to psychological changes triggered by other kinds of speech. We may, for example, find ourselves transformed—and perhaps even find our depression or anxiety healed—by reading a book on cognitive behavioral therapy, or hearing about its insights from a friend—and not just by learning about, and experiencing it, in therapy. Those who encounter it in therapy seem (at least in studies of efficacy) to improve much more frequently and markedly than those who do not receive therapy.²⁶⁶ But none of the courts discussing the First Amendment status of psychotherapy have explained why the relationship established in psychotherapy, or the success it tends to generate in improving people’s psychological functioning, should transform the therapists’ speech into *non-speech* for First Amendment purposes.

The same difficulty plagues the Ninth Circuit’s attempt to draw a clear distinction between speech that constitutes therapeutic treatment and speech that merely describes such treatment. As Justice O’Scannlain asked in dissenting from the denial of rehearing en banc: “[B]y what criteria do we distinguish between [psychotherapist] utterances that are truly ‘speech,’ on the one hand, and those that are, on the other hand, somehow ‘treatment’ or ‘conduct’?”²⁶⁷ Consider again the model conversation on automatic thoughts from *A Therapist’s Guide on Brief Cognitive Behavioral Therapy*:²⁶⁸ On the one hand, this speech (both that of the therapist and that of the client) is part and parcel of the therapist’s course of treatment. On the other hand, it simultaneously provides information to the client about the therapy and what she is supposed to gain from it: It informs her about automatic thoughts, how they operate, and the role they play in triggering the client’s specific problems.

There are, perhaps, artificial boundary lines that a court might draw to distinguish psychotherapist speech, on the one hand, from treatment or conduct, on the other. For example, courts might limit their definition of psychotherapist “speech” or “recommendations about treatment”

265. Volokh, *supra* note 76, at 1311-26.

266. BRUCE E. WAMPOLD & ZAC E. IMEL, *THE GREAT PSYCHOTHERAPY DEBATE: THE EVIDENCE OF WHAT MAKES PSYCHOTHERAPY WORK* 82 (2d ed. 2015).

267. See *Pickup*, 740 F.3d at 1215-16 (O’Scannlain, J., dissenting from denial of rehearing en banc).

268. See *supra* text accompanying note 241.

solely to the initial exchange between a therapist and client. The APA's Ethics Code requires psychotherapists to share certain information with "clients/patients as early as is feasible in the therapeutic relationship about the nature and anticipated course of therapy"—and provide "sufficient opportunity for the client/patient to ask questions and receive answers."²⁶⁹ Psychotherapists are likewise required to discuss and address the client-patient's questions about "fees, involvement of third parties, and limit[ations] of [the therapist's] confidentiality."²⁷⁰ When the therapist intends to treat a condition "for which generally recognized techniques and procedures have not been established, psychologists inform their client-patients of the developing nature of the treatment, the potential risks involved, alternative treatments that may be available, and the voluntary nature of their participation."²⁷¹ So, courts might find that the conversations psychotherapists have in this pre-treatment phase of interaction with the client receive First Amendment protection.

After all, as noted earlier, some writers argue that one of the key reasons that psychotherapy often has the success it does is that clients are changed by the relationship they form with a particular therapist—and by the commitment they form, and maintain, to that therapist's particular approach.²⁷² If that is true, then courts might hold that recommendations about treatment end, and treatment itself begins, when such a professional relationship is formed and begins to transform the client's thinking in ways that would be unlikely to occur if the client heard the same information—for example, about automatic thoughts—*outside* of that therapeutic relationship. One might thus treat informed consent as the last stop in the therapist's and client's path of discussion about treatment before they leave the First Amendment realm of discourse and deliberation behind them—and enter the realm of medical treatment and the dangerous or significant consequences it might have for a client's health and safety.

The problem with extending such First Amendment protection to the informed consent process, and *only* the informed consent process, is that—in psychotherapy, at least—that is by no means the only part of talk therapy where dissemination of important knowledge takes place. Much of what a client learns about the therapeutic process and how she can use it to transform her thinking, she learns not before the process, but during it. Consider again the example above, wherein the cognitive behavioral therapist tells her patient about automatic thoughts and the importance of pausing to examine them, and assess whether they are

269. ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 10.01(a) (AM. PSYCHOLOGICAL ASS'N 2010).

270. *Id.*

271. *Id.* § 10.01(b).

272. *See supra* text accompanying notes 256-258.

rational. Why should a therapist's communication about this aspect of cognitive behavioral therapy be protected only if covered by the therapist in obtaining informed consent and in explaining "the nature and anticipated course of" cognitive-behavioral therapy, but not if the therapist instead conveys precisely the same information during therapy itself? As Elyn Saks and Shahrokh Golshan write, many psychotherapists are of the view that some of the education about the therapeutic process and what it can achieve can only be effectively conveyed to a client after therapy begins.²⁷³ There are reasons to "be skeptical, for example, about whether, at the beginning of the process, the patient can really absorb the information about risks and benefits in any meaningful way."²⁷⁴ In part for this reason, some therapists adopt a "process view" on which the practitioner "obtain[s] informed consent over time," and not simply at the "start of the process."²⁷⁵

Such a broader understanding of occupational speech protection is also consistent with the Court's opinion in *Legal Services Corp. v. Velazquez*.²⁷⁶ At issue in *Velazquez* was the constitutionality of a statute specifying that, where lawyers received government subsidies to help clients make arguments for welfare cases, they could not challenge the constitutionality of U.S. welfare laws (unless they were willing to forego the subsidies).²⁷⁷ The Court struck down this legislation. The government, it said, may not control "an existing medium of expression . . . in ways which distort its usual functioning."²⁷⁸ It may not use its financial power to distort the way lawyers craft and generate arguments, particularly when doing so will force lawyers to say things at odds with effective lawyering, or prevent them from saying things required in effective lawyering.²⁷⁹ Here, the Court was extending First Amendment protection not merely to the discussion a lawyer has with a prospective client prior to providing that client with legal services.²⁸⁰ Nor was it limiting the First Amendment to the discussion a lawyer has with a client about the client's options (To sue or not to sue? To use or avoid using a particular argument in a brief?).²⁸¹ Rather, it held that free speech law protects lawyers in advancing a legal argument—challenging a welfare law's constitutionality—in speech that is at the heart of a litigator's professional conduct, namely the advocacy that occurs in, and

273. SAKS & GOLSHAN, *supra* note 52, at 28.

274. *Id.*

275. *Id.* at 45-48.

276. 531 U.S. 533 (2001).

277. *Id.* at 536-39.

278. *Id.* at 543.

279. *See id.* at 543, 545-48.

280. *See id.*

281. *See id.*

makes a difference to, the outcome of litigation.²⁸²

IV. RELIANCE IN TALK THERAPY AND MEDICINE—AND THE JURISPRUDENCE OF OCCUPATIONAL SPEECH

A. *Considering Strict Scrutiny*

Given the problems in the Ninth Circuit’s arguments for treating talk therapy as conduct subject only to rational basis review, one might suggest that the best response is to give talk therapy the same protection as other speech. After all, it is up to each person, not government officials, what moral, spiritual, or practical advice they will seek out from friends. They should be equally free, one might argue, to choose among the offerings in the marketplace of ideas generated by experts, such as psychologists. In seeking a solution to life problems or emotional confusion, they should be able to seek out Freudian, psychodynamic advice from psychologists, if they so choose, or cognitive-behavioral advice if they prefer that.

This is essentially the position taken by Paul Sherman in a recent essay calling on courts to offer staunch First Amendment protection to occupational speech.²⁸³ The first part of his argument is that, under the Supreme Court’s 2001 ruling in *Holder v. Humanitarian Law Project*,²⁸⁴ even if one can justify describing talk therapy, or another service offered by a professional, as “professional conduct,” it remains speech for First Amendment purposes so long as it carries a message from speaker to listener.²⁸⁵ As the Court said in *Holder*, when “the conduct triggering coverage under [a] statute consists of communicating a message,” it counts as First Amendment “speech.”²⁸⁶ The second part of Sherman’s argument is that if government then restricts such speech *on the basis of its message* (rather than a content-neutral basis like its decibel level or location), such coercive silencing of what we can say or hear is presumptively unconstitutional—and can pass constitutional muster only in the very rare circumstance that government can overcome strict scrutiny.²⁸⁷ This stance is, in fact, the one taken by a district court that the Ninth Circuit reversed: Judge William B. Shubb, in a decision by the

282. *Id.*

283. See generally Paul Sherman, Commentary, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183 (2015).

284. 561 U.S. 1 (2010).

285. Sherman, *supra* note 283, at 189-91.

286. *Holder*, 561 U.S. at 28; see also Sherman, *supra* note 283, at 190.

287. Sherman, *supra* note 283, at 191-93; see *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (noting that content-based restrictions on speech are generally subject to strict scrutiny, which requires that the regulation be “narrowly tailored to promote a compelling Government interest,” and “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative”).

U.S. District Court for the Eastern District of California, found that California's SOCE therapy was precisely such a content-based restriction on therapists' speech, and it *was* premised on the government's "disagreement with [certain] psychoanalytical theories," and its agreement with others.²⁸⁸ He thus applied strict scrutiny and, unsurprisingly, found that California's ban could not overcome this (almost insurmountable) standard.²⁸⁹

On this view, the right response to the Third Circuit's "college sophomore" hypothetical is that when psychotherapists offer the same advice as a college sophomore they should receive the same level of First Amendment protection. And there is another observation that supports this claim of a functional equivalence between psychotherapists' advice, on the one hand, and the advice of friends and family members, on the other. As Richard Restak notes, "[f]or centuries," before the rise of modern psychology, "the [central] treatment for depression was talking to friends."²⁹⁰ Justice Scalia likewise notes in his dissent in *Jaffee v. Redmond* (the case that established a federal psychotherapist-patient evidentiary privilege) that "[f]or most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders."²⁹¹

B. First Amendment Jurisprudence and Occupational Speech

There is, however, a problem with this argument for strict scrutiny. In the professional marketplace of ideas, certain interests of ours are at stake that are not at stake in ordinary speech interactions. While citizens in our constitutional system must be left free to hear and decide for themselves the merits of various contributions people make to democratic discourse, they are *not* similarly left to fend for themselves when faced with possibly fraudulent or ineffective professional or commercial services (even when these services involve speech). Government is charged with protecting individuals from incompetent or dishonest doctors and psychologists, and unsafe or ineffective medicines and therapies. Given the reliance interests at stake in these professional interactions, government officials cannot be handcuffed too tightly by First Amendment law. When we recruit the services of a doctor, we depend heavily on medical advice we are ill-equipped to question. As

288. *Welch v. Brown*, 907 F. Supp. 2d 1102, 1115-17 (E.D. Cal. 2012), *rev'd sub nom.* *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014).

289. *Id.* at 1117-21.

290. RICHARD RESTAK, *THE NEW BRAIN: HOW THE MODERN AGE IS REWIRING YOUR MIND* 121 (2003).

291. *Jaffee v. Redmond*, 518 U.S. 1, 22 (1996) (Scalia, J., dissenting).

Daniel Halberstam points out:

[We] tend to lack the knowledge to evaluate [our] own medical condition or to understand fully the various treatment options apart from their careful presentation by the physician. . . . Although patients may get a second opinion, the social practice of seeking treatment from a physician, or even a second opinion, is not a general unbounded scholarly investigation, but the placing of trust in, and the recognition of the authority of, one or more physicians.²⁹²

These considerations provide a possible answer to the Third Circuit's analogy and challenge. In striking contrast to offerings of personal wisdom from a college classmate, psychotherapists draw upon a body of expertise and years of training that college sophomores generally lack, even when they are psychology majors. In return for the fee charged by therapists, clients rely on that expertise in a way they generally do not rely on a friend's suggestions. They can also rely on therapists to provide something else—apart from such expertise: a series of professional commitments (such as duty of confidentiality) that is backed not just by social norms akin to those of friendship or kinship, but by disciplinary rules and legal penalties. Our reliance on our doctor's advice is backed not just by our own individual sense of the doctor's qualifications, but by the reassurance that is provided by professional monitoring and legal constraints. We do not simply take a doctor's word that she is a doctor. We rely on our knowledge that she has been vetted by the medical profession (in obtaining an M.D. or D.O. degree, and in training during a residency) and also by the state (in meeting licensing requirements), and would be subject to professional discipline and legal penalties if she ignored the profession's standard of care.

Thus, the confidence we place in a physician's words has a significance for us here not unlike the confidence we place in many non-verbal features of our environment. For example, when we enter an elevator and let it lift us up twenty floors, we rely on our assumption that its design and engineering are sound enough to keep us from a dangerous fall (in part, because its design and engineering meet building code requirements). Similarly, when we take medicines (or, in other cases, cease to worry about physical symptoms), we do so in part based on our reliance upon a doctor's verbal advice—we are staking our physical welfare (and possibly our lives) on the assumption that the physician's advice is medically sound and is consistent not just with the doctor's own best judgment, but with the standards of the medical profession and the laws that govern it.

The strict scrutiny that protects public debate is thus a poor fit for

292. Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PENN. L. REV. 771, 845 (1999).

expert advice that we rely upon to assure our health. The barrier that strict scrutiny erects against state interference is too strong. Even if this allows a patient to sue a doctor for malpractice after the fact, and only when there was “legally cognizable harm,”²⁹³ this would likely be insufficient for the government to play the role it does in protecting our reliance interests. Given the harms that can arise from incompetent or unethical medical practice by a physical or a mental health professional, we want government to be able to protect us before those harms arise, and not simply to authorize malpractice suits when it is too late to stop them.

Proponents of strict scrutiny might respond that such arguments are not sufficient to deny occupational speech the same high level protection accorded to other speech. As the Supreme Court made clear in *United States v. Stevens*, the categories of content that receive lower protection—such as fighting words, true threats, obscenity, defamation, and commercial speech—are part of a small list of exceptions to the strong default rule that speech may not be restricted on the basis of its content.²⁹⁴ And as the Court also made clear in that case, neither courts nor government officials can freely add to that list simply on the ground that the “social costs” of applying the normal First Amendment default rule (strict scrutiny) seem too high.²⁹⁵ The list of exceptions must remain a short and exclusive one if it is not to undermine the First Amendment’s strong prohibition on content-based censorship. Thus, we cannot rule out strict scrutiny for occupational speech restrictions simply because it seems to be a poor fit. Rather, under the Court’s rule in *Stevens*, the only category that can be added to the list of unprotected (or less protected) content categories is a category that is essentially already there: It is only when a type of speech has “been historically unprotected, but . . . not yet . . . specifically identified or discussed as such in [free speech] case law,” that its presence on that list may be expressly recognized by courts (even if they have not done so before).²⁹⁶

But even given this demanding test for suspending strict scrutiny, the speech of professionals—if not all those engaged in an occupation—seems to meet it. Indeed, Supreme Court Justices have already made it clear that that professional speech delivered in the course of professional services to a client receives far less protection than does speech where reliance interests are absent. In 1945, for example, the Supreme Court held in *Thomas v. Collins* that the First Amendment did not permit Texas to arrest a union organizer for making a speech to a group of workers on the ground that he lacked the “organizer’s card” required for

293. See *supra* text accompanying notes 224-227.

294. *United States v. Stevens*, 559 U.S. 460, 460 (2010).

