LOYALTY TESTING FOR ATTORNEYS: WHEN IS IT NECESSARY AND WHO SHOULD DECIDE?

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> *Judge Musmanno, Court of Common Pleas, Allegheny County*: "Before we proceed in this case, I want to interrogate, and my duties require that I interrogate, counsel for the plaintiff. . . . Hymen Schlesinger, have you ever been a member of the Communist Party; Are you a member of the Civil Rights Congress; . . . Did you or did you not form the Civil Rights Congress, which is a Communist Front Organization, in your office—the Civil Rights Congress which is a part of the movement to overthrow the Government of the United States by force and violence."
>
> *Attorney Schlesinger refused to answer these questions.*
>
> *Judge Musmanno*: "We have formally adjudged you unfit to try a case in this Court as of today, morally unfit. You do not possess an allegiance to the United States."[1]

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[1] Proceedings on May 24, 1951 in a trespass case in which Attorney Schlesinger represented the plaintiff, *quoted in* Schlesinger v. Musmanno, 81 A.2d 316, 317 (1951) (alteration to the original) (internal quotation marks omitted). The Supreme Court of Pennsylvania found that the judge was without jurisdiction to determine that Attorney Schlesinger was unfit to practice law or to inquire as to whether he was a member of the Communist Party. The court concluded: "[w]hat the Judge has done, in his zeal against communism, is to adopt the detestable method employed by communists themselves in arbitrary and unjudicial proceedings contrary to all our cherished traditions of law and legal procedure." *Id.* at 319-20. Although Judge Musmanno's harassment tactics were extreme and by no means representative of the behavior of judges during this period, his actions illustrated the popular attitude that individuals associated with Communist organizations should be presumed guilty of disloyalty to the United States. In a later split decision, the Supreme Court of Pennsylvania reversed a trial court order disbarring Schlesinger for membership in the Communist Party from 1946 to 1950, based upon a finding by a three-member bar committee. The court ruled that since the bar had not conducted a proceeding that afforded Schlesinger due process (three committee members acted as prosecutor, judge, and jury) and there was no proof of unprofessional conduct in his relations with clients or the courts, the

ABSTRACT

The concept of loyalty has been manipulated to mean different things with respect to the profession of law depending on the political climate brought about by national crises throughout the history of this country. An attorney's loyalty to his country has referred to more than mere allegiance and support of the laws of the sovereignty in that it has been understood to concern specified beliefs, doctrines, and associations. It has been tested through the imposition of loyalty oaths from the colonial days through the Civil War and Cold War, to the current post-September 11 era in which the government's emphasis on patriotism[2] *has impacted, and in some cases, compromised the professional integrity of attorneys. This Article explores whether purely national security interests may be fairly imposed upon an attorney's ethical obligations, given his unique position in society, by considering how the values of freedom of association and freedom of belief compete with the obligation of attorneys to uphold and defend the Constitution. It proposes a balanced approach of particularized inquiries by the courts into suspicious attorney conduct that avoids over-inclusive investigations that may capture instances where security interests are unrelated in any legitimate way to the attorney's representation of a client. The following discusses connections between various historical periods and suggests that history, brought to light through an examination of the papers of Erwin N. Griswold,*[3] *in which he criticizes the lack of procedural safeguards in loyalty inquiries before Congressional bodies in the 1950s, may guide the debate over restraints on the attorney role in current times. The Article sets the controversy in a larger framework of ethical standards governing attorney conduct generally when attorneys may more readily identify themselves as members of legal communities whose responsibilities transcend nation-state borders. In light of the history of unsuccessful attempts by the bar to test the loyalty of attorneys and place restraints upon representation of clients, this Article argues that questions of ethical standards for*

bar's finding that Schlesinger violated his attorney oath was not justified. *In re* Schlesinger, 172 A.2d 835 (1961).

[2] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.).

[3] Erwin N. Griswold held numerous positions of distinction, including: Assistant Professor of Law, Harvard Law School (1934-1935); Professor of Law, Harvard Law School (1935-1967); Dean, Harvard Law School (1946-1967); Solicitor General of the United States (1967-1973); partner, Jones Day Reavis & Pogue, Washington, D.C. (1973-1991); member, U.S. Civil Rights Commission (1961-1967); member, conference with Soviet lawyers, Lawyers Alliance Nuclear Arms Control (1983-). WHO'S WHO IN AMERICAN LAW 1994-1995, at 364 (8th ed. 1994).

attorneys may best be left to the courts.

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INTRODUCTION

The wide disparity in the rules governing the professional responsibilities of lawyers in the fifty states and in the ninety-four federal district courts has been criticized as creating an obstacle to the growing nationalization and globalization of legal practice.[4] Federal courts have drawn on multiple sources of rules for deciding upon issues of attorney ethics—the Model Rules of Professional Conduct, the versions of the rules adopted by the states in which they sit, the older Model Code of Professional Responsibility, the Federal Rules of Civil and Criminal Procedure and Evidence, and rules developed by the courts themselves.[5] Although most states have adopted the Model

[4] *See* Andrew L. Kaufman, *Who Should Make the Rules Governing Conduct of Lawyers in Federal Matters*, 75 TUL. L. REV. 149, 159 (2000); *see* JUDITH A. MCMORROW & DANIEL R. COQUILLETTE , MOORE'S FEDERAL PRACTICE: THE FEDERAL LAW OF ATTORNEY CONDUCT § 801.05 (3d ed. 2001).

[5] Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 6, 22 (2005). "There is utility in working toward coherence in ethical rules in federal court practice, but recent experience suggests that the efforts toward a rule-based system will ultimately be futile." *Id.* at 7.