295. *Id.*

296. *Id.*

such activity by state law.²⁹⁷ But it indicated that if the organizer's activity consisted not simply of speaking to a gathering of workers, but went "further" into "collection of funds" or "securing subscriptions" to join a union, then it would "enter[] a realm where a reasonable registration or identification requirement may be imposed."²⁹⁸ In a concurring opinion, Justice Jackson added that the government must have a "wider range of power over the pursuit of a calling than over speech-making" to "shiel[d] the public against the untrustworthy, the incompetent, or the irresponsible."²⁹⁹

In his 1985 concurring opinion in *Lowe v. Securities & Exchange Commission*, Justice White analyzed the difference between "speech-making" and "pursuit of a calling" more deeply.³⁰⁰ A doctor or lawyer is staunchly protected when broadcasting his view to the world for anyone to consider (and possibly reject), because constraints on such communication are "regulation[s] of speaking and publishing as such."³⁰¹ But the First Amendment applies with much less force, said Justice White, where a professional "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances."³⁰² This distinction has continued to serve as the starting point for other professional speech cases.³⁰³

Sherman suggests that it is only a subset of occupational speech regulation—namely, laws establishing punishing medical, legal or perhaps other professional malpractice—that might satisfy "the historical test set forth in *United States v. Stevens*."³⁰⁴ Aggrieved clients and patients, he writes, have long been able to sue doctors and lawyers for malpractice.³⁰⁵ But, he says, "the mere fact that speech may be punished after it causes harm is different from saying that it may be prophylactically banned or licensed."³⁰⁶ But licensing laws also have a long history.³⁰⁷ And neither Justice Jackson's concurrence in *Thomas*,

297. *Thomas v. Collins*, 323 U.S. 516, 518, 532-34 (1945).

298. *Id.* at 540.

299. *Id.* at 545 (Jackson, J., concurring).

300. *Lowe v. SEC*, 472 U.S. 181, 231-33 (1985) (White, J., concurring); *Thomas*, 323 U.S. at 545.

301. *Lowe*, 472 U.S. at 232.

302. *Id.*

303. *See, e.g., Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 883-85 (11th Cir. 2015).

304. Sherman, *supra* note 283, at 196.

305. *Id.*

306. *Id.*

307. *See, e.g., Wollschlaeger*, 797 F.3d at 883-85 (noting that state regulation of the professions is "deeply rooted" and citing Supreme Court precedent that states "have broad power to establish standards for licensing practitioners and regulating the practice of professions") (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). *See also* Claudia Haupt, Professional Speech, 125 YALE L. J. 1238, 1279 (forthcoming 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2509458 ("Licensing requirements for law and

nor Justice White's in *Lowe*, spoke of such a limit on government power to protect clients from misleading or incompetent professional speech. For Justice White, the key question in determining the First Amendment status of a professional's speech was not whether it was regulated before or after a harm arose from it, but rather whether it was delivered to the public (in a book or newspaper) or to a client (as part of the professional's role, and within a relationship where the professional "takes the affairs of a client personally in hand").

The public-private speech distinction implicit in judicial analyses like that of Justice Jackson and Justice White has been given an even clearer formulation—and justification—in Robert Post's analysis of professional speech. Post provides an explanation of the rationale for this difference in his book, *Democracy, Expertise, and Academic Freedom*.³⁰⁸ In public discussion, he claims, a physician's speech—like the speech of others—is contributing to a realm of public discourse, the nature of which must remain free from government control, even if this leaves it chaotic and often filled with questionable statements.³⁰⁹ Public discussion, in other words, follows Oliver Wendell Holmes's tenet in *Abrams v. United States* that "all life is an experiment."³¹⁰ Thus, First Amendment discourse in public is necessarily a free-for-all where, subject to rare exceptions, anything goes. And psychotherapists, doctors, lawyers, and other professionals are as free as other citizens to join in this public debate.

By contrast, the professional practices individuals rely upon to provide guidance for their health, legal affairs, or finances *cannot* be such a free-for-all. As Post notes, a doctor "who offers bad advice to a patient" may not invoke the First Amendment principle that protects unhindered discussion to argue that "his advice was an experiment, as all life is an experiment."³¹¹ Rather, the speech must accord with "authoritative professional standards."³¹² The law—rather than giving doctors and lawyers First Amendment freedom to tell their clients anything they wish to say, or anything that accords with their *personal* judgment—"stands as a surety for the disciplinary truth of expert pronouncements."³¹³ That is why an ill person can rely upon a doctor's advice rather than being left to wonder whether, and to worry that, the doctor might—without the patient being able to tell—be offering advice

medicine in the United States likely date back to the founding period").

308. POST, *supra* note 63, at 38-43.

309. *Id.* at 12-13, 43.

310. *Id.* at x. (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

311. POST, *supra* note 63, at 45.

312. *Id.* at 44-45.

313. *Id.*

deeply at odds with accepted medical wisdom or scientific studies.

*C. First Amendment Protection of Reliance Interests
(Versus Public Discourse)*

However, drawing a line of this sort—between professional speech to the public (as a citizen) and private, personalized speech to a client (as a professional providing a service)—does not clearly tell courts everything they need to know. It leaves unanswered the question of whether the latter, less protected side of this distinction—the side in which the professional provides private and personalized advice—is (1) speech that does receive First Amendment protection, but receives less of it than does speech to the public, or (2) conduct that lies entirely outside of the First Amendment, and thus receives no free speech protection at all. The Third Circuit’s analysis adopts the first of these two options: it protects professional speech against regulation, but only with intermediate scrutiny rather than the strict scrutiny that applies to restrictions of public deliberation.³¹⁴ The Ninth Circuit’s analysis of psychotherapy, by contrast, appears to favor the second. The reliance and trust we place in a psychotherapist does not merely weaken the free speech protection that covers talk therapy—it eliminates it entirely, at least when we are *in* treatment (and not simply talking with the therapist about treatment).³¹⁵

I have already argued in Part III of this Article that the Ninth Circuit’s answer is in many ways problematic.³¹⁶ However, there is a variation of the Ninth Circuit’s argument that provides *some* First Amendment protection for professionals’ speech to their clients—beyond that provided by rational basis review—but continues to treat it as fundamentally different from public deliberation and decidedly outside the First Amendment’s core. This argument begins with the observation that the First Amendment does not and cannot protect all uses of language: As Frederick Schauer writes, there are numerous examples of speech “that the First Amendment ignores.”³¹⁷ For instance, he notes: “Securities violations, antitrust violations, criminal solicitation, and many other categories of ‘speech’ remain uncovered by the First Amendment.”³¹⁸ Some of our speaking falls outside the First Amendment’s scope, and this may well include some speaking that communicates ideas—such as the information in reports required by the

314. *King v. Governor of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014).

315. *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014).

316. *See supra* Part III.

317. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004).

318. *Id.* at 1771.

SEC. Moreover, writes Schauer, professionals' speech to their clients seems to be among the categories that are often left outside the First Amendment's scope: Medical malpractice suits brought against a doctor for a misdiagnosis, for example, do not raise a First Amendment question even though that misdiagnosis comes in the form of speech.³¹⁹

Other scholars have drawn upon the work of Alexander Meiklejohn to help explain why some kinds of speech are protected by the First Amendment and others are not. The First Amendment, Meiklejohn argues, does not protect all communication, but only the communication that contributes to, and underlies, the process by which we govern ourselves in a democracy.³²⁰ More recent scholars have refined Meiklejohn's claim. Lillian R. BeVier, for example, argues that the First Amendment protects not all speech, but "the process of forming and expressing the will of the majority according to which our representatives must govern."³²¹ James Weinstein likewise argues that free speech theory should be "firmly based in the right of individual participation in the political process."³²² Robert Post also presents his own version of this approach: The "best possible explanation of the shape of First Amendment doctrine," he writes, "is the value of democratic self-governance."³²³ The Constitution protects that "communication in the public sphere" which allows for the "democratic legitimation" that occurs when "those who are subject to law believe that they are also potential authors of law."³²⁴

Post, moreover, extends this model to help explain existing First Amendment doctrine about professional speech. As an initial matter, he writes, professionals' speech to their clients is not speech that is aimed at forming public opinion.³²⁵ The "private, professional communications between doctors and their patients plainly do not count as public discourse" and thus, at least presumptively, do not count as the kind of speech the First Amendment protects.³²⁶ This is not simply because they occur in a private setting: Free speech may protect private channels of discussion that are tributaries feeding into the larger ocean of public discourse. Our conversations with family members, friends, and

319. See *supra* text accompanying note 158.

320. See Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) ("The First Amendment does not protect 'a freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is [thus] concerned, not with a private right, but with a public power, a governmental responsibility.").

321. Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 308-09 (1978).

322. James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 513 (2011).

323. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011).

324. *Id.*

325. Post, *supra* note 235, at 974.

326. *Id.*

colleagues help educate us both about the issues of the day, and—even when they concern personal issues like the family budget or questions about personal health or consumer choices—help shape our understanding of whether and how government can respect our interests, for example, in deciding questions about health insurance coverage. Indeed, on Post’s account, such private conversations may even be a *part* of public discourse in that they are part of an ongoing conversation by which we determine how our society should be structured: “[T]here is no reason,” as he points out, “why public opinion might not be formed one conversation at a time.”³²⁷

There is, however, another reason that the private conversations we have with doctors or other professionals fall outside of the constitutionally-protected realm of public discourse. As Post observes, they occur “within social relationships” that are characterized by “dependence and reliance.”³²⁸ In short, communication where we solicit advice from someone we depend on to deliver a service based on expertise is *not* communication that we are well-placed to autonomously query. Daniel Halberstam draws a similar contrast between professional speech and public discourse: Professional-client discussion is not part of an “unbounded public debate”—where even the ultimate values that guide us are fair game for questioning and revision, and it is up to each of us to freely decide which values we adhere to and what claims to accept.³²⁹ It is rather, says Halberstam, a “bounded speech practice” or “predefined communicative project” where a doctor’s communication, for example, has a given goal (providing health guidance to a patient who needs it and is ill-equipped to question it)—and government may intervene to assure that the doctor’s speech serves that goal.³³⁰ If, as the Court has said, the function of free speech is to protect debate that is “uninhibited, robust, and wide-open,”³³¹ perhaps professional speech does not fit the bill—because it is not open-ended intellectual exploration, but rather a form of practical conduct to achieve an agreed-upon personal end (like restoration of physical or mental health).

Still, while professional-client communications—on Post’s model—are presumptively excluded from the scope of the First Amendment, there are situations where this presumption is not the end of the story: The medical wisdom we receive in a doctor’s office may not be public discourse, but it is knowledge this is often essential for us to engage in intelligent public discourse about medical or health issues. We will not, for example, be well-positioned to critique the laws or

327. POST, *supra* note 63, at 46.

328. Post, *supra* note 323, at 483, 485.

329. Halberstam, *supra* note 292, at 832-33.

330. *Id.* at 844-45.

331. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

policies that determine how we receive and pay for healthcare unless we have an accurate sense of how the practice works (and when it works well). For this reason, argues Post, professional speech does have some First Amendment value—even though its value is of a different kind than that of public discourse.³³² Rather than being a form of speech by which we participate in public discourse, the conversations we have with doctors represent speech that helps provide the raw material for such discourse by generating knowledge necessary for it. In this respect, Post argues, professional speech is akin to advertising or other commercial speech, which—although it is information that furthers consumer purchases rather than democratic decisions—is still valuable for citizens because, as the Supreme Court has recognized, it provides information that might be of value to economic policy decisions or other spheres of human life that are the subject of democratic decision-making.³³³ And just as the First Amendment allows courts to protect commercial speech against government restrictions that undermine its accuracy, so too should it protect “the integrity of physician-patient communications as a channel for the communication of accurate medical information.”³³⁴ More generally, says Post, the First Amendment should protect professional speech against regulation that “corrupt[s]” the “diffusion of expert knowledge” rather than protecting it—for example, by prohibiting professionals from dispensing disciplinary truth, or requiring them to voice a false version of it.³³⁵

With Post’s approach as background, it is now clear that the First Amendment should—at the very least—protect the reliance interests that individuals bring to a doctor-patient relationship, or a therapist-client relationship. If, as Post says, the law is supposed to “stand[] as a surety for the disciplinary truth of expert pronouncements,”³³⁶ it betrays this function when it is instead a surety for nothing but the legislature’s own ideological stances. This appears to be the case, for example, in many regulations that require doctors to give voice to abortion-related views, even though these views (whatever their merits) have little connection to medical science or practice. As the Fourth Circuit noted in *Stuart v. Camnitz*, by requiring physicians to “display the sonogram, and describe the fetus to women seeking abortions,” the government was effectively commandeering physicians’ speech to carry the government’s own ideological message.³³⁷ Apart from limiting the doctor’s own preferences about what to say, it “threaten[ed] harm to the patient’s psychological

332. See Post, *supra* note 235, at 974-78.

333. *Id.* at 974-76, 978.

334. *Id.* at 940.

335. See POST, *supra* note 63, at 47-48.

336. *Id.* at 45.

337. *Stuart v. Camnitz*, 774 F.3d 238, 242, 246, 253 (4th Cir. 2014).

health, interfer[ed] with the physician's professional judgment, and compromis[ed] the doctor-patient relationship.”³³⁸ Far from giving a patient confidence that she could trust her doctor's advice, this law compelling sonograms deeply undermined that confidence by making it clear that a doctor's speech might reflect something other than good medical judgment—it might reflect the state legislature's judgments about political and moral issues.³³⁹

D. An Alternative Approach for Protecting Reliance Interests in Speech

There is, however, another way of understanding the significance of reliance interests in First Amendment law, and it involves beginning with a different presumption. Instead of presuming that professional speech is unprotected by the First Amendment, except insofar as (and to the extent that) it delivers accurate information of a certain kind from an expert to a client, one might begin from the opposite starting point: Professional speech is protected, but such protection is reduced to allow the government the regulatory space it needs to protect citizens against certain types of harms that can arise from justified reliance of a kind which is normally absent in First Amendment communication—namely, the reliance of an individual when she trusts a professional or an authoritative source of information about a commercial or financial transaction she is contemplating.

This contrast—between (1) providing protection only to the extent speech has a certain quality or value (for example, disseminating truthful information) and (2) limiting protection of speech only in order to let the state address a certain kind of harm—has already made a recent appearance in First Amendment jurisprudence. As I have argued in

338. *Id.* at 250.

339. There are cases that – contrast to *Camnitz* -- have upheld compelled ultrasound requirements, after subjecting them only a much more lenient review that is the “antithesis of strict scrutiny” and derived not from First Amendment law, but from the undue burden analysis the Supreme Court set forth in *Planned Parenthood v. Casey*. See *Tex. Med. Providers v. Lakey*, 667 F.3d 570, 575-76 (2012). Other cases have similarly upheld other state controls on physician speech to women seeking abortions. There is also a significant scholarly literature analyzing such decisions. See generally e.g., Janet L. Dolgin, *Physician Speech and State Control: Furthering Partisan Interests at the Expense of Good Health*, 48 NEW ENG. L. REV. 293 (2013), Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws*, 34 CARDOZO L. REV. 2347 (2012), ; Post, *supra* note 235, Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Fact, and Open Questions*, 48 WASH. UNIV. J. LAW & POL'Y (forthcoming 2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665850. A thorough analysis of these physician speech case law is beyond the scope of this article. What is important, as a number of these analyses emphasize, is that state intrusion into doctor-physician speech can undermine a patient's ability to rely on their doctor's judgments, and that this threat to reliance interests should play an important part in the First Amendment analysis of state interference in physician speech.

earlier scholarship,³⁴⁰ such contrast appears to lie at the core of the disagreement in *Sorrell v. IMS Health Inc.* between the majority and dissenting opinions.³⁴¹ For the dissenting opinion, the commercial speech was more amenable to government restriction than other speech in large part because, while commercial speech serves an “informational function,” it did not have the same importance, and is not deserving of the same protection, as “‘core’ political speech.”³⁴² For the majority opinion, by contrast, commercial speech was staunchly protected from government restriction—*except* when that restriction targeted some harm inherent in commercial speech such as a “risk of fraud” raised by marketing.³⁴³

The same choice between First Amendment frameworks exists for professional speech: Government might have greater authority to regulate because such speech has (1) distinctive and narrower First Amendment value, because unlike public discourse, its value lies only in its promulgation of accurate information (the “limited value” approach), or (2) because, given the reliance individuals place on professional speech to solve pressing health or other problems, such speech raises distinctive harms (the “speech harm”-based approach). Moreover, where courts adopt the latter of these two approaches, they are essentially treating professional speech as another category of speech—like fighting words, true threats, libel, or commercial speech—which *R.A.V.* gives government a kind of limited license to restrict, so long as it does so for the harm-controlling purposes or interests that justify government action.³⁴⁴ On this model, as discussed earlier, courts would permit government to impose restrictions on professional speech, but *only* if it is targeting inaccurate information, or other deviations from professional standards that make a professional’s advice harmful, deceptive, or are otherwise damaging to interests of the client that government is responsible for protecting.³⁴⁵

At first glance, perhaps, there may seem to be little practical difference between these two approaches. It does not matter, one might argue, whether one *begins* with the presumption that occupational speech is “non-speech” or “speech” for First Amendment purposes if—when courts take additional factors into account—they move from either of these opposing starting points to the same First Amendment middle

340. Blitz, *supra* note 125, at 45-48.

341. See *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2680 (2011) (Breyer, J., dissenting).

342. See *id.* at 2673-74 (quoting *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980)).

343. *Id.* at 2672 (majority opinion) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

344. See *R.A.V.*, 505 U.S. at 394-96.

345. See *supra* Part II.D.

ground (where occupational speech gets some free speech protection, but not as much as public debate). In other words, if it is clear the First Amendment should protect “the integrity of physician-patient communications as a channel for the communication of accurate medical information,”³⁴⁶ but *only accurate* information, why does it matter whether courts justify such protection on the basis of (1) the value that accurate medical information has for patients’ understanding of these health issues (and that of the public), or (2) the harm that the government does to patients by depriving them of that information? The two approaches, on this argument, are merely two different ways of describing the same First Amendment framework: six of one, half-a-dozen of the other.

My argument here, however, is that it is of consequence for First Amendment law which of these approaches courts adopt, and that the latter, speech-harm-based approach is the better choice for two reasons. First, government may harm the integrity of physician-patient (or psychotherapist-client) communications not *only* when it interferes with the flow of accurate information, but also in other ways. For example, imagine a situation where government allows every physician complete freedom to convey any accurate medical information she wishes to convey to her patient, but also requires her to inform each patient seeking an abortion of philosophical arguments that abortion is morally impermissible (and bars her from offering philosophical arguments for its permissibility). It may be true that such a compelled speech requirement is objectionable, in part, because it can result in deception or confusion: Even if the physician is permitted to make it clear (1) that such arguments come from philosophy and not from medical science and (2) that the arguments do not represent the physician’s own point of view, but rather that endorsed by legislators, there is a risk patients may still assume that what they hear in their physician’s office from their physician represents her own judgments, and those of the medical profession. As Nadia Sawicki notes, “[w]here informed consent mandates require physicians to communicate messages dictated by the state, there is a substantial risk that patient-listeners will not recognize the true origins of the speech.”³⁴⁷

But even where such confusion is absent, such a compelled speech requirement seems intuitively in tension with First Amendment principles: To use the Supreme Court’s language from *Velazquez*, it exerts “control” over “an existing medium of expression . . . in ways which distort its usual functioning.”³⁴⁸ More specifically, it partly wrests

346. Post, *supra* note 235, at 940.

347. Sawicki, *supra* note 339, at 33.

348. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543 (2001).

control of this medium away from the patient and physician—and uses it to promote (as *Camnitz* puts it) the state’s own ideological preferences.³⁴⁹ The same would be true if government compelled a psychotherapist to voice state-designed messages to their clients, for example, about the state’s views about the supposed value to the client’s life (and mental well-being) of performing particular kinds of service to one’s community.

To be sure, Post’s framework for physician speech also treats such compelled speech as problematic, even when it does not deceptively disguise the state’s view as the physician’s own: It is not only when physicians are compelled to hide medical truths or voice medical falsities that free speech rights are undermined, but also, he writes, when they are compelled to “affirm ideological truths to which they might well object.”³⁵⁰ But it is hard to see why this follows if the only First Amendment value that physician (or other occupational) speech has for individuals lies in the disciplinary truth embodied in it.

If a compelled speech requirement leaves such disciplinary truth untouched (because the physician remains free to convey her understanding of medical wisdom), why is it nonetheless problematic? For Post, the answer lies in the case of *Wooley v. Maynard*,³⁵¹ which makes it clear that the state may not compel individuals to give voice to an “idea they find morally objectionable.”³⁵² This is in part because the Supreme Court cited *Wooley* in upholding state-required disclosures by physicians to patients seeking an abortion and noted, in doing so, that such disclosure requirements are constitutional even though a “physician’s First Amendment rights not to speak are implicated.”³⁵³

But the Supreme Court may have made this assumption in part because it saw physician-patient speech as having a First Amendment value that extended beyond the accuracy of the medical information it conveys. If the *only* First Amendment value of occupational speech lies in the accurate information it conveys to a patient or client, it is unclear why a compelled ideological message is problematic if it does not undermine the truth of what a professional says. And since *Wooley* focuses only on compelled speech requirements, it does not explain why it would be problematic for government to restrict a psychotherapist or other professional’s speech on ideological grounds instead of compelling her to give voice to a state-approved message.³⁵⁴

349. *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014).

350. Post, *supra* note 235, at 959.

351. *Id.* at 959.

352. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

353. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (citing *Wooley*, 430 U.S. 705 (1977)).

354. *See Wooley*, 430 U.S. at 713.

For some commentators, the answer lies in the fact that such ideological compulsion often entails not just control of professional activity, but of the physician's thought and speech *outside of* this professional role. Sawicki, for example, stresses that "not every word [a doctor] says" should be "considered 'professional speech' even if she utters those words while providing care to a patient . . . mandates of ideological or political statements, for example, may be better treated as compulsions of private speech."³⁵⁵ This is a plausible doctrinal stance. But where, for example, a psychotherapist is giving a patient advice about how to understand mental function (or asking her questions intended to elicit such understanding), it seems odd to say such discussion would count as "professional speech" when subject to safety-minded regulation, but as "personal speech" when subjected to regulations motivated by ideology. Moreover, as Sawicki acknowledges, what makes a state mandate for physicians or other professionals "ideological" or political is not self-evident.³⁵⁶

R.A.V. provides a plausible doctrinal solution to this puzzle: Government, under *R.A.V.*, may not justify interfering with and reshaping advertising or commercial speech to its liking—even if it can show that doing so leaves the speech in a state that is factually accurate, or even if has a plausible account of why its speech requirement is in some sense, non-ideological.³⁵⁷ It needs to show more than that. More specifically, it needs to be able to show that its interference in commercial speech is justifiably aimed at the "risk of fraud" or some other harm of a kind that makes the content of commercial speech fair game for state restriction.³⁵⁸ Similarly, if the government restricts physician speech, for example, by requiring that a physician or psychotherapist act as a mouthpiece for the government's message, it cannot fend off First Amendment objections simply by claiming that its doing so leaves the physician or therapist free to provide an accurate account of medical or psychological knowledge.³⁵⁹ Rather, it has to have a plausible claim that its interference in physician or therapist speech is justified by the need to protect patients or therapy clients from fraud or incompetence, or to otherwise protect their reliance interests that are at stake when they put their physical or mental health in the hands of a doctor or therapist.³⁶⁰

In most cases, perhaps, the existence of a health or safety concern

355. See Sawicki, *supra* note 339, at 8.

356. See *id.* at 27 ("there remains significant uncertainty, as to what, precisely, qualifies as 'ideological speech' for the purpose of the First Amendment.).

357. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992).

358. *Id.* at 424-25 (Stevens, J., concurring).

359. See *id.* at 395-96 (majority opinion).

360. *King v. Governor of N.J.*, 767 F.3d 216, 224, 232 (3d Cir. 2014).

that justifies some speech limits will be obvious—and a court will thus not need to give any serious consideration to the question of whether a particular licensing or malpractice law violates the First Amendment. As noted earlier, for example, where government malpractice laws come from the judgment of a professional body itself, courts may quickly conclude that they are necessary to protect the reliance interest that a patient or client brings to a professional relationship.

There may be other cases, however, where a government's insistence that it is only acting to protect clients' reliance interests may be far more suspect. First of all, such a reliance interest may simply not be at stake in a particular form of occupational speech. For example, while getting accurate medical advice may be a matter of life or death, there may be much less at stake when we hire a tour guide to tell us about a neighborhood: We might, of course, find ourselves confused or misinformed by a tour guide who is ignorant or ineffective at clearly communicating her knowledge. And we might be similarly confused or ill-informed by a tutor we hire to answer questions we have about economics, philosophy, or literature. But that does not necessarily mean that we can claim a right to rely on such a tutor or tour guide akin to the justifiable reliance we place in physician's judgment. Nor to insist that the First Amendment leaves government with power to restrict what they say to us (or to others who wish to hire them). In these circumstances, after all, individuals are using tour guides or tutors to obtain the same kind of information they could obtain by reading a book, watching an Internet video, or using a smartphone application. The First Amendment does not allow government to censor the content of a tour book or a history book, and it is not clear why it should have any more authority to censor the same content when it comes—in a more personalized form—from the mouth of a tour guide or history tutor.³⁶¹ Courts should thus not rush to conclude that a reliance interest justifying speech restriction is present whenever advice or other expressive activity is “personalized,” or is offered in exchange for a fee: If our physician's words have a different significance for us than information we find on the Internet or in a medical book, and are more subject than are the latter to government regulation, this is not simply because it comes in the form of a personalized service, but also because it comes as part of a fiduciary relationship wherein the physician has undertaken certain duties to us or

361. In fact, the Ninth Circuit refused to recognize a reliance interest in one case where individuals felt they had a right to rely on the accuracy of written materials. In *Winter v. G.P. Putnam's Sons*, “mushroom enthusiasts” sued the publisher of a book called *The Encyclopedia of Mushrooms* after they ate mushrooms, relying on this encyclopedia's classification of these mushrooms as “safe to eat.” 938 F.2d 1033, 1033-34 (9th Cir. 1991). The court refused to find that the publisher could be liable for this information under products liability and noted that its reasoning was “[g]uided by the First Amendment and the values embodied therein.” *Id.* at 1036.

other patients.

Nor should courts assume that a reliance interest is present whenever advice we receive is “characteristic dependent.” As Robert Kry pointed out, whether it is personalized or not, advice from a hired expert may be “[c]haracteristic dependent,” in the sense that its content may “var[y] depending on the characteristics or circumstances of the person receiving it, regardless of the manner in which it is delivered.”³⁶² Certain software on an application or a website, for example, may produce different content according to answers we give to certain questions. While such characteristic-dependent advice may be something we are more likely to perceive as information we can rely upon and use for solving specific problems, courts cannot simply assume we have a right to rely on information in this way. Consider newspaper columnists who provide personal advice in response to reader questions. The advice they give in the column is not personalized in the same sense as a doctor’s private advice to a patient—it is available to all readers of the newspaper (and is read by many of them). But it is characteristic-dependent in the sense that its content is framed as the answer to a particular concern raised by a particular questioner, generally about her own life circumstances. Still, this does not mean that the reader should have a right to rely on the columnist’s response in the same way that a patient or client relies on a doctor or therapist. In fact, a federal district court recently found that Kentucky violated the First Amendment when it attempted to silence such an advice columnist on the ground that he was engaged in the “unauthorized practice” of psychology.³⁶³

E. Aesthetic Freedom and Occupational Speech

Moreover, there is a second respect in which First Amendment protection might go *beyond* simply protecting a client’s access to (and reliance upon) “disciplinary truth”—and protect clients not only against the betrayal of reliance interests, but also other interests that are at stake in their conversations with professionals or other hired experts. This is especially clear where the occupational speech in question has an artistic or aesthetic component. We sometimes recruit the aid of experts in a given field not only for expert truth that we can trust in and use as a solid foundation for action—but also for more idiosyncratic aesthetic or value judgments. For example, if I hire an interior decorator to suggest a

362. Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 907 (2000).