Rules of Professional Conduct, there is significant variation among them.[6] Usually the highest court of each state adopts the professional rules as rules of court,[7] but the discipline of lawyers has traditionally been the responsibility of state and local bar organizations. When federal judges decide ethical problems arising in cases over which they preside, they may recognize the professional rules of the state as persuasive authority in determining an attorney's ethical responsibilities, and may use state disciplinary mechanisms to investigate matters.[8] However, they routinely rely upon norms established by custom or practice or their individual expectations of how proceedings should be conducted in their courtroom, all of which may or may not be traceable to particular laws or rules of professional responsibility.[9] Federal judges may exercise discretion, simply allowing their gut to lead them to a result that makes sense in that matter. In many cases they have no other choice since many ethical dilemmas arising in litigation are not addressed by the rules, and if they are, the rules still leave the application and determination of sanctions up to the judge.[10] The attitude that a trial judge is master of his or her courtroom is perhaps most prevalent in the arena of policing attorney behavior.

Despite the lack of uniformity in the professional rules, even between federal and state courts sitting in the same state, attorney oaths upon admission to the bar continue to acknowledge the dual allegiance that an attorney has to his state and the nation, thereby implicitly promoting loyalty to the government. For example, when a new lawyer is sworn into the Massachusetts bar, he is required to take an oath stating that he will support the Constitutions of the United States and the Commonwealth; that he "will do no falsehood, nor consent to the

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[6] STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 4-5 (7th ed. 2005).

[7] DANIEL R. COQUILLETTE, REAL ETHICS FOR REAL LAWYERS 4 (2005). Legislatures and executive agencies also adopt rules regulating attorney conduct; the SEC Standards of Professional Conduct pursuant to the Sarbanes-Oxley Act, 17 C.F.R. 205 (2005), is an example of the latter. *Id.*

[8] Telephone conferences with Ellyn S. Rosen, Associate Regulation Counsel, ABA Ctr. for Prof'l Responsibility, in Chicago, Ill. (Oct. 14, and Oct. 15, 2008). In some states, state bar associations are responsible for investigating, prosecuting, and adjudicating allegations of misconduct, while in other states the state supreme court has created an agency of the court for this purpose. Typically disciplinary trials are conducted by a hearing panel of two lawyers and one non-lawyer which issues findings of fact and rulings of law with a recommendation. Ultimately the state's supreme court imposes the appropriate discipline. *Id.*

[9] McMorrow, *supra* note 5, at 24 (describing informal mechanisms employed by judges such as talking with the lawyer at sidebar or calling the lawyer on ethical violations in open court).

[10] *Id.* at 8; *see* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 196 (1991) ("Because rules operate within a framework that determines the status of those rules, and because that framework is likely to be substantially political, social, economic, and psychological, the status of a rule in the decisional process of any decision-maker . . . is not something that can be determined solely by analyzing the concept of a rule.").

doing of any in court"; that he "will not wittingly or willingly promote or sue any false, groundless, or unlawful suit, or give aid or consent to the same"; and that he will conduct himself "with all good fidelity as well to the courts as [his] clients."[11] The "Oath On Admission" to the federal bar requires that the attorney "solemnly swear (or affirm) that as an attorney and as a counselor of this court [he] will conduct [himself] uprightly and according to law, and that [he] will support the Constitution of the United States."[12] The understanding that an attorney accepts the responsibility of promoting justice, even when that means espousing the unpopular views of his clients, constitutes the foundation of the legal profession.[13] And the Model Rules theoretically protect attorneys from the prejudice of guilt by association when they take on unpopular causes.[14] Examples in history, however, reveal this not to have always been the case.[15]

From the earliest periods of English law, the oath of admission

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[11] BD. OF BAR EXAM'RS, INFO. RELATING TO ADMISSION OF ATTORNEYS IN MASS. 9 (2006), *available at* http://www.mass.gov/bbe/barapprulesaug2002.pdf; *see also* MASS. GEN.LAWS ch. 221, § 38 (2005). Massachusetts has required an oath of attorneys upon admission to the bar since 1686. *The Current American Swearing Epidemic*, MASS. L. Q., May 1951, at 47, 52 [hereinafter *American Epidemic*]; *see* Stephen C. O'Neill, *The History of the Lawyer's Oath*, 3 MASS. LEGAL HIST. 91 (1997).

[12] U.S. COURTS, THE FED. JUDICIARY, OATH ON ADMISSION, *available at* http://www.uscourts.gov/forms/ao153.pdf.

[13] "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . . ." MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2004).

[14] "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004). The guidance provided by Comment 5 is as follows: "Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities." *Id.* cmt. 5. *See also* Andre A. Borgeas, *Necessary Adherence to Model Rule 1.2(B): Attorneys Do Not Endorse the Acts or Views of Their Clients by Virtue of Representation*, 13 GEO. J. LEGAL ETHICS 761 (2000).