363. *Rosemond v. Markham*, No. 13-42-GFVT, 2015 WL 5769091, at *3, *6, *11 (E.D. Ky. Sept. 30, 2015) (finding that, where the advice columnist gave advice about dealing with a teenager in response to a letter writer’s questions, “[t]he relationship that is necessary between a professional and a client to trigger application of the *professional speech* doctrine just did not exist”).

design and color scheme for a living room or office building, I may expect that interior decorator to have certain training and skill sets (or, at the very least, that she be honest with me about her training or experience)—but I should not be shocked if her judgments differ markedly from those I would receive from other interior decorators. Likewise, if I wish to hire a composer for a film project, or a graphic designer for a website I am creating, I may understandably ask about that person’s musical or artistic training. But I cannot expect I would receive anything close to the same musical score from different composers, or the same web layout, color scheme, or illustrations from different graphic designers.

In all of these cases, moreover, I may find that the artistic design or the musical score I receive is not only at odds with those I might receive from other interior decorators or composers but also with my own aesthetic judgments. The reliance interest that we have been discussing here as the basis of First Amendment protection is no longer present in the same way. Rather than being forced to trust in an expert—such as a physician or surgeon—whose judgments I am ill-suited to question (except perhaps by going through the burdensome process of getting a second or third opinion), I will here be in a position to reject what the interior decorator, the graphic designer, or composer proposes, because it is not simply a matter of disciplinary truth that I am powerless to assess, but also a matter of my own artistic taste—against which I can assess the proposals of a decorator, a designer, or composer, even if I am not an expert in those fields. In these situations, the professional discourse in question is, to use Halberstam’s terminology, *not* the kind of “bounded speech practice” where there is a profession-wide consensus about the appropriate “content and purpose of the communication.”³⁶⁴

If the government forbade an interior decorator or graphic designer from expressing a certain artistic judgment—whether in a sketch or in words—in order to “protect” a client from being exposed to the artistic judgments reflected in such proposals, such a restriction should certainly raise significant First Amendment concerns. The law may be a “surety for the disciplinary truth of expert pronouncements”³⁶⁵—where there *is* such disciplinary truth—but it cannot, consistent with the First Amendment, be a surety for artistic or aesthetic conformity. As the Supreme Court has said: “[E]sthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.”³⁶⁶ Likewise, it

364. See Halberstam, *supra* note 292, at 833.

365. POST, *supra* note 63, at 45.

366. United States v. Playboy Entm’t Grp., Inc., 529 U.S. 803, 818 (2000).

is not the government's role to decide what musical compositions are good enough to deserve the money of an individual who is willing to pay for them. In professional exchanges of this sort, artistic freedom is at stake, and the government may not limit it without raising First Amendment concerns.³⁶⁷

The same is true, moreover, in some professional relationships where the expertise recruited by a client is more academic than artistic in nature. I might, for example, hire a historian to research and write a report about my family's history, or that of a company or club in which I have a leadership role. While I might expect that all competent historians who come to this task will come with certain research skills and knowledge, I cannot expect that they will all make the same judgments about which characters or twists in this history are most significant or deserving of attention. In a similar vein, when people hire a tour guide to lead them through a city neighborhood, they might not do so only to obtain accurate information about that city—but also in the hope they will find other value in the tour guide's words. They may, for example, want a tour guide who is not only a specialist in the neighborhood's haunts and history, but also an animated and skillful storyteller, or someone who has lived in the neighborhood and infuses the tour's narrative with accounts of her own day-to-day life there. In such a situation, citizens may well welcome some state regulation—for example, a background check system that can give them confidence that the tour guides they follow are fit to be trusted with their safety. But it is not for the state to say how historians or tour guides are to select which historical facts are important, or to decide how to recount them.

It should not be surprising, then, that two recent federal appellate courts—each asking whether tour guide licensing requirements violated the First Amendment—both agreed that government would likely run afoul of the First Amendment's protection if it tried to restrict what tour guides could tell sightseers.³⁶⁸ The courts came to different conclusions. The District of Columbia and New Orleans had each required tour guides to obtain a license before offering tours to sightseers, and to pass a multiple-choice test about the city's geography and history as a

367. It is thus puzzling why the Eleventh Circuit was so dismissive of First Amendment concerns about Florida's requirement for licensing interior designers. *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011). The court insisted that, because the law governed "direct, personalized speech" of professionals with clients, it "does not implicate constitutionally protected activity under the First Amendment." *Id.* It is hard to see, however, why such a principle would not allow government to likewise interfere with the speech of life coaches, college tutors, or historians hired by individuals or organizations on the ground that it disagreed with the views expressed in the speech. It may be that the court was comfortable with the licensing statute because it deemed it content- and viewpoint-neutral. But this point was not elaborated in the case itself.

368. See *Edwards v. District of Columbia*, 755 F.3d 996, 1000 (D.C. Cir. 2014); *Kagan v. City of New Orleans*, 753 F.3d 560, 562 (5th Cir. 2014).

condition of obtaining this license.³⁶⁹ In *Edwards v. District of Columbia*, the D.C. District Court found this requirement infringed upon the First Amendment.³⁷⁰ In *Kagan v. City of New Orleans*, the Fifth Circuit found that it did not.³⁷¹ But while these courts came to different conclusions, they agreed on the First Amendment framework. The Fifth Circuit agreed with the D.C. Circuit that the stories and information tour guides shared with sightseers counted as protected speech.³⁷² This licensing requirement survived First Amendment scrutiny, in its view, but this was only because it did not prevent tour guides from talking or control what they said: “Tour guides may talk but what they say is not regulated or affected by New Orleans.”³⁷³ It agreed, moreover, that to the extent that regulations were to impose any limits on tour guides’ speech, they would have to survive intermediate scrutiny.³⁷⁴

One possible response to these observation is to advocate that First Amendment law draw a distinction between the speech of “professionals” and that of other occupations. *Professional* speech, on this view, might be subject to state restriction than *occupational* speech. More specifically, one might argue, the state has a strong interest in restricting speech not merely where an expert does offers us the benefit of her expertise (artistic or otherwise), but also – to use Justice White’s words – “takes the affairs of a client *personally* and purports to exercise *judgment on behalf* of the client.”³⁷⁵ Doctors, lawyers, and accountants, for example, appear to fit this description. Tour guides, historians, and interior designers perhaps do not. One might likewise emphasize, as the Eleventh Circuit panel did in *Wollschlaeger*, that a States interest in regulating speech between a client and physician is strong not only because it concerns medicine, but because occurs “within the confines of a fiduciary relationship.”³⁷⁶ Such a fiduciary relationship that may well be absent in other occupational relationships.

In any event, one cannot assume that the reliance interests we bring to a commercial exchange will be the same in all circumstances—or that the presence of such reliance interests justifies giving the government space to regulate aspects of occupational speech that have little to do with protecting such interests. As the Court noted in *R.A.V.*, it is a familiar part of First Amendment doctrine that “a particular instance of speech can be proscribable on the basis of one feature (for example,

369. *Edwards*, 755 F.3d at 999; *Kagan*, 753 F.3d at 561.

370. 755 F.3d at 1001-02, 1009 (striking down tour guide licensing regulations as an unconstitutional limitation on tour guide speech).

371. 753 F.3d at 562.

372. *See Edwards*, 755 F.3d at 1000; *Kagan*, 753 F.3d at 562.

373. *Kagan*, 753 F.3d at 562.

374. *Id.*

375. *Lowe*, 472 U.S. at 232 (emphasis added).

376. *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 891 (11th Cir. 2015).

obscenity) but not on the basis of another (for example, opposition to the city government).³⁷⁷ It may be that in certain kinds of occupational speech we do not justifiably rely heavily on the truth of what an expert says, and in such cases there will be far less occupational speech that is legitimately “proscribable” (because of the risks it creates for our health, safety, or financial welfare) than there is in, say, the advice we receive from our physician or accountant. As noted earlier, it may not always be obvious to judges what regulations can legitimately be said to count as protecting such reliance interests, and which cannot, and courts will thus have to decide how much to defer to officials’ judgment that a certain professional regulation, for example, really counts as a regulation dedicated to promoting patient safety.³⁷⁸ But in at least some kinds of occupational speech regulation, for instance, those that prevent a client from hiring a graphic designer with a particular kind of artistic approach, any such government claim is likely to be implausible—because while the health or safety advice we may receive from a physician is fair game for restriction under the First Amendment, the aesthetic recommendations of an artist are not.

Moreover, these examples make it clear that courts cannot assume a reliance interest is present—and justify restriction of speech—any time a client (1) pays for a service, (2) receives a service that is “personalized,” and (3) that is “characteristic-dependent.” These three conditions, after all, exist not only when we rely on a physician or an attorney, but also when we hire a portrait artist to create a painting in a certain style or a piano teacher to teach us skills using a certain instructional technique.

Government may, in some cases, need to regulate activities that entail aesthetic judgments in the course of protecting citizens’ reliance interests. For example, it imposes certain limits on the way architects, and the structural engineers working with them, design buildings or other structures, to make sure the result is both safe and functional—and in that case, perhaps, its protection of clients’ (and the public’s) interest in safe structures will require it to simultaneously place some limits on the kind of aesthetic decisions an architect can propose to her client. Where legitimate regulation does collateral damage to First Amendment expression in this way, however, courts should apply intermediate scrutiny (rather than rational basis) to assure that such damage is not much greater than necessary to accomplish the state’s goals.³⁷⁹ Nor is it clear that such First Amendment concerns will entirely disappear when an occupational relationship is also a professional relationship in which the professional exercise judgment on the client’s behalf: not all features

377. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992).

378. See *supra* text accompanying notes 185-187.

379. See *supra* Part II.C.

of the interactions we have with a doctor or lawyer may be characterized by such reliance on that kind of expert judgment.

V. THE FIRST AMENDMENT VALUE OF PSYCHOTHERAPY

It may seem at first that, because psychotherapists are in the business of mental health treatment, First Amendment law should treat them in all respects like physicians, and not like artists or historians. Indeed, the Ninth Circuit essentially treated psychotherapy as a branch of medicine: California's therapy restriction, it concluded, is just as deserving of "deferential review" as are "other regulations of the practice of medicine."³⁸⁰ And, in certain respects, psychotherapy is undoubtedly much closer to medicine than to many other kinds of professional activity.³⁸¹ A psychotherapist, like a physician, sets herself the goal of restoring a person's health.

I argue in this Part, however, that this vision of talk therapy is too simple.³⁸² Psychotherapy is not just a variant of medicine; it is a distinctive kind of healing practice—and one which may often be more likely than medicine to include expression of idiosyncratic value judgments that are shared by therapist and client, but do not reflect a profession- or society-wide consensus. According to Nancy McWilliams, for example, psychotherapy is a practice "at the intersection of two vertices: the medical and the religious."³⁸³ Psychotherapists resemble physicians in some of what they do: they heal specified diseases, often using "validated techniques" that have "specific, replicable effects."³⁸⁴ But their work also sometimes ventures into the territory of philosophy: they use "existential, experiential, humanistic, romantic, collaborative, or discovery-oriented ways of seeking answers to (unanswerable) human questions."³⁸⁵

A. *The Medical Model and Psychotherapy*

This does not mean that First Amendment law should simply ignore the strong parallels between psychotherapists and physicians. Indeed, psychotherapy has long been viewed as a kind of medical treatment—or something analogous to it—by both practitioners and many of those who seek its benefits. As Eric Caplan writes in his seminal history of psychotherapy, it was born in America in the late nineteenth and early twentieth centuries when physicians decided to claim talk therapy for

380. *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014).

381. See *SAKS & GOLSHAN*, *supra* note 52, at 77.

382. See *infra* Part V.

383. *MCWILLIAMS*, *supra* note 34, at 3.

384. *Id.*

385. *Id.*

themselves—so that they could offer a scientific alternative to the popular religion-tinged “mind cure” movement and similar programs.³⁸⁶ On a number of occasions, in fact, physicians lobbied for laws permitting only those in their own profession to treat mental illness.³⁸⁷ In the 1890s, they moved—unsuccessfully—to ban “mind cure” adherents from offering talk therapy.³⁸⁸ A decade later, they made a similar effort in response to the rise of the Emmanuel movement, a “cooperative venture between Boston physicians and Episcopalian ministers” that aimed to improve psychological, spiritual, and physical health by offering the public a mix of classes, clinics, and psychotherapy sessions.³⁸⁹ The “movement’s medical critics,” writes Caplan, expressed concern about its popularity and “sought to restrict the practice of psychotherapy to licensed physicians.”³⁹⁰ They argued (in the words of neurologist Charles Dana) that “the care of the sick is safest in the hands of those trained for the purpose,”³⁹¹ and that “there ought to be definite forms of psychotherapeutics” based upon science.³⁹² And, in 1955 and 1956, similar efforts arose from within the American Medical Association (“AMA”): The “legislature for New York,” writes Rollo May, “had before them a bill introduced by the conservative wing of the AMA that would make all psychotherapy a branch of medicine”³⁹³ and thus, effectively, make it illegal for anyone to practice psychotherapy unless they had graduated from medical school and were following the professional standards applicable to practicing physicians.³⁹⁴ Thus, wrote May, passage of such an act would have meant that therapists like himself—a practitioner of existential-humanist therapy who held a Ph.D. in psychology rather than an M.D.—could be “outlawed and possibly arrested for practicing medicine” without a license.³⁹⁵

These takeover efforts failed in the end to give physicians a monopoly over talk therapy. Although some talk therapy is offered by those with medical training (especially psychiatrists), much talk therapy is offered by psychologists, social workers, or others without a medical degree.³⁹⁶ Still, one might argue, even where these therapists are not practicing medicine, they are engaged in a healing practice that in many

386. ERIC CAPLAN, MIND GAMES: AMERICAN CULTURE AND THE BIRTH OF PSYCHOTHERAPY 62-63, 149-51 (Andrew Scull ed., 1998).

387. *Id.* at 84-85.

388. *Id.* at 63-64, 84-89.

389. *Id.* at 117-23.

390. *Id.* at 131.

391. *Id.*

392. *Id.* at 133.

393. Rollo May, *Foreword* to AM. PSYCHOLOGICAL ASS’N, HISTORY OF PSYCHOTHERAPY: A CENTURY OF CHANGE, at xxiii (Donald K. Freedheim et al. eds., 1992).

394. *See id.*

395. *Id.*

396. *Id.* at xxiii-xxiv.

ways follows the same model: they cure or treat illnesses (mental rather than physical) by drawing upon scientific findings (in this case, about the mind rather than the body).

In fact, such a “medical model” for psychotherapy seems to be implicit in the two forms of psychotherapy that were dominant in the United States throughout the twentieth century: (1) psychoanalysis, rooted in the theories and methods of Sigmund Freud; and (2) the behaviorist approach, rooted in the psychological theories of John B. Watson, Ivan Pavlov, and B.F. Skinner.³⁹⁷ In many ways, these approaches are starkly different. For those in the psychoanalytic (or psychodynamic) school, a client’s emotional or mental struggles often have their roots in unconscious feelings or beliefs forged in childhood experience or other significant episodes in life.³⁹⁸ As Frank and Frank describe this approach, it “involve[s] repeated, emotionally charged interactions with a therapist who tries to increase the patient’s awareness of more or less unconscious feelings and attitudes, especially those formed in childhood.”³⁹⁹ The behaviorist approach, by contrast, focuses not on the patient’s internal life or history, but on understanding and changing the “immediate environmental determinants of patients’ attitudes and behavior.”⁴⁰⁰ As one of its most prominent practitioners, Joseph Wolpe, describes it: “Behavior therapy consists of applying experimentally established principles to overcoming these persistent unadaptive habits.”⁴⁰¹ It is rooted in a “deterministic outlook” that regards the patient as a product of biological and environmental determinants, with every “[a]ttitude[], thought[], verbal behavior, and emotional behavior hav[ing] all been shaped in various ways and various degrees by the organism’s previous interactions with his environments.”⁴⁰²

Despite their significant differences, both of these schools focus on using science to fix mental malfunctioning.⁴⁰³ As the book *Persuasion and Healing* observes, the conceptual schemes provided by Freud, Pavlov, and Skinner “[t]ogether . . . supply scientifically respectable rationales for contemporary methods of psychotherapy.”⁴⁰⁴ As Bruce Wampold points out, both of these approaches also emulate the medical model by (1) identifying “an illness or disease,” or “disorder,” (2) seeking “a biological explanation for the illness or disorder,” (3) a

397. See FRANK & FRANK, *supra* note 262, at 4-5; MCWILLIAMS, *supra* note 34, at 1.

398. See MCWILLIAMS, *supra* note 34, at 1-2.

399. FRANK & FRANK, *supra* note 262, at 4.

400. *Id.* at 5.

401. JOSEPH WOLPE, *THE PRACTICE OF BEHAVIOR THERAPY* 1 (Arnold P. Goldstein & Leonard Krasner eds., 2d ed. 1973).

402. *Id.* at 53.

403. See FRANK & FRANK, *supra* note 262, at 5.

404. *Id.* at 5.

“mechanism of change,” and (4) “a particular therapeutic procedure.”⁴⁰⁵ Freudian psychologists, for example, may (1) diagnose hysteria, (2) explain it as based in “repressed traumatic events,” (3) seek to change it with “insight into [the] unconscious,” and (4) use “free association” as the treatment tool.⁴⁰⁶ Behaviorists might likewise treat a client with (1) “phobic anxiety” by (2) explaining it as arising from Pavlovian conditioning, (3) seeking to desensitize the client to the stimulus that triggers the anxiety, and (4) do so with techniques of “systematic desensitization.”⁴⁰⁷

In more recent years, most behavioral therapy has incorporated a focus on “cognitive processes” and, as a consequence, has become “cognitive-behavioral therapy.”⁴⁰⁸ But it has maintained its scientific focus. According to Derek Trustcott, when psychiatrist Aaron Beck laid the foundations for cognitive therapy, his work appealed to “empirically minded therapists” in the behaviorist school because of its “scientific rigor.”⁴⁰⁹ Unlike behaviorists, Beck wanted to take stock of unseen mental operations, but he adhered to scientific standards as he did so: “hypothesiz[ing] change processes, operationalizing his change tasks, and evaluating the efficacy of his approach.”⁴¹⁰

However, it is wrong to think that this medical model provides the only template for psychotherapy. There are circumstances in which it is a poor fit for describing what happens in talk therapy. In fact, some psychologists have made efforts to distance themselves from the medical model. They have, as one commentator writes, begun to address therapy users as “clients” rather than “patients” to “signify a rejection of [a] medical way of thinking, replacing it with the humanistic language of growth and change.”⁴¹¹ In the view of these psychotherapists, therapy is “not about curing illness but about helping people to find solutions and new directions in life for themselves.”⁴¹² Among the many well-known and widely-used psychotherapy approaches are some, such as the humanistic approach developed by Carl Rogers, that are more aligned with philosophy than with science and medicine.⁴¹³ This is also true of the Existential Psychotherapy practiced by therapists such as Ludwig

405. WAMPOLD & IMEL, *supra* note 266, at 7-9.

406. *Id.* at 18.

407. *Id.* at 19-20.

408. DEREK TRUSCOTT, BECOMING AN EFFECTIVE PSYCHOTHERAPIST: ADOPTING A THEORY OF PSYCHOTHERAPY THAT’S RIGHT FOR YOU AND YOUR CLIENT 105-07 (2010).

409. *Id.* at 98-99.

410. *Id.* at 99.

411. Joseph, *supra* note 2.

412. *Id.*

413. See *Transpersonal Pioneers: Carl Rogers*, SOFIA UNIV., <http://www.sofia.edu/about/history/transpersonal-pioneers-carl-rogers> (last visited Feb. 9, 2016).

Binswanger, Victor Frankl, Irvin Yalom, and Rollo May.⁴¹⁴ As Yalom writes, the “basic tenets of existential therapy are such that empirical research methods are often inapplicable or inappropriate.”⁴¹⁵

More specifically, there are three important aspects of psychotherapy which seem to require a departure from the idea that it is simply a branch or variant of medicine, and can thus be subject to precisely the same First Amendment rules: (1) the plurality of approaches that exist in place of any discipline-wide professional consensus;⁴¹⁶ (2) the desire of many therapy-seekers to use therapy not simply to achieve mental health, but to struggle with questions about what will give them a sense of meaning, or give their lives (or work) value;⁴¹⁷ and (3) the respects in which the conversations individuals have with therapists not only count, in some ways, as an exercise of freedom of expression, but also serve as a crucial means of exercising another First Amendment freedom, namely what the Court has called the “freedom of thought.”⁴¹⁸

B. Challenges to the Medical Model: The Diversity of Psychotherapy Approaches and the Common Factors Model

One reason that psychotherapy cannot be treated as perfectly analogous to medicine is its methodological diversity. Psychotherapy often involves far more experimentation and uncertainty. It is more often the case in psychotherapy than in medicine that clients can, and do, experiment at times by switching between radically different approaches. A doctor treating a bacterial infection (say a stubborn sinus infection) often decides that the typical and appropriate medical response to such an infection is a course of antibiotics. As Bruce Wampold writes, “in medicine, . . . there is a modal explanation for a disorder and one or a few competing treatments based on the modal explanation.”⁴¹⁹ By contrast, imagine that this person, having recovered from his sinus infection with the help of antibiotics that the doctor prescribed, now turns from medicine to psychotherapy in order to help address a different, more lasting set of problems in his life: a long-felt sense of depression, a tendency to become anxious and inarticulate in

414. ROLLO MAY & IRVIN YALOM, EXISTENTIAL PSYCHOTHERAPY 1, 11 (last visited Feb. 24, 2016), http://www.cengage.com/resource_uploads/downloads/0495097144_81300.doc.

415. IRVIN D. YALOM, EXISTENTIAL PSYCHOTHERAPY 22 (1980).

416. Lynn Margolies, *Understanding Different Approaches to Psychotherapy*, PSYCH CENTRAL (Mar. 31, 2010), <http://www.psychcentral.com/lib/understanding-different-approaches-to-psychotherapy>.

417. Cheryl A. MacDonald, *How to Achieve Success with Counseling*, HEALTH PSYCHOLOGY CTR., <http://www.healthpsychology.org/achieving-success-with-counseling> (last visited Feb. 24, 2016).

418. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

419. WAMPOLD, *supra* note 39, at 25.

social interactions, a paralyzing writer's block, or an abiding sense of low self-esteem. It is no longer the case that all competent practitioners will likely provide similar treatment. Rather, the client and the practitioner will face a dizzying array of choices and possibilities. As Wampold writes, in psychotherapy, there are "more than 500 distinct psychotherap[eutic] theories and . . . the number is growing."⁴²⁰

There are, moreover, immense differences between different approaches and often between different variants of the same approach. An anxious person who goes to a psychodynamic therapist might find herself trying to seek out the roots of her anxiety in past family interactions or other childhood experiences. If she goes to a behaviorist, she may instead engage in the more focused task of understanding what events in the external world trigger the anxiety and how to teach herself to react differently. If she goes to a *cognitive* behaviorist, she may be counseled to recognize the irrational "automatic thoughts" that arise with such anxiety and teach herself to recognize and correct or modify those thoughts when they appear. An existentialist therapist, by contrast, may work with her to explore how to distinguish neurotic and paralyzing anxiety from "the unavoidable existential anxiety of living."⁴²¹ A psychiatrist, or a psychotherapist well-versed in neuroscience, may adhere to one of the aforementioned approaches, but also consider the possibility that the anxiety is rooted in aspects of brain physiology or chemistry, and may require medications.

This raises a significant complication for arguments that, like those of the Ninth Circuit, quickly classify the talking cure as a type of curing that the state may assure meets professional standards. In medicine, perhaps, such a quick exclusion of a doctor's treatment-related speech from the First Amendment realm makes intuitive sense. Whereas a doctor can voice professional heresy in the realm of public debate, she cannot be left free to do so in private treatment. As noted earlier, Post accounts for this difference by noting that, whereas public discourse follows the tenet that "all life is an experiment," the law does not excuse a doctor "who offers bad advice to a patient" and then argues that "his advice was an experiment, as all life is an experiment."⁴²²

But for seekers of psychotherapy, life inevitably *is* an experiment to some degree—because psychotherapeutic wisdom does not provide a single "modal explanation" and solution for a given mental health problem or psychological goals. It, rather, offers a marketplace of psychological theories (and associated methods) from which individuals

420. *Id.*; see also David Wasdell, *In the Shadow of Accreditation*, in IMPLAUSIBLE PROFESSIONS, *supra* note 41, at 29, 31 (noting the "bewildering array of therapies and approaches from which to choose").

421. MAY & YALOM, *supra* note 414, at 2-3.

422. POST, *supra* note 63, at 45.

are left to choose, and within which they can experiment.⁴²³ This marketplace of psychological approaches is not as unconstrained or immune from professional regulation as is the more general First Amendment marketplace of ideas one finds in public discourse. Given the risks that therapy can raise for clients' mental health, it cannot be left immune to regulation—and while there are many very different counseling options available, this does not mean that even unsafe counseling approaches should get a chance to recruit clients in the therapy marketplace. Still, the bazaar of approaches one finds in therapy is closer to a First Amendment marketplace of ideas than is a body of disciplinary truth in medicine.

One might still argue that the legislature and other authorities in a democratic government should, in this circumstance, be charged with doing some of the experimenting themselves—and remove therapy techniques from the market when evidence indicates they are unsuccessful in restoring clients' mental health, so that clients are not misled into placing reliance on them. Rather than view the set of therapy choices that confront a client as a pure marketplace of ideas, perhaps it is at least to some extent a marketplace of professional services which professional authorities and legislatures should prune of ineffective offerings. This observation is at least partially right: If government has a legitimate role in protecting the reliance interests we bring to therapy—for example, our dependence on the therapist to correctly identify a particular mental illness and give us sound advice about treatment—it has to have power to act against therapists that betray these reliance interests.

However, this is only part of the picture. As in a marketplace of ideas, at least some of the experimenting and evaluating of different therapy techniques must be left to individual therapy seekers. Which techniques work for a particular patient may well depend (to a far greater extent than is true in medicine) on the client's own value and belief system. In fact, this is one of the central points made by a well-known challenge to the medical model raised by therapists and writers who espouse the “common factors” approach of the “contextual model.”⁴²⁴

This common factors approach traces its origin to a 1936 article by the psychotherapist Saul Rosenzweig in the *American Journal of Orthopsychiatry* titled, *Some Implicit Common Factors in Diverse Methods of Psychotherapy*.⁴²⁵ Rosenzweig aimed to explain a puzzle that stemmed from the fact that different practitioners of psychotherapy held radically different views of how the human mind works and how it could

423. WAMPOLD, *supra* note 39, at 25-27.

424. WAMPOLD & IMEL, *supra* note 266, at 57-59.

425. Saul Rosenzweig, *Some Implicit Common Factors in Diverse Methods of Psychotherapy*, 6 AM. J. ORTHOPSYCHIATRY 412, 413 (1936).

be cured.⁴²⁶ If the success of a therapy method depended upon the accuracy of its assumptions about human nature, then one would expect to see some therapy methods succeed (those with the correct view of human mental processes), and other mistaken therapy methods fail.⁴²⁷ Instead, observed Rosenzweig, diverse therapy methods of the time virtually all seemed to have the same success in treating patients.⁴²⁸ Analogizing this situation to the Dodo Bird race in *Alice in Wonderland* in which “[e]verybody has won,” Rosenzweig stressed that all therapy methods appeared to be proven right by the results, even though Freudians, behaviorists, and adherents of other schools of therapy argued that other types of psychotherapies were mistaken.⁴²⁹ The solution to this puzzle, claimed Rosenzweig, is that there are “unrecognized factors” in any therapeutic situation—whether it occurs in Freudian therapy, that Behavioral Therapy, or another kind of counseling—and these common factors lead to common results (and often successful results) no matter what the details of the particular theory.⁴³⁰

In *Persuasion and Healing*, Jerome Frank provided perhaps the most prominent elaboration of such a common factors model.⁴³¹ Originally published in 1961, and then revised and republished by Frank and his daughter, Julia Frank, the book suggests that “all psychotherapies share at least four effective features”: (1) a “therapeutic alliance” or “emotionally charged, confiding relationship with a helping person;”⁴³² (2) a “healing setting;”⁴³³ (3) a “rationale, conceptual scheme, or myth that provides a plausible explanation for the patient’s symptoms and prescribes a ritual or procedure for resolving them;”⁴³⁴ and (4) a “ritual or procedure that requires the active participation of both patient and therapist and that is believed by both to be the means of restoring the patient’s health.”⁴³⁵

The third of these four factors—namely, the fact that therapeutic alliance is built around a “rationale, conceptual scheme, or myth” shared by the therapist and the client—presents perhaps the starkest contrast with medicine. In medicine, a particular antibiotic will likely kill the bacteria causing an infection—and will do so regardless of a particular patient’s beliefs or philosophy of life. Indeed, it will do so once it enters a patient’s body, even if the patient is entirely unaware that the antibiotic

426. *Id.* at 412.

427. *See id.*

428. WAMPOLD & IMEL, *supra* note 266, at 33.

429. *See id.*

430. *Id.*

431. FRANK & FRANK, *supra* note 262, at 39–43.

432. *Id.* at 40.

433. *Id.* at 41.

434. *Id.* at 42.