[15] Perhaps the best example is the difficulty that leaders of the American Communist Party had in securing their desired legal representation when charged with conspiracy to form an organization to teach and advocate a violent overthrow of the U.S. government in *Dennis v. United States*, 341 U.S. 494 (1951). Their efforts to hire attorneys of stature to counteract the public prejudice failed since high-profile attorneys feared losses to their reputations. *See* Charles Grutzner, *Court Offers '2d Team' Reds 10 Lawyers to Defend Them*, N.Y. TIMES, Aug. 9, 1951, at 1; *see also* HOWARD R. SACKS, DEFENDING THE UNPOPULAR CLIENT (1961) (containing materials detailing struggles of conscience at the bar, prepared as part of the Professional Responsibility Education Project of the National Council on Legal Clinics); Daniel H. Pollitt, *Counsel for the Unpopular Cause: The 'Hazard of Being Undone,'* 43 N.C. L. REV. 9 (1964-1965) (discussing prejudice from the bench and bar suffered by southern attorneys defending the rights of persons accused of Communism in the 1950s and the cause of school desegregation in the 1960s); Milnor Alexander, *The Right to Counsel for the Politically Unpopular*, 22 LAW TRANSITION 19 (1962-1963) (discussing contempt cases and disbarment suits for attorneys representing individuals accused of Communist activity and disloyalty to the United States, and giving the results of a survey of members of the bar concerning representation of the politically unpopular).

contained specific pledges—of "truth, trustworthiness, and faithfulness" to the court and one's clients, of public service, to fully use one's talent, and never to delay in one's service.[16] But historically in the United States, as Part I of this Article demonstrates, the tenets expressed in lawyers' oaths upon bar admission have been deemed an insufficient testament of loyalty to the government during periods when the government has perceived threats to its national security from foreign powers and citizens under their influence. The requirement that attorneys take an additional "loyalty oath" pledging obedience to the national government dates back in this country to as early as the colonial period when attorneys in some states had to take a "test oath" renouncing allegiance to Great Britain.[17] After the Civil War, when there was suspicion that former Confederate sympathies were an obstacle to restoring the country's unity, attorneys were required to swear a test or loyalty oath affirming that they had not participated in the Confederacy as a condition for appearing before the United States Supreme Court, the district and circuit courts, and the court of claims.[18] Then again during the Cold War era, amid the hysteria of the Red Scare, which is the focus of Part II of this Article, the American Bar Association requested state bars to require each attorney to take an "anti-Communist" oath and to file an affidavit stating whether he was or ever had been a member of the Communist Party or any organization advocating the overthrow of the United States government.[19] Archival research into the rights of attorneys representing persons suspected of Communism in the 1950s[20] provides support for my argument that courts are in the best position to decide upon ethical standards of attorneys, particularly the question of when the withdrawal of an

[16] Leonard S. Goodman, *The Historic Role of the Oath of Admission*, 11 AM. J. LEGAL HIST. 404, 410-11 (1967) (tracing the close link between lawyers' oaths of admission in colonial America and early English law).

[17] Robert A. Emery, *'I Do Solemnly Swear': The Evolution of the Attorney's Oath in New York State*, N.Y. ST. B.J. 48, 48 (2005).

[18] The Supreme Court determined the test oath to be unconstitutional in part because it violated the Fifth Amendment's privilege against self-incrimination in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866) (eliminating loyalty oaths as a requirement for lawyers practicing in federal courts).

[19] *Proceedings of the House of Delegates*, 75 ANN. REP. A.B.A. 102, 148-49 (1950). The Resolution requested the state bars to require each of their members to file an affidavit attesting to whether he participated in the Communist Party or any subversive activities. *Id.* at 148. The Resolution is cited in part *infra*.

[20] Papers of Erwin Griswold, including "The Fifth Amendment Today" containing information on the controversy resulting from Erwin Griswold's speech on the Fifth Amendment before the ABA in Philadelphia in August, 1955, and Griswold's participation on the panel, "Lawyers and the Fifth Amendment" in which he defended the right of attorneys to plead the Fifth Amendment and not be automatically disbarred; clippings relating to activities of Senator Joseph McCarthy, to due process, to the Fifth Amendment, and to self-incrimination, 1954-1955; and clippings on the Fifth Amendment, Topical Correspondence and Clipping files, 1950-1978, [hereinafter *Griswold papers*] (on file with Special Collections, the Harvard Law School Library).

attorney from representation of a client suspected of posing a national security threat is warranted.

Attorneys practicing during times when loyalty oaths were imposed were often faced with the dilemma of defending the causes of their clients at the risk of having their own loyalty to the United States called into question. The bar elite, most effectively through the loyalty oath proposal, attempted "to intimidate lawyers for unpopular defendants and to discipline those whose beliefs or associations were adjudged subversive."[21] Historian Jerold Auerbach argued that the Canons of Professional Ethics did little to guide attorneys in their responsibilities to promote the administration of justice and equality under the law by failing to set useful parameters since they "urged lawyers to defend the accused regardless of their personal opinion as to guilt" at the same time as "permitting lawyers to reject distasteful clients."[22] Loyalty oaths had the chilling effect of scaring attorneys from representing such clients since they raised the specter that any time an attorney represented a Communist, he could lose his license.[23] Loyalty to country was prioritized over loyalty to client. With respect to those attorneys identified as Communists themselves, the Committee on Un-American Activities asked: "How can a lawyer maintain his oath to uphold and defend the Constitution of the United States when he is an agent of a conspiratorial apparatus designed to destroy the Constitution?"[24] The committee asked how such an attorney could be "an officer of the court . . . also an officer of the State, with an obligation to the public" when his loyalties were to the Communist Party.[25]

Legal scholars writing during the Cold War predicted a "sterility of the bar" as zeal in attorneys was interpreted by judges as an indication of Communist or revolutionary inclinations, regardless of the political nature of the matter, a trend which they feared would eventually result

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[21] JEROLD S. AUERBACH, UNEQUAL JUSTICE 240 (1976); *see also* James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L.Q. 725 (2005) (the author traces instances throughout the twentieth century where the "bar machinery" was misused to punish governmental dissenters in efforts to maintain the political status quo).