435. *Id.* at 50.

is inside of her body. By contrast, according to the common factors approach, the psychotherapeutic community can and should understand that “personal values, characteristics, and life experiences may make particular patients more amenable to one technique than to another. Patients who fail to profit from an existential approach may respond to a behavioral one, and vice versa.”⁴³⁶ This is because the value that a “conceptual scheme” has for a particular therapy client often lies not in its underlying truth but in the aid it offers for addressing a particular task: The more a particular conceptual scheme makes sense to a client, given her “assumptive worldview,” the better a foundation it provides for building an alliance with a therapist who shares a commitment to the same scheme, for helping the client to make sense of the problem, and for inspiring hope that she can solve it.

This thus cuts strongly against “[t]herapists who see themselves as applied behavioral scientists” and invariably “assum[e] that the therapeutic power of an interpretation depends on how closely it approximates objective truth.”⁴³⁷ Because the value of a therapy method lies not in how much it approximates such an external truth, but in whether it serves the function of helping a client to make sense of her situation, and improve upon it, the “patient,” says Frank, “is the ultimate judge of the truth of an interpretation.”⁴³⁸ Thus, while the therapist is an expert in psychology and the diagnosing and treatment of psychological illness, the client will also bring a critical element to answering the question of what constitutes good therapy. Just as I might override the professional recommendations of a composer or designer on the basis of my own aesthetic preferences,⁴³⁹ so a particular client may decide that a particular form of therapy is a poor fit for her own beliefs and values. As a consequence, what counts as good therapy is not simply a matter of what techniques the majority of therapists, or the legislature, is willing to endorse, but also what works for a particular individual.

This, of course, makes it very challenging for the court to apply the Third Circuit’s principle that courts must distinguish between genuine professional regulation and censorship “under the guise” of such regulation.⁴⁴⁰ Distinguishing legitimate therapists from charlatans is difficult where there is a bewildering number of competing approaches and theories, and what counts as good therapy for one school might count as irresponsible for another. If the state is to ban a particular psychotherapeutic practice as outside the professional consensus, where does it find such a consensus? How can it insist to a psychologist or to a

436. *Id.* at xiv.

437. *Id.* at 72.

438. *Id.*

439. *See supra* text accompanying notes 363–364.

440. *King v. Governor of N.J.*, 767 F.3d 216, 236 (3d Cir. 2014).

client seeking psychotherapy that—as in medicine—he or she does not have a right to experiment with different approaches, but must use the accepted approach if there is no one accepted approach?

One possible answer is that there may be a unifying thread that extends through, and ties together, even the fragmented world of psychotherapy. Perhaps states can exclude techniques like SOCE from the realm of accepted psychological techniques by showing that SOCE is outside even the very large circle that embraces approaches as different as psychodynamic theory, cognitive-behaviorism, or existential and humanistic psychology. Indeed, the Third Circuit observed that this seemed to be the case. Many different organizations of psychological experts, it noted, have spoken with “urgency and solidarity” against SOCE.⁴⁴¹

But if it is correct that the “the patient is the ultimate judge of the truth of an interpretation,” then this argument requires elaboration.⁴⁴² How, one might ask, can the psychotherapeutic community insist that a particular patient or client is receiving an unacceptable form of therapy when the client believes it is correct and helpful? The answer might come in different forms.

One basis for psychotherapists’ solidarity—even in the face of uncertainty and a client’s contrary claims—might be the strong sense of many practitioners, both from empirical evidence and their personal sense of how psychotherapy works, that a certain kind of psychotherapist response to a situation may be dangerous for a client regardless of the therapist’s school of thought. All therapists, for example, might be expected to recognize, and take proactive measures to address, signs of suicidal tendencies in a particular case.

Another might be that there are situations where even a client’s belief in a conceptual scheme will not make it effective. Consider again the hypothetical claim of a talk-therapy Alzheimer’s cure that I

441. *Id.* at 238. Claudia Haupt provides a far more developed theoretical account of how such disciplinary knowledge may play a role in First Amendment law. She suggests that professions, including that of psychotherapy, be considered “knowledge communities” and that the First Amendment should bar government interference not only in the way these members of these communities communicate with clients, but also in the way they develop the disciplinary body of knowledge that defines them (for the sake of the clients, professionals themselves, and the wider society). See Haupt, *supra* note 309, at 1271-1277. She also argues that, in disputes such as the legal disputes over SOCE, the most “workable approach” for courts “is to defer to the knowledge community” *Id.* at 1295. However applying this model to psychotherapy requires at least some confidence that psychotherapy is, in at least some respects, a *single* knowledge community “drawing on a shared reservoir of knowledge” that cuts across the different schools of therapy, *Id.* at 1251. If each school of therapy is instead its *own* knowledge community, with “psychotherapy” and the American Psychological Association, respectively providing a shared label and shared organizational umbrella (but not a shared body of disciplinary knowledge), then such a model would not justify a judicial approach whereby some psychological knowledge communities can suppress the occupational speech of others.

442. FRANK & FRANK, *supra* note 262, at 72.

discussed near the beginning of the Article.⁴⁴³ No matter how strongly a particular client wants to believe in the efficacy of such a talk therapy cure, it will not banish his Alzheimer's. Other aspects of a client's mental functioning may be just as resistant to change. As Frank and Frank themselves point out, certain psychoses may have a "significant genetic or constitutional component" and, for this reason, "psychotherapy by itself cannot cure most psychoses," although it can "play[] a part in their management."⁴⁴⁴ In short, while a client's belief in a conceptual scheme may be an important determinant in what therapy method is effective, it is not the only variable and is, at times, not the most important. Thus, Jerome Frank also observes that, while most studies have shown different therapy methods to be equally effective, there is evidence that "certain techniques may indeed prove to be more effective than others for specific syndromes—notably, exposure to the fear-inducing stimulus for situation-bound fears, and abreaction for posttraumatic stress disorders."⁴⁴⁵

This brings us to still another possibility for generating agreement across different psychological schools: There might be some common metric whereby even psychotherapists who cannot agree on how the human mind works or how to fix it *can* agree on how to measure the success of therapeutic outcomes. As Wampold points out, studies of talk therapy's efficacy have largely found it to make a difference for therapy clients.⁴⁴⁶ As noted above, one of the striking aspects of these findings is that therapy seemed to have a powerful healing effect on clients regardless of the type of therapy used.⁴⁴⁷ Across a range of mental disorders, psychodynamic approaches, cognitive-behavioral approaches, humanistic approaches, and others, all appeared to work just as well.⁴⁴⁸ There was "no evidence to suggest that some treatments were more effective than others."⁴⁴⁹ One might thus argue that when a therapy, like SOCE, falls short of this standard—when it produces no clear evidence of the efficacy that one finds in other methods—that is one basis upon which psychotherapists can recommend against it, and perhaps take steps to exclude it from the acceptable practice of the profession. It certainly seems plausible for the community of mental health practitioners to consider excluding—from the list of commonly-accepted practices—a technique that consistently fails to produce the result that it promises.

443. See *supra* text accompanying notes 67-69.

444. FRANK & FRANK, *supra* note 262, at 11.

445. *Id.* at xv.

446. See WAMPOLD & IMEL, *supra* note 266, at viii-ix.

447. *Id.* at x.

448. See *supra* text accompanying notes 395-418.

449. WAMPOLD, *supra* note 39, at 70.

In some ways, in fact, the therapeutic community has already embraced the use of such effectiveness measures. As Wampold notes, psychologists have become uncomfortable with the contrast between medicine's "well established explanations" and psychology's proliferation of approaches.⁴⁵⁰ Wampold additionally highlights that "psychotherapy has [also] been fighting to be seen as a recognized treatment within the healthcare delivery system" and "an unrestricted variety of treatments, all of which are claimed to be effective, is not particularly appealing to third-party payers."⁴⁵¹ In part for such reasons, the Society of Clinical Psychology (Division 12 of the APA) appointed a task force to identify "empirically validated treatment[s] (EVT[s])."⁴⁵² In response to criticism that, given the "uncertainty in science and the evolving nature of conclusions," it was unclear whether a technique could ever be validated, the classification effort began to instead use the label "empirically supported treatments (ESTs);" however, this too met criticism, and in recent years psychologists seeking to distinguish legitimate from illegitimate treatment have focused more on the concept of "evidence-based treatment (EBT)," using it to "designate treatments for which there is evidence of efficacy."⁴⁵³

Such measures, perhaps, provide one basis for psychotherapists—and regulators—to find that certain therapies, including SOCE therapy, simply cannot deliver what they promise. Drawing on such indicators of efficacy—or of harm that might accompany a psychotherapeutic technique whether it is efficacious or not—one might distinguish therapies that are safe and effective from those that are not, much as the FDA evaluates the safety and effectiveness of pharmacological treatment.⁴⁵⁴ And just as FDA studies might find that a drug is ineffective or harmful even if scientists are not sure *why* it is ineffective or harmful, so psychotherapists (or those regulating them) might argue that, even if therapists cannot agree upon a particular model of mental functioning, or how to repair it when it fails, they can agree—at least in some cases—on what counts as a therapeutic failure.

This is precisely the approach that the 2009 APA Report relies upon in recommending against the use of SOCE therapies.⁴⁵⁵ Canvassing the studies it could find on the use of SOCE, the APA Task Force found insufficient evidence to conclude that SOCE was effective (and also

450. *Id.* at 27.

451. *Id.*

452. *Id.* at 27-28 (emphasis omitted).

453. *Id.* at 28, 31 (emphasis omitted).

454. *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 697, 703, 723 (D.C. Cir. 2007) (noting that "drug regulation" takes account of "the risks associated with both drug safety and efficacy").

455. *See* 2009 APA REPORT, *supra* note 15, at 86, 90-92.

found that “there was some evidence to indicate that individuals experienced harm from SOCE”).⁴⁵⁶ Critics of the California and New Jersey SOCE bans for minors have raised doubts about both the APA’s finding of ineffectiveness and its finding of harm.⁴⁵⁷ The APA could draw confident findings about lack of effectiveness, they point out, only with respect to early studies, primarily from the late 1960s and 1970s, which generally involved use of “aversive methods,” rather than the pure talk therapy conducted in more recent programs.⁴⁵⁸ With respect to later studies, the APA Report made clear that the APA Task Force was unable to draw “a conclusion regarding whether recent forms of SOCE are or are not effective.”⁴⁵⁹ The APA Task Force added a similar caveat to its conclusion about harm. On the one hand, it noted that the potential harm from SOCE therapy could be grave: “[A]ttempts to change sexual orientation,” it observed, “may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts.”⁴⁶⁰ On the other hand, it stressed that “there is a dearth of scientifically sound research on the safety of SOCE,” and the research gave no indication of the “prevalence of harmful outcomes” or the “frequency of . . . harm.”⁴⁶¹

In any event, it seems unwise to make a First Amendment protection depend heavily upon what studies like this show. In the first place, such studies present a moving target. For example, a 2015 article—following up on the 2009 APA Report—released new findings that the “SOCE participants” in its study “reported little to no sexual orientation change as a result of these efforts and instead reported considerable harm.”⁴⁶² Moreover, courts are not nearly as well-placed to make sense of such studies as are psychotherapists and regulators. While courts will give a “hard look” to agency determinations to tell if such are arbitrary and capricious, and must sometimes evaluate evidence to tell if the empirical evidence supporting a particular restriction allows it to meet heightened scrutiny, this does not mean they should do so every time professional activity (and the speech within it) is restricted in any way.⁴⁶³ Rather, where there is a reliance interest at stake in

456. *Id.* at 43.

457. Spencer Case, *Do “Conversion Therapy” Bans Violate Free Speech?*, NAT’L REV. (July 14, 2014, 6:31 PM), <http://www.nationalreview.com/article/382442/do-conversion-therapy-bans-violate-free-speech-spencer-case>.

458. 2009 APA REPORT, *supra* note 15, at 27.

459. *Id.* at 43.

460. *Id.* at 42.

461. *Id.*

462. John P. Dehlin et al., *Sexual Orientation Change Efforts Among Current or Former LDS Church Members*, 62 J. COUNSELING PSYCHOL. 95, 104 (2015).

463. See *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443, 445 (4th Cir. 1996).

psychotherapy, as there is in medicine—when a particular client is justifiably relying on his therapist to use methods that have been shown to be effective (in the same way that a particular patient may rely on her physician to prescribe only drugs that have been shown to be safe)—then courts should generally defer to the relevant experts. The key question for a court is thus *not* the question of whether the method is ineffective or harmful. That is a question they should, except in rare cases, leave for experts.

It is, rather, two other questions: First, a court should ask, is there in fact a reliance interest at stake in the situation in question? Is a therapy client really justifiably expecting a therapist to use *only* those talk therapy methods that have been deemed effective and free of certain risks of harm? Or is this a situation where a therapy client is permitted to seek (and does seek) certain therapy methods that do *not* count as an “evidence-based treatment” or that otherwise fall short of the bar that psychotherapy studies use to measure efficacy? The reason this question is important is, again, because the state’s interference in professional speech is more clearly justified only when such interference is needed to protect a patient or client interest of a kind that is absent in other conversations: namely, the patient or client’s need to stake her health or financial welfare on the truth and the soundness of advice she is unable to effectively evaluate herself. In some fee-for-service exchanges, this reliance interest is absent—for example, it may not be present when someone hires a “life coach” or college tutor—and where it is absent, the state’s justification for interfering (and shaping) the conversation disappears. It may likewise be absent in some therapeutic encounters if individuals want the freedom to continue to experiment with methods that may not have worked for other people—even if such experimentation requires them to forego the security (and state “surety” of “disciplinary truth”) that they would have when limiting themselves to methods that have already been proven effective.

Second, even where there *is* a reliance interest at stake, courts should ask—following *R.A.V.*—if a state’s speech restriction is, in fact, designed to protect that reliance interest. For example, if a minor seeking SOCE therapy can be assumed to be counting on that SOCE therapy to help (and not harm) her, courts should ask—as the Third Circuit did⁴⁶⁴—if that state’s regulation is really designed to protect that minor, or is instead aimed at the *impermissible* goal of suppressing the ideas in the therapist-client conversation. Again, a key question here is how deferential the court should be—and specifically, whether it should simply accept the government’s claimed purpose or whether (and how) it should look behind such a claim. At least one basis for skepticism is

464. See *King v. Governor of N.J.*, 767 F.3d 216, 238 (3d Cir. 2014).

discussed in *R.A.V.* itself: Where government claims its speech restriction is needed to address a particular kind of speech, for example, the reputational damage inflicted by libel, but then seems concerned *only* with libel that is “critical of government,” this is a red flag that government is likely less concerned with countering reputational damage than it is with censoring criticism.⁴⁶⁵ Similarly, if legislators bar a therapy technique (like SOCE) because it flunks certain measures of efficacy or has been shown to raise certain risks of harm or both, this will be legitimate only if it is clear legislators would be protecting clients from such efficacy or harm problems as a general matter—and in all forms of therapy where they arise—and not merely in therapies rooted in ideas that legislators oppose. It may be justifiable, as *R.A.V.* makes clear,⁴⁶⁶ for a legislator to focus on forms of talk therapy where lack of efficacy risks of harm are most serious, because that kind of selectivity tracks the reason that professional speech should be subject to greater regulation in the first place (to protect clients from ineffective or harmful techniques). But that would not provide license for subjecting equally ineffective or harmful therapy techniques to different legislative treatment because the legislator found one such technique more offensive than another.

In short then, evidence for lack of efficacy—or risk of harm—may justify a legislature or regulatory body in excluding some talk therapy schools from the marketplace of psychological ideas (and associated methods) from which therapy seekers may explore and choose. But, if *R.A.V.* provides the background for professional speech regulation (as *Sorrell* did for commercial speech regulation), then the state should only be able to exclude a talk therapy method in this way if it can show: (1) that the client brings a reliance interest (in a technique’s efficacy and lack of harmfulness) to the therapist-client relationship; and (2) that the state’s speech restriction is genuinely aimed at protecting that reliance interest, and not simply at suppressing opposing ideas.⁴⁶⁷

C. Challenge to the Medical Model II: The Goals of Psychotherapy and “Capacity for a Conception of the Good”

There is a second problem with attempting to fit psychotherapy entirely within the template of the medical model. Not only is psychotherapy marked by a great diversity of different paths for addressing mental health concerns, it is also marked by diversity of goals. Therapy seekers do not seek out psychological experts solely to treat a particular neurosis or other mental illness—they sometimes enter

465. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383-84 (1992).

466. *Id.* at 388-90.

467. See *id.* at 382-83, 395-96.

therapy with other goals that are less about curing diseases than about solving other types of life dilemmas. Nancy McWilliams, as I have noted above, notes that some individuals enter therapy “seeking answers to (unanswerable) human questions.”⁴⁶⁸ According to Irwin Yalom, “therapy is a deep and comprehensive exploration into the course and meaning of one’s life.”⁴⁶⁹ As Tim LeBon explains, in a book on the value of philosophy for psychotherapists, some individuals seeking therapy sometimes do so not to “have their unconscious interpreted, or be clinically diagnosed,” but rather to “make good decisions, understand the language of their emotions and work out how to lead a meaningful and worthwhile life.”⁴⁷⁰

This gives talk therapy a different kind of First Amendment value than physician speech. When psychotherapy veers into discussion of “unanswerable human questions,” it strays outside the borders of a “bounded speech practice” dedicated to an agreed-upon practical goal (such as restoring health with a specified medicine or treatment procedure). And it moves more deeply into First Amendment territory. It provides a forum for expression of a kind that is not only covered by the First Amendment, but lies at its core—namely, expression that is used to engage in autonomous thinking and formation of one’s beliefs. More specifically, if a person in therapy is seeking to figure out how she should live her life going forward, or what kind of a person she should be, or what kinds of commitments and activities will give her life value (whether in family life, work, or other settings), then she is engaged in an activity that is staunchly protected by the First Amendment against state intrusion—at least when it takes place through speech: namely, an individual’s revision of her own “conception of the good.”

As John Rawls defines it, “[t]he capacity for a conception of the good is the capacity to form, to revise, and rationally to pursue . . . a conception of what we regard for us as a worthwhile human life.”⁴⁷¹ Moreover, says Rawls, a crucial feature of modern liberal societies is the existence of “different and indeed incommensurable and irreconcilable conceptions of the good”⁴⁷²—and a foundational commitment in each such society to a “liberty of conscience” that allows room for different individuals to form, and adhere to, their own conception of the good.⁴⁷³ In fact, as a number of scholars point out, modern freedom of speech law can be understood as providing such protection.⁴⁷⁴ As Daniel Solove

468. MCWILLIAMS, *supra* note 34, at 3.

469. YALOM, *supra* note 88, at 125.

470. TIM LeBON, WISE THERAPY: PHILOSOPHY FOR COUNSELLORS 1 (2001).

471. JOHN RAWLS, POLITICAL LIBERALISM 302 (1993).

472. *Id.* at 303-04.

473. *Id.* at 313-14.

474. See, e.g., Daniel Solove, *The Virtues of Knowing Less: Justifying Privacy Protections*

argues, for example, liberal theory holds that “the government must maintain neutrality as to different conceptions of the good” and, “[i]n the context of free speech, the neutrality principle mandates that the government must avoid favoritism or bias toward particular messages.”⁴⁷⁵ Corey Brettschneider likewise argues that the First Amendment prohibits government from restricting speech on the basis of viewpoint, at least in part, because “[c]itizens must be free from coercive threat as they develop their own notion of . . . the good.”⁴⁷⁶

If therapy is often sought by individuals who are seeking to give life meaning, or attain a sense of purpose, then this is a place where government’s coercive force is out of place—even if the state can conceivably recruit experts within the field of psychotherapy to take its side in debates about what constitutes a good life. More specifically, government can have no veto on which conception of the good we choose through conversation—whether those conversations are with a friend, a life coach, or a psychotherapist. As Claudia Haupt observes in proposing a theoretical framework for professional speech, “[n]o amount of specialized training . . . by itself makes a professional more competent to render value judgments,” and courts should therefore not defer professional community’s judgments on such an issue.⁴⁷⁷

To be sure, it is possible to imagine a world where there is a clearer division of labor between the medical and philosophical sides of psychotherapy—with every practitioner focused exclusively on one, and only one, of these dimensions of the profession. There are, in fact, some types of professionals that seem to tackle some of the philosophical quandaries that sometimes bring individuals to a psychotherapist—but forswear any expertise in diagnosing or treating mental illness. Philosophical counseling, for example, “uses philosophical insights and methods to help people think through significant issues in their life,” but generally limits itself to “non-pathological ‘problems in living’ such as questions around direction in life, relationship issues, ethical problems and career dilemmas.”⁴⁷⁸ As the National Philosophical Counseling Association explains, “the philosophical counselor specializes in the examination and analysis of arguments rather than in looking for the underlying causal etiology of dysfunctional mental processes.”⁴⁷⁹ Life coaching is another professional activity that, in many cases, at least

Against Disclosure, 53 DUKE L.J. 967, 984-85 (2003).

475. *Id.*

476. COREY BRETTSCHEIDER, WHEN THE STATE SPEAKS, WHAT SHOULD IT SAY?: HOW DEMOCRACIES CAN PROTECT EXPRESSION AND PROMOTE EQUALITY 75-76 (2012).

477. Haupt, *supra* note 307, at 1253.

478. LEBON, *supra* note 470, at 9.

479. *Philosophical Practice*, NAT’L PHIL. COUNSELING ASS’N, <http://www.npcassoc.org/philosophical-practice> (last visited Feb. 26, 2016) (emphasis omitted).

might tackle problems regarding life quandaries without addressing questions stemming from mental illness.⁴⁸⁰ So, arguably, is the spiritual or pastoral counseling that religious figures might use when they help individuals of a certain faith try to draw on that faith in meeting particular challenges. One might argue that, if these professions handle the philosophical side of psychotherapy, then psychotherapists should confine themselves to the medical side—and perhaps this is true of the way many psychiatrists help patients with mental disorders, and *would have been* true of psychotherapy had certain physicians (in the 1950s and in earlier times) succeeded in limiting the practice of psychotherapy to individuals with medical training.

In its existing form, however, the practice of psychotherapy appears to involve more than simply treating illness. This is perhaps most clear in existential and humanistic schools of psychotherapy; but, as LeBon explains, one can also find examples of philosophical problem-solving in other schools, such as cognitive-behavioral therapy and rational-emotive-behavioral therapy.⁴⁸¹ More generally, the profession seems to understand itself as offering methods not only for curing mental sickness, but at changing mental patterns in other ways.⁴⁸² The APA's Psychologist Locator website thus avoids describing clinical psychology as focused exclusively on the treatment of illness. It states that "[p]sychologists are trained to help people deal effectively with *many of life's problems* and can help improve physical and mental health for you and your family."⁴⁸³ The message seems to be that a psychologist will treat a client's concerns even if they do not stem from a mental illness. To the extent state regulation of psychotherapy's medical functions necessarily also embraces—and places limits on—the way it aids individuals in dealing with other issues, related to forming a conception of the good, it should be subject to the intermediate scrutiny necessary to assure that the limits it places on our autonomous belief formation are not substantially more onerous than they have to be.⁴⁸⁴

To be sure, a profession may commit its *own members* to respect certain values in carrying out their profession and to reject others. As Ezekiel Emmanuel writes, a "profession is partially characterized by its ends, the purposes that define its activities," and "[w]hen a person chooses to become a member of a profession, he accepts . . . the

480. See *What Is Life Coaching?*, LIFE COACHING.COM, http://www.lifecoaching.com/pages/life_coaching.html (last visited Feb. 26, 2016).

481. LEBON, *supra* note 470, at 14-15.

482. *Id.* at 14.

483. *Psychologist Locator*, PRAC. CENT., <http://www.locator.apa.org> (last visited Feb. 26, 2016) (emphasis added).

484. See *supra* text accompanying notes 120-127.

profession's ends as his own."⁴⁸⁵ A physician, for example, will commit herself (among other things) to the end of "restoring the health of sick individuals" and should not be surprised if the profession insists on respect for this end in its code of ethics—and in the rules that it applies to the verbal advice that the physician offers to patients.⁴⁸⁶ In fact, the Supreme Court has emphasized that the state has a strong interest in protecting a physician's commitment to her "role as healer."⁴⁸⁷

Psychotherapists might similarly adopt a code of ethics that rules out use of psychological expertise for certain tasks—such as aiding the efforts of government interrogators to use techniques amounting to torture or inhumane treatment. Bound by its code of ethics, a psychotherapist may have to reject a client's request for aid in promoting certain sorts of goals. But it is one thing for a profession to turn such an individual away; it is another for it to recruit the state's coercive power to block that individual from having those conversations elsewhere. A particular professional community, in other words, may refuse to aid certain conceptions of the good (like those that show profound lack of respect for other individuals' dignity), and it may do so simply by defining its own collective values. But for the government to bar such conversations throughout society—whether in books, or in sessions which seek personal advice—it has to have reasons that go beyond a bare desire to exclude that conception of a worthwhile life from its boundaries. That is because, unlike the governing body of a professional community, the government of a liberal society is not permitted to impose limits on what ethical values its individual members choose to believe in, or discuss—except in those circumstances where individuals' verbal efforts to advance such a goal threatens the kind of harm that the state is empowered to regulate, for example, through "incitement" to engage in violence.⁴⁸⁸

This analysis has significant implications for how courts evaluate the constitutionality of a restriction on psychotherapy (or other professional activity). More specifically, courts might distinguish—and treat differently—two kinds of professional speech rights: (1) the right of an individual to engage in—and *describe herself as engaging in*—certain types of talk therapy as part of a recognized profession, such as the profession of psychotherapy or clinical psychology; and (2) the right of an individual to engage in certain types of talk therapy on her own,

485. EZEKIEL J. EMANUEL, *THE ENDS OF HUMAN LIFE: MEDICAL ETHICS IN A LIBERAL POLITY* 14 (1994).

486. *Id.* at 16-18.

487. *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (quoting AM. MED. ASS'N CODE OF MED. ETHICS, Op. 2.211 (1994), <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion2211.page>).

488. *See supra* text accompanying notes 100-103.

outside of any recognized and licensed professional practice (and without misleading clients into thinking it is a part of such a practice). The latter of these bans is more far-reaching: it bans or penalizes a certain kind of verbal interaction in *any context* (perhaps on the ground that it constitutes the “unauthorized practice of psychology”).

If we revisit the Ninth Circuit’s decision in *Pickup*, it becomes apparent that the Ninth Circuit saw California’s law as applying the former, less speech-restrictive type of measure.⁴⁸⁹ The Ninth Circuit seemed comfortable finding California’s therapy restriction constitutional at least in part because—although that restriction barred professionals from offering minors SOCE therapy while acting as a “licensed psychotherapist” in California—it continued to let them offer it *outside of* this professional community in a variety of other contexts.⁴⁹⁰ It remained permissible, for example, for pastoral counselors offering therapy, and remained permissible for a variety of advice-giving services outside of licensed psychotherapy.⁴⁹¹ Arguably, then, the Ninth Circuit’s decision could be understood as applying only rational basis to California’s SOCE ban because it was simply giving legislative force to standards already adopted by the APA and other organizations representing the view of this particular professional community.⁴⁹² The views and arguments that psychotherapists had defined as unacceptable within their own community remained permissible in other contexts.

On the other hand, one could argue that California’s ban is, in fact, more far-reaching—at least when considered in conjunction with section 2903 of the *California Business and Professions Code*.⁴⁹³ This provision forbids anyone to engage in “the practice of psychology . . . without a license granted under this chapter, except as otherwise provided in this chapter,” and it defines psychology quite broadly—to include any service applying “psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis,” including any “amelioration of psychological problems.”⁴⁹⁴ This statutory language seems to extend California’s standards for practicing psychology not only to those who call themselves “psychotherapists,” but also to anyone—working under *any title*—who helps clients by applying “psychological principles” to ameliorate their

489. *Pickup v. Brown*, 740 F.3d 1208, 1229-30 (9th Cir. 2014).

490. *Id.*

491. See *supra* text accompanying note 238.

492. See *Pickup*, 740 F.3d at 1231.

493. See CAL. BUS. & PROF. CODE § 2903 (Supp. 2016).

494. *Id.* (West 2003 & Supp. 2016).

“psychological problems.”⁴⁹⁵ Given the analysis I have set forth earlier in this Article, such a law would likely be unproblematic under the First Amendment only if it is understood by courts as limited in scope. More specifically, to the extent the law bars not merely those who present themselves as psychotherapists, *but all others* from dispensing certain kinds of advice, it should do so: (1) *only* to protect a client who can be said to rely on a professional’s advice in the way that patients rely on a physician’s or psychotherapist’s advice regarding mental illness or treatment options; and (2) *only* in ways that protect such a reliance interest, and avoid imposing across-the-board the kind of conception of the good that individuals can adopt, or seek help in understanding or refining.