[22] *See* AUERBACH, *supra* note 21, at 258, *referring to* Canon 15, "How Far a Lawyer May Go in Supporting a Client's Cause" and Canon 44, "Withdrawal from Employment as Attorney or Counsel," ABA CANONS OF PROF'L ETHICS, *available at* http://www.abanet.org/cpr/mrpc/Canons_Ethics.pdf.

[23] *See* Terence C. Halliday, *The Idiom of Legalism in Bar Politics: Lawyers, McCarthyism, and the Civil Rights Era*, 7 AM. B. FOUND. RES. J. 911, 923-24 (1982) (profiling the activities of the Civil Rights Committee of the Chicago Bar Association, and remarking that loyalty was "abused for partisan purposes" in the face of appeals to the Constitution for protection).

[24] H. COMM. ON UN-AMERICAN ACTIVITIES, 86TH CONG., REPORT ON COMMUNIST LEGAL SUBVERSION: THE ROLE OF THE COMMUNIST LAWYER 2 (Government Printing Office 1959) [hereinafter REPORT BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES].

[25] *Id.* at 5.

in a softening of advocacy.[26] Drawing on historical examples from as early as the reign of England's King Henry VIII (1509-1547), critics of the oaths predicted that if state bars were first to require anti-Communist oaths of their members, then further disavowals of specific beliefs, doctrines or associations would follow, as dictated by the political necessities of the time.[27]

Loyalty oaths during the 1950s incited anger from attorneys who perceived them to contradict the duty that the profession owed to the society. Rather than a testament to an attorney's beliefs in the principles of the Constitution and a guarantee of allegiance to the United States government, which oaths upon admission to the bar presumably already accomplished, the true aim of the loyalty oaths was to purge unpopular opinions or sympathies among members of the bar.[28] In a letter of protest to the proposals of the Boston Bar Association to inquire into the Communist leanings of its members, a group of Massachusetts attorneys in 1951 questioned whether it was realistic for their local bar association to ask lawyers "to forget . . . that they are lawyers and accept the greater responsibility of citizens and patriots."[29] This very question can appropriately be asked today, over fifty years later, as explored in Part III of this Article. Although the issue of loyalty oaths has not been revisited since the 1950s, lawyers representing causes understood as antithetical to the war effort in Iraq or in defense of the "enemy," namely the representation of Guantanamo detainees, have faced attacks by officials of the executive branch.[30] In January 2007, Charles "Cully" Stimson, who has since resigned from his position as Deputy Assistant Secretary of Defense for Detainee Affairs, made comments during an interview on a Washington radio station (Federal News Radio) criticizing major law firms that were representing terrorists and claiming that it was to the detriment of the firms' reputable clients.[31] He posed it as outrageous that money from large clients was being funneled to the defense of terrorists who sought

[26] Samuel M. Koenigsberg & Morton Stavis, *Test Oaths: Henry VIII to the American Bar Association*, 11 LAW. GUILD REV. 111, 125-26 (1951).

[27] *Id.* at 126.

[28] Zechariah Chafee, Jr., *Purge Trials Are For Russian Lawyers, Not American Lawyers*, 74 N.J. L.J. 169 (1951).

[29] *A Protest Received July 2, 1951*, MASS. L. Q., July 1951, at 20, 20.

[30] *See* Daniel Coquillette, *Patriots in Defense of the 'Enemy*,*'* BOSTON GLOBE, Jan. 18, 2007, at 11A, *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/01/18/patriots_in_defense_of_the_enemy/ (telling the story of Josiah Quincy Jr.'s "unpopular" representation of the British Captain Preston in the aftermath of the Boston Massacre). Coquillette shows how Josiah Quincy Jr. set an example of defending unpopular causes that the Defense Department should respect, instead of suggesting that clients should pressure law firms to stop representing detainees in Guantanamo. *Id.*

[31] *Guantanamo Remarks Cost Policy Chief His Job*, CNN.COM, Feb. 2, 2007, http://www.cnn.com/2007/US/02/02/gitmo.resignation/index.html.

to dismantle the very financial interests of those large clients.[32] Given the passionate backlash to Stimson's comments,[33] including even a petition from the deans of law schools,[34] it does not appear that leaders of the legal profession will allow American society to adopt the perception that it is "un-American" for attorneys to support such causes.[35]

If the initial oath upon admission to the bar requires a lawyer to swear to uphold and defend the Constitution, what is the harm of requiring a loyalty oath that reaffirms an attorney's promise to abide by the laws of the United States, perhaps sworn to before each matter the attorney argues in court? Why are loyalty oaths not considered merely a subset of the initial oath? The present day corollary to the question of the 1950s—"Are you a member of the Communist Party?"—would be "Are you a member of Al-Qaeda?" After all, attorneys, as officers of the court, should be held to heightened standards of promoting adherence to the laws of the country. And given their prominent status in society and their potential to influence the behavior of others, attorneys should have a greater responsibility than other citizens in being patriotic. As many laws that make it illegal to aid and abet a crime already exist, and presuming that a membership in a terrorist organization means furthering its goals as opposed to passively learning about its ideals, then why would a special loyalty oath that does not restrict the attorney role any more than criminal laws already do create so much tension and generate so much objection?

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[32] *Id.* Stimson's specific comments were as follows: "When corporate CEOs see that those firms are representing the very terrorists who hit their bottom line back in 2001, those CEOs are going to make those law firms choose between representing terrorists or representing reputable firms." *Id.*

[33] *See* Anna Palmer, *Unintended Consequences: Corporations Decry Official's Detainee Screed*, LEGAL TIMES, Jan. 22, 2007, at 14, *available at* http://ccrjustice.org/files/Stimson_07.01.22_LegalTimes.pdf. Karen Mathis, the president of the ABA, is quoted as saying that Stimson's comments were "universally rejected." *Id.*

[34] In a petition dated January 15, 2007, law school deans urged the Administration "promptly and unequivocally to repudiate Secretary Stimson's remarks." Press Release, Yale Law Sch., Law Deans Release Statement on Remarks of Cully Stimson Regarding Lawyers for Detainees (Jan. 16, 2007), *available at* http://www.law.yale.edu/about/4055.htm. The petition stated: "In a free and democratic society, government officials should not encourage intimidation of or retaliation against lawyers who are fulfilling their pro bono obligations." *Id.*

[35] Stimson's comments, which he later retracted, served to unite members of the bar in their belief that our justice system requires that everyone be given a defense. *See* Bernard Hibbitts, *Stimson Apologizes to Detainee Lawyers for Guantanamo Representation Comments*, JURIST, Jan. 17, 2007, http://jurist.law.pitt.edu/paperchase/2007/01/stimson-apologizes-to-detainee-lawyers.php. One example of a prominent law firm championing unpopular causes is that of Wilmer Hale, which in its defense of six Algerian terrorist suspects held at Guantanamo Bay continuing since 2004, has provided 35,448 billable hours worth approximately $17 million. Farah Stockman, *Detainee Fight Gets Bigger, Costlier For Long-battling Boston Law Firm*, BOSTON GLOBE, June 25, 2008, at 1, *available at* http://www.boston.com/news/local/massachusetts/articles/2008/06/25/detainee_fight_gets_bigger_costlier_for_long_battling_boston_law_firm/.

History teaches us that a special oath, while not unconstitutional if viewed as resembling the widely accepted attorney oath, is simply not a good idea. There are conflicting attitudes among segments of the bar. There are those who fiercely adhere to the protections of the First Amendment who would argue that the attorney oath upon admission is itself a loyalty oath which states should not be legally allowed to require. To them an additional loyalty oath would only be a further constitutional violation. Then there are others who consider the initial oath upon admission to be legitimate and any subsequent loyalty oath superfluous. These attorneys might oppose a loyalty oath because of its symbolic value. If we place value on the freedom of association and freedom of belief, then one's political ideas should be held sacrosanct and should not be perceived as having any bearing on an attorney's duties in the representation of his clients. Criminal defense attorneys are certainly in a vulnerable position because the justice system needs them to associate with terrorist suspects and provide them with a fair defense. In fact, representing a member of Al-Qaeda who is charged or about to be charged with a crime against the United States *is* upholding and defending the Constitution, and thus remaining true to the lawyer's oath upon admission. For this reason, they might believe that they are entitled to special protection from scrutiny of their representation. But no lawyer is above a court examination where there is significant evidence that he has adopted the aims of his terrorist client such that his representation has crossed the line and has been utilized to perpetrate crime. Any argument that complete privacy exists in the attorney-client relationship, thus shielding it from governmental inquiries, overlooks a real threat posed by the bar in these circumstances.

What is unsettled in the area of professional responsibility, and certainly not adequately addressed in the Model Rules of Professional Conduct,[36] are the situations in which attorneys feel compelled to follow international norms of morality and what they perceive to be universal principles of humanity rather than adhere to applicable state and national law governing attorney behavior and the rules of professional conduct. Recent cases involving attorney representation of suspected terrorists have highlighted the problem of conflicting sources of an attorney's ethical obligations. In a couple instances to date where

[36] *See* MODEL RULES OF PROF'L CONDUCT R. 8.5 (2004). (It provides that the rules of professional conduct shall be applied as follows: "(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct."). Comment 7 states the following exception: "The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise." *Id.* cmt. 7.

courts have applied the proscription in the USA Patriot Act or comparable state statute against "material support" of terrorists to the conduct of attorneys representing terrorists, we can perceive an approximation of the loyalty examinations used by the bench and bar in the 1950s. Arguments today that courts should not interpret legislation to impede the role of an attorney or infringe upon the attorney-client relationship echo those lodged against the ABA and state and local bar associations in that earlier dark period in our history. But prosecution under the material support statute is not the moral equivalent of Communist hearings. In light of the bar's failed efforts to regulate an attorney's loyalty to this country through the imposition of oaths in the 1950s, this Article argues that the regulation of attorney conduct in this area may best be left to particularized investigations by the courts. Controversies over the proper authority to determine applicable ethical standards will become more numerous in the contexts outside national security with the growing globalization of legal practice.

I. OVERTHROW OF TEST OATHS IN EARLY AMERICA

In America during the Revolution the concept of allegiance developed as a corollary of citizenship in contrast to the former status of loyal subjects to the British crown. On June 24, 1776, Congress declared that "all persons residing within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws . . . ."[37] Through legislation states established test oaths and declarations to identify dissenters among its population.[38] Those found guilty of treason could face punishment as severe as public execution.[39] For example, in New York, the requirement of all public officers to swear that they would "bear true faith and allegiance to the State of New York as a free and independent State" was imposed on attorneys in 1781.[40] It was later supplemented by a further "test oath" requiring attorneys to renounce allegiance to Great Britain.[41]

The idea that citizenship and membership in a political community resulted from a contract between a willing individual and his government meant that allegiance could neither be assumed by the government nor be permanent once given since the government's

[37] James H. Kettner, *The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance*, 18 AM. J. LEGAL HIST. 208, 215 (1974), *citing* 5 J. OF THE CONTINENTAL CONGRESS 475, 475-76 (1776).

[38] Koenigsberg & Stavis, *supra* note 26, at 215.

[39] *Id.* at 216.

[40] Emery, *supra* note 17 at 48, 49 n.16.

[41] *Id.* at 49 n.18. The New York Legislature enacted a statute in 1788 combining the loyalty and test oaths into one. *Id.* at 48, 49 n.21.

violation of that contract could result in the withdrawal of a citizen's allegiance.[42] Citizens gave their allegiance to a state in return for protection of laws at a time of considerable chaos during the formation of state governments upon America's independence from Britain.[43] From the perspective of state governments which had an interest in maintaining security during the Revolutionary War, it was necessary to identify citizens over whom they could assert sovereignty.[44] The concept of individual freedom to decide on where to place one's allegiance, perhaps according to what was most advantageous to one's personal interests, evolved after the Revolutionary War.[45]

During Reconstruction, states used loyalty testing, calling for their citizens to affirm their support of the Constitution and the laws of the United States as a means to promote the Union Government and to counteract fidelity to the Southern states.[46] Loyalty tests and oaths failed to separate the loyal from the disloyal because "the oath was never a test of conscience but of political partisanship and acceptability" which made it "difficult to substantiate [its] worth . . . even as a war-time measure."[47] Congress' enactment in 1862 of a loyalty oath for judges, United States court officials, and officials of the legislative and executive departments requiring them to swear to no prior involvement in treason against the United States led to the first use by the federal government of test oaths for attorneys starting in January of 1865.[48] As a means to ferret out those attorneys who had participated in the Confederate effort or were sympathetic to its ideals, Congress required every attorney to swear that he had not borne arms against the United States or supported any hostile forces prior to practicing before a federal court.[49] During this period, states were also imposing disavowals upon lawyers through oaths prescribed in their constitutions, in addition to government officers, clergymen, teachers, corporate officers and directors, eligible voters, and others.[50] Border states, namely Missouri, Maryland, Kentucky, and West Virginia, required attorneys licensed in

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42 *See* Kettner, *supra* note 37, at 219-29 (citations omitted).

43 *Id.* at 226.

44 *Id.* at 235.

45 *Id.* (citing Martin v. Commonwealth, 1 Mass. 347, 384-85 (1805) (Sedgwick, J.) ("They had an election, and this was to be determined by their own opinions of interest and duty.")).

46 *See* Lewis D. Asper, *The Long and Unhappy History of Loyalty Testing in Maryland*, 13 AM. J. LEGAL HIST. 97, 103 (1969).

47 HAROLD MELVIN HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION 154-55 (1954). Hyman covers the period from 1861 to 1884.

48 William A. Russ, Jr., *The Lawyer's Test Oath During Reconstruction*, 10 MISS. L.J. 154, 154-55 n.3 (1937-1938); see Hyman, supra note 47, at 103. As of January 24, 1865, no person could be admitted to the bar of the Supreme Court without first taking the oath. After March 4, 1866, this applied to the bar of any circuit court, district court, or court of claims. *Id.* at 155.

49 Koenigsberg & Stavis, *supra* note 26, at 119 n.85a.

50 *Id.* at 119.

their states to take an oath disavowing aid to the Confederates.[51]

In the federal courts, lawsuits were being filed to test the constitutionality of the test oath for lawyers.[52] A Tennessee court decided that the federal lawyer's oath caused attorneys to forfeit the property of fee-generating contracts with clients, and determined the oath unconstitutional because it was *ex post facto* legislation.[53] The reasoning was that since "exclusion from practice for disloyalty was not a penalty of law in 1861," Congress could not make it one in 1865.[54] The United States Supreme Court settled the matter of the oath of allegiance in *Ex parte Garland*, which concerned a lawyer and ex-Confederate legislator of Arkansas who received a Presidential pardon and sought permission to appear before the Supreme Court without having first to take the oath.[55] Test oaths prescribed by Congress upon attorneys prevented an individual from pursuing his profession or vocation. While this case was pending, federal judges across the country were handling the matter of the oaths in various ways: some considered it unconstitutional and stopped requiring it of attorneys appearing before them; some waived it, pending the Supreme Court's decision; and others maintained the oath requirement.[56] In January, 1867, the Court in a five/four decision found the federal test oath for attorneys unconstitutional because it functioned as punishment for acts that were not punishable at the time they were committed. The test oath was distinguishable from qualifications for offices, which Congress did have the power to prescribe.[57] The Court in *Garland* recognized the injustice of an oath that requires a denial, thereby making a presumption of guilt and requiring an attorney to initially attest to his loyalty. It held that Congress cannot use its power to prescribe qualifications to inflict punishment for past disloyalty.[58]

The dissent in *Garland*, on the other hand, pointed to the special status afforded attorneys in society, and identified a corresponding duty of "fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation" as a fair

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[51] Russ, *supra* note 48, at 156-57.

[52] *Id.* at 158.

[53] HYMAN, *supra* note 47, at 103 (discussing the opinion of Judge Connally F. Trigg of the U.S. Circuit Court for the Eastern District of Tennessee, *In re* Baxter, 2 F. Cas. 1043 (C.C.E.D. Tenn. 1866)); *see also In re* Shorter, 22 F. Cas. 16 (D.C. Ala. 1865), *and Ex parte* Law, 15 F.. Cas. 3, (D.C. Ga. 1866), at 104-05.

[54] HYMAN, *supra* note 47, at 103.

[55] 71 U.S. (4 Wall.) 333, 375 (1867). In the same 1866 term, the Supreme Court decided *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), in which Missouri's prescription of a test oath as a condition for the right to preach or give religious sacraments was found unconstitutional as an *ex post facto* law.

[56] HYMAN, *supra* note 47, at 108.

[57] *Id.* at 110.

[58] *Garland*, 71 U.S. at 380.

requirement of practicing in federal courts.[59] By characterizing the law requiring an oath as a "qualification, exacted in self-defense,"[60] the dissent seemed to justify it as a means of protecting the strength and unity of the country. The idea that attorneys, as officers of the court sworn to uphold the Constitution, have a heightened responsibility to be faithful to the ideals of the United States in their professional work and that the government can test the existence of such loyalty is a recurring theme throughout the history of this country.

II. RESOLUTIONS OF THE AMERICAN BAR ASSOCIATION DURING THE COLD WAR

Although this country would not experience any federally legislated requirement of loyalty oaths for attorneys again, the 1950s brought efforts by national, state, and local bar organizations and state legislatures to accomplish the same. In September, 1950, after a favorable report by the Committee on Resolutions, the American Bar Association Assembly and House of Delegates adopted resolutions holding that it was especially appropriate that all lawyers be required to take an anti-Communist oath, and requesting states to require each lawyer to file an affidavit regarding membership in the Communist party.[61] The Resolution requested of the states was that each member of the Bar be required:

> [W]ithin a reasonable time and periodically thereafter, to file an affidavit stating whether he is or ever has been a member of the Communist party, or affiliated therewith, and stating also whether he is or ever has been a member or supporter of any organization that espouses the overthrow, by force or by any illegal or unconstitutional means, of the United States Government, or the government of any of the states or territories of the United States; and in the event such affidavit reveals that he is or ever has been a member of said Communist Party, or of any such organization, that the appropriate authority promptly and thoroughly investigate the activities and conduct of said member of the Bar to determine his fitness for continuance as an attorney.[62]

The House of Delegates called for expulsion of Communists from the ABA and recommended that states disbar Communists.[63] The vote

[59] *Id.* at 385.

[60] *Id.* at 396.

[61] For a close analysis of the Resolution adopting the requirement of loyalty oaths, see ZECHARIAH CHAFEE, JR., THE BLESSINGS OF LIBERTY 161-76 (1956).

[62] *Proceedings of the House of Delegates*, 75 ANN. REP. A.B.A. 120, 148-49 (1950).

[63] *Proceedings of the House of Delegates: February 26-27, Chicago*, 37 A.B.A. J. 309, 320 (1951).

to adopt the Resolution was taken without benefit of any debate at the end of their session, after many delegates had left.[64] Those in favor of loyalty oaths expressed the concern that if there were no requirement of such an oath, there would be no plan in place for identifying Communists for disbarment.[65]

Opponents cited a host of constitutional issues raised by the proposed attorney loyalty oath. First, as the oath required a statement of past as well as present membership in the Communist Party, on which basis disbarment would result, it would violate the *Garland* doctrine making it unconstitutional to punish past conduct.[66] Second, its limitation on groups supported by the attorney or views he "espoused" would run counter to the First Amendment's protection of the freedom of speech and equal protection of the law under the Fourteenth Amendment.[67] Finally, in the sense that the oath could effectively condemn an attorney through his own words, it could violate the privilege against self-incrimination under the Fifth Amendment.[68] All of these arguments presume that a loyalty oath would require avowals that went beyond that of the oath upon admission.

A. *Backlash from State and Local Bar Associations: The Case of Massachusetts*

Resistance from various state and city bar organizations to the American Bar Association's initiative to get them to require loyalty oaths of their members reflected the fierce independence of the legal profession. Among the groups of attorneys not intimidated by the ABA was the New York City Bar Association. On December 12, 1950, that group adopted a resolution opposing the requirement of any oath other than the traditional oath to support the Constitution.[69] A group of twenty-seven ABA members (eight from New York, two from Boston, and seventeen from other cities) issued a public statement opposing the requirement of an anti-Communist oath as repetitious of the universally required professional oath upon admission. The group also felt that the requirement implied "widespread disloyalty and illegal acts on the part of lawyers generally," when there was no evidence of such.[70] Despite

[64] *American Epidemic*, supra note 11, at 56.

[65] *See* comments of William C. Walsh of Maryland *in Proceedings of the House of Delegates*, *supra* note 63.

[66] *Constitutional Issues Raised by the Proposed Loyalty Oath for Lawyers*, 36 IOWA L. REV. 529, 531-32 (1950-1951).

[67] *Id*. at 532-34.

[68] *Id*. at 534-35.

[69] *The Lawyer's Loyalty Oath*, 37 A.B.A. J. 128, 128 (1951).

[70] *The Proposed Anti-Communist Oath: Opposition Expressed to Association's Policy*, 37

the debate over the worth of oaths, the ABA House of Delegates voted on February 27 to affirm its stance on the anti-Communist oath. It also voted not to adopt a resolution calling for a poll of members of the ABA regarding the question of membership in the Communist Party, as it was expensive and useless since members would choose to ignore it or not answer truthfully.[71] Apparently the feeling was that an oath carried a significance that attorneys could not take lightly.

Some state bar associations not only were pitted against the ABA with respect to the oath initiative, but often found themselves opposing their own state legislature. In Massachusetts a special committee of the legislature[72] whose mission was "to curb communism" reached a majority decision to recommend adoption of legislation patterned after the Maryland "Ober" law,[73] and another calling for an additional loyalty oath for attorneys. Pursuant to "An Act to Require Attorneys-At-Law to Take an Oath of Loyalty to the Principles of the Constitution of the United States and the Commonwealth," the following oath was proposed:

> I, (insert name), do solemnly swear (or affirm) that I do not advocate, and have not advocated, nor am I a member of any political party or organization that advocates, the overthrow of the government of the United States or of this commonwealth by force or violence or by any other illegal or unconstitutional method; and that so long as I am an attorney, I will not advocate nor become a member of any political party or organization that advocates the overthrow of the government of the United States or of this commonwealth by force or violence or by any other illegal or unconstitutional method.[74]

Due process was provided in Section 39F of the proposed legislation which gave attorneys the right to a hearing before the board of bar examiners, with adequate time beforehand to prepare for a defense.[75]

A.B.A. J. 123, 123 (1951).

[71] *Proceedings of the House of Delegates*, *supra* note 63.

[72] Five of the eight members of this committee were lawyers, but only one of those five, Representative William E. Hays, a Republican from Waltham, Massachusetts and Harvard Law School graduate, opposed the loyalty oath proposal. W.E. Mullins, *This Is How I See It: Bill to Require Lawyers to Take Loyalty Oath Should Be Passed Readily by Both Branches*, THE BOSTON HERALD, March, 1951, *in Griswold Papers*, Box 88, Folder 8, *supra* note 20.

[73] This statute, The Subversive Activities Act of 1949, MD. ANN. CODE art. 85A, § 15, which made the membership in the Communist Party or any organization found to advocate the overthrow of the government a crime, served as a model for other state statutes. The Massachusetts version, "An Act Relative to crimes against the government, subversive organizations and the loyalty of candidates for public office and of officers and employees of the Commonwealth or of any political subdivision thereof," can be found in H.R. 2759, 157 Gen. Ct. (Mass. 1951).

[74] H.R. 2323, 157 Gen. Ct. (Mass. 1951), Appendix C-II (proposed MASS. GEN. LAWS ch. 221, § 39B).

[75] H.R. 2323, 157 Gen. Ct. (Mass. 1951), Appendix C-II (proposed MASS. GEN. LAWS ch. 221, § 39F). The proceedings anticipated were as follows: "At the hearing all evidence

One Massachusetts legislator, Representative William E. Hays, spoke out against what he called "hasty legislation."[76] He pointed out that there was "adequate Federal law to deal with any serious subversive activity,"[77] presumably referring to the Smith Act.[78] The argument that national security is the domain of Congress rather than the state board of bar examiners meant that the onus to determine seditious activity among the bar and to examine any charges against an attorney should be ultimately placed upon the courts. The procedural safeguards of a court trial, namely the formality of pleading requirements that call for careful formulation of charges, an opportunity to fully develop a defense, rules on admissibility of evidence, and the use of a jury as trier of fact, would make it a much fairer forum for the determination of the loyalty of attorneys. Not only did Hays consider the requirement of a loyalty oath unnecessary, but he thought it would operate as an "affront to the legal profession," and went so far as to term it "an inquisition."[79] Further, he warned that the legislation could "lull[] citizens into a false sense of security."[80] Certainly the level of sincerity of attorneys taking an oath would vary, but undoubtedly many would treat it simply as a necessary step to maintain their license to practice law, comparable to the payment of yearly fees.

In support of the stance taken by the Executive Committee of the Massachusetts Bar Association against attorney loyalty oaths, Harvard Law Professor George K. Gardner went before the Massachusetts Legislature at a hearing on the issue. Consistent with his position before the House of Delegates of the ABA in Chicago in February, 1951, Professor Gardner argued that the attorney oath upon admission, which requires lawyers to swear to uphold both the federal and state constitutions, already operates as a "loyalty" oath and contains "a short code of professional ethics."[81] To require the proposed loyalty oath in addition to the lawyer's oath would in effect make the latter "perfunctory in spirit and in fact."[82] In a May 1, 1951 letter to the *Boston Herald*, Professor Gardner further explained that the proposed oath was no more than an "oath of submission," and that the citizens of

theretofore considered by the board which in any way tends to prove the disloyalty of the petitioner or attorney shall be presented and the petitioner or attorney shall be permitted to present any pertinent evidence in rebuttal or tending to prove his loyalty." *Id.*

[76] *The Current American Swearing Epidemic: Supplementary Statement of Representative William E. Hays*, MASS. L. Q., May, 1951, at 47, 50.

[77] *Id.*

[78] 18 U.S.C. § 2385 (2006). The Smith Act made it a crime to be a member of an organization which taught or advocated the overthrow of the government by force or violence. *Id.*

[79] *Statement of William E. Hays*, *supra* note 76, at 51.

[80] *Id.*

[81] *The Current American Swearing Epidemic: The Hearing*, MASS. L.Q., May, 1951, at 47, 52-53.

[82] *Id.* at 53.

the Commonwealth do not want "submissive lawyers."[83]

There was not enough resistance from the members of the Boston Bar Association ("BBA") to prevent that organization from adopting policies consistent with the ABA's resolutions. That association's Special Committee to Inquire into Communism Within the Bar put forth proposals, in response to the ABA, including the following: disbarment of members found after investigation and a hearing to advocate the overthrow of the governments of the United States or the Commonwealth; denial of admission to persons who are members of the Communist Party or adherents of Marxism-Leninism; and an additional attorney oath pledging loyalty