There may be some circumstances where even such an across-the-board ban on certain types of psychological advice is justified: Government may, as noted earlier, restrict certain kinds of speech, so long as its restriction focuses on certain kinds of harm.⁴⁹⁶ A legislature may, for example, make it a crime for individuals to make “true threats,” to incite violence, or to publish hardcore pornography or any other sexual expression that counts as “obscene”—and it may make such speech illegal not only within a specific community or context, but also in social or commercial interactions more generally.⁴⁹⁷ Similarly, even where a person offering SOCE therapy for a minor expressly states that she is *not* acting as a psychotherapist—even, for example, if she characterizes herself as a “life coach”—it is conceivable that some of the techniques she uses in such an interaction could cause some of the same harms that led the APA to express concern about the SOCE therapy practiced by therapists—that it could “cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts.”⁴⁹⁸

In fact, as Jacob Victor notes, state laws barring fraudulent services may already provide a legal means for individuals to sue providers of SOCE therapy.⁴⁹⁹ In June 2015, an aggrieved individual prevailed in a civil suit against an organization called “Jews Offering New Alternatives for Healing”—which he had sued, claiming it had engaged in consumer fraud by telling him that homosexuality was a mental disorder and that it could offer him a cure in exchange for money.⁵⁰⁰ The counselor at the

495. *Id.*

496. See *supra* text accompanying notes 99-105.

497. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003); *Miller v. California*, 413 U.S. 15, 16-17 & n.1, 18-19, 24-27 (1973).

498. See 2009 APA REPORT, *supra* note 15, at 42.

499. Jacob M. Victor, Note, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1562-64 (2014).

500. Zoë Schlanger, *Jonah: The Largest Jewish Gay Conversion Therapy Organization Takes Its Last Breath*, NEWSWEEK (Dec. 18, 2015, 1:44 PM), <http://www.newsweek.com/life-and-death->

center of that case was not a licensed therapist and had had “no psychology degree or mental health license of any kind.”⁵⁰¹

Outside of a commercial context, activities akin to those that occur in SOCE can still conceivably cause harm akin to that which the APA found occurs in SOCE—but would be harder for the state to regulate under the First Amendment—for two reasons. First, whereas the state can impose criminal and civil liability for fraudulent commercial transactions, the Supreme Court in a plurality decision rejected the notion that false speech is “presumptively unprotected,” and found punishing certain types of false speech on the basis of its content triggers “exacting scrutiny.”⁵⁰² Although in a concurring opinion Justices Breyer and Kagan argued the government should be able to forbid or punish false speech subject only to intermediate scrutiny,⁵⁰³ they too would apply strict scrutiny where government restricts “false statements” in disciplines such as “the social sciences” or “history,” because government interference would risk undercutting the process by which true information is generated in such disciplines.⁵⁰⁴ And so, six Justices adopted a First Amendment rule that would likely extend staunch protection to psychological falsehoods—at least where such a falsehood is not part of a fraudulent commercial transaction.⁵⁰⁵

Nor does existing First Amendment law leave government free to restrict non-commercial variants of SOCE therapy based upon the emotional damage they might cause. In *Brown v. Entertainment Merchants Ass’n*, the Court found that the First Amendment forbids California from banning the sale of violent video games to minors.⁵⁰⁶ It rejected California’s argument that such a speech ban should be permissible because scientific research reviewed by legislators indicated that such video-game playing made minors more aggressive.⁵⁰⁷ As Clay Calvert and his co-authors noted in a recent article examining the implications of the *Brown* decision for SOCE therapy bans, the Court’s analysis of California video games seems to create “a very steep burden” for “anti-SOCE law,” except to the extent such laws can be said to be confined to “a heavily regulated profession like medicine.”⁵⁰⁸

In short, then, while government can likely bar fraudulent equivalents of psychotherapy in a commercial context, it would be

jewish-exgay-therapy-organization-406898.

501. *Id.*

502. *United States v. Alvarez*, 132 S. Ct. 2537, 2546-48 (2012) (plurality opinion).

503. *Id.* at 2551-52 (Breyer, J., concurring).

504. *Id.* at 2552.

505. *See id.* at 2542-43, 2547, 2551.

506. 131 S. Ct. 2729, 2741-42 (2011).

507. *Id.* at 2739.

508. Clay Calvert et al., *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 WM. & MARY J. WOMEN & L. 525, 555-57 (2014).

difficult for it to extend such bans, for example, to the “religious and private efforts” used by the majority of SOCE-users in a recent study—efforts which included “church counseling” or “group-involved . . . change efforts.”⁵⁰⁹ And this is true even though the researchers conducting the study found—as with SOCE provided by therapists—that SOCE carried out through these former means was deemed by those using it to be even more ineffective and harmful than psychotherapy.⁵¹⁰

D. Psychotherapy and Protection for Freedom of Thought

There is one other reason that talk therapy may—to a far greater extent than medicine—count as an activity that lies firmly within the realm that the Constitution preserves (in the Court’s words) for the autonomy of self.⁵¹¹ Talk therapy is not only an activity where a therapist’s and client’s freedom to speak are at stake—it is also a key tool by which a client exercises her freedom of thought. It not only enables us to understand our thinking processes, but also to reshape them. As Henry Greely writes, psychotherapy is an “intervention that people . . . want to use to change how their brains work,”⁵¹² and regulations of psychotherapy implicate not only expressive liberty, but also “cognitive liberty.”⁵¹³ In other words, psychotherapy restriction implicates an interest that Seana Shiffrin argues is at the heart of free speech jurisprudence—namely, “the individual agent’s interest in the protection of the free development and operation of her mind.”⁵¹⁴ When the state bars a person from developing her mind in a particular way—using a particular kind of therapy—it wrongly wrests away from her the power to determine what kind of a person she will be and how her mind will function.

This kind of freedom to shape oneself may initially seem to have a closer relationship to the realm of substantive due process than to First Amendment speech rights. After all, when people transform “how their brains work,” they are not simply adopting or communicating certain ideas. They are engaging in a kind of self-alteration which seems to have more kinship with activities the Court has previously protected under the

509. Dehlin et al., *supra* note 462, at 99-100.

510. *Id.* at 100 & fig.1.

511. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

512. Henry T. Greely, *Sexual Orientation Change Efforts, California Law, and Cognitive Liberty?*, STAN. L. SCH.: LAW & BIOSCIENCES BLOG (Dec. 27, 2012), <https://law.stanford.edu/2012/12/27/lawandbiosciences-2012-12-27-3385>.

513. *Id.*

514. See Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT 283, 287, 289-91 (2011); see also SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 92 (2014) (making the same argument).

Due Process Clause.⁵¹⁵ For example, where the Court has previously given individuals autonomy in certain realms of medical decision-making, it has done so under the Due Process Clause.⁵¹⁶

However, there are reasons to think that, at the very least, when individuals use conversations as the instrument of mental transformation, they should receive protection under the First Amendment and not solely under the Due Process Clause. As Kent Greenawalt writes, the First Amendment includes not only a freedom to speak with others, but a freedom to engage in internal dialogue or “self-communication.”⁵¹⁷ In fact, he writes, “[o]ne might conceive of protection of self-communication as deriving from a principle of freedom of thought more fundamental even than a principle of free speech.”⁵¹⁸ Moreover, such internal deliberation is a core First Amendment activity whether it functions as “a preface to interpersonal communication or [is] intended to remain indefinitely for oneself.”⁵¹⁹ And the Supreme Court has recognized this. In *Stanley v. Georgia*, for example, it made clear that the First Amendment principles protect not only individuals’ freedom to express their beliefs and emotions, but also their freedom to form them.⁵²⁰

As other scholars point out, this process of reflection and belief formation cannot remain completely internal.⁵²¹ It necessarily has an external dimension. Instead of developing their thoughts or preserving memories solely in their “mind’s eye,” individuals often write them down in journals. By writing their thoughts down, and then reviewing them, they develop their thinking in ways that would be impossible if they had to rely solely on natural memory.⁵²² As Neil Richards and Julie Cohen have written in their respective works on intellectual privacy, modern digital media provides additional tools for self-understanding.⁵²³ As Richards writes, free speech requires that courts protect not just the public “marketplace of ideas,” but also the private mental “workshops

515. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 849 (1992) (holding that due process protects against state interference with a woman’s decision to have an abortion).

516. *Id.* at 851-52.

517. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 46 (1989).

518. *Id.*

519. *Id.*

520. 394 U.S. 557, 564 (1969) (stating that the Constitution is designed to protect individuals “in their beliefs, their thoughts, their emotions and their sensations” (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting))).

521. See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 378-79 (2011).

522. *Id.* at 342, 379.

523. See Julie E. Cohen et al., *Copyright and Privacy: Through the Privacy Lens*, 4 J. MARSHALL REV. INTELL. PROP. L. 273, 281-82 (2005); Neil M. Richards, *Intellectual Property*, 87 TEX. L. REV. 387, 434-35 (2008).

where ideas are crafted.”⁵²⁴ And this requires protecting not just our silent thinking, but also the “close proxy for our thoughts” we create with the tools given to us by the Internet and other technologies of communications (for example, as we surf the Internet).⁵²⁵ As Cohen writes, maintaining “breathing space for intellectual privacy” requires (among other things) protection of the “records about what people read, see, hear and use.”⁵²⁶ Moreover, while self-communication may often be solitary, it also frequently relies on institutional environments that require the actions of many people—the individuals who make digital communications, for example, or the librarians whose compilation of physical and electronic resources provides raw material for individuals’ explorations.⁵²⁷

Modern psychotherapy is another crucial realm for such reflection upon, and shaping of, thought. It is a deeply personal process of self-exploration. The therapist, after all, is not there to describe or understand her own life. Although two people are present, the focus is squarely on the individual receiving the therapy. The focus is on that individual’s personal history, her secrets, her feelings, and on addressing her struggles. It is in this respect that another social institution provides a setting for “self-communication.”

It is conceivable that protection of this mental freedom might sometimes justify, rather than forbid, certain kinds of government intervention—for example, where teenagers believe their mental autonomy requires independence from their parents’ control. As Catherine Ross observes, mature minors’ autonomous access to information can sometimes be gained only if they can—at least, in some circumstances—make choices free from their parents’ oversight.⁵²⁸ This was the stance the APA appeared to take when it reported that SOCE therapy was often being used in ways that appeared to undercut minor clients’ autonomy rather than support it.⁵²⁹ Its deepest worries were about “adolescent inpatient facilities that offer coercive treatment.”⁵³⁰ It rightly emphasized that “involuntary and coercive interventions and residential centers for adolescents” raised grave concerns, not only because of the possible harms of SOCE therapy itself, but because of the “restriction of liberty” accompanying this treatment, and the threat it

524. Richards, *supra* note 523, at 396, 408.

525. *Id.* at 389, 434.

526. Cohen et al., *supra* note 523, at 282.

527. See Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 830-31, 876 (2006).

528. See Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 230, 250-51 (1999).

529. See 2009 APA REPORT, *supra* note 15, at 71 & n.55.

530. *Id.* at 71.

posed to “client self-determination.”⁵³¹ Even in less oppressive environments, psychotherapy may be less a foundation for teenagers’ autonomy and freedom of thought than an attack upon it. It may be that teenagers, struggling with sexual feelings and the need for psychological guidance, should be protected against being limited by their parents to one type of sexual-orientation therapy, when they should be made aware of, and might benefit from, others (like affirmative-support therapies). Even where teenagers steered toward sexual conversation *are* made aware of alternative forms of therapy, they may still feel they have no choice but to undergo the therapy that their parents insist upon, and they may still suffer harm from intensive therapy and need safeguards against the harms generated by it. As the Third Circuit noted in upholding New Jersey’s ban on such therapy, the state’s interest in protecting patients’ health was especially strong because it sought to “protect minor clients—a population that is especially vulnerable to [harmful professional] practices,” and likely to suffer far greater harm from these practices than others.⁵³²

Still, if teenagers’ mental freedom might sometimes require that they be protected from being pressured or coerced into talk therapy they find ineffective, it also likely requires that they—like adults—be free to *consider and use* even those forms of therapy that a legislature dislikes or believes is based on offensive ideas. In other words, just as the state should have to show—in restrictions on adult therapy—that its restrictions are legitimate attempts to protect client safety and not “suppress[ion] [of] disfavored ideas under the guise of professional regulation,”⁵³³ so the state should have to make the same showing when it bars mature minors from undergoing forms of therapy which they freely accept and may find helpful.

VI. CONCLUSION

A therapist does not simply heal a client’s mental illness, or help her to improve her mental functioning—she does so in large part by communicating ideas to her about how to understand and transform her thoughts and feelings. In doing so, therapy serves a crucial First Amendment purpose—which, as Seana Shiffrin points out, is to secure “the individual agent’s interest in the protection of the free development and operation of her mind.”⁵³⁴ Psychotherapists guide their clients in exploring and shaping their psyches—and do so in a manner that depends heavily on the client’s own conception of the good (and not

531. *Id.* at 79.

532. *King v. Governor of N.J.*, 767 F.3d 216, 237-38 (3d Cir. 2014).

533. *Id.* at 235, 236.

534. Shiffrin, *supra* note 514, at 287.

simply a socially- or professionally-endorsed conception of physical or mental health). While First Amendment protection has some role to play in medical speech that occurs between physicians and patients, its importance and strength intensifies when the focus of psychotherapists' speech is not solely on applying scientifically-validated principles of biology or behavior to physical and mental health, but is also largely on helping the client think about, develop, and choose between personal value commitments.⁵³⁵

The Third Circuit's decision in *King* largely recognized this—and responded by holding that talk therapy is First Amendment speech subject to intermediate scrutiny of the same sort that courts apply in commercial speech cases.⁵³⁶ But difficult questions will likely arise about how courts should apply this uncertain middle-ground level of scrutiny, or the choice of scrutiny rule set forth in *R.A.V. v. St. Paul*. It is not clear, for example, how courts can distinguish legitimate professional regulations of psychotherapy from those which are a pretext for censorship—especially in a field like psychotherapy where different schools of thought have very different stances on which therapy techniques are legitimate. Nor is it clear how much deference they should give to legislatures' insistence that their regulations are aimed at protecting health (and not at suppressing speech for other, less laudable reasons). Still, this is a task courts cannot easily avoid. For better or worse, psychotherapy straddles the key constitutional boundary line between individuals' inner lives, where each person should exercise autonomy free of state control, and the realm of appropriate health and safety regulations, where clients count on government to monitor medical practice. To understand psychotherapy's First Amendment status, courts cannot pretend that psychotherapy lies on only one side of this boundary line, where health regulation can remain unhampered by the Constitution. Rather, they must elaborate and adapt the Court's earlier First Amendment doctrines for assuring the government stays, as much as possible, on its own side of this boundary line, and leaves individuals free to chart their own course on the other.

535. See *supra* text accompanying notes 437-440.

536. 767 F.3d at 233-35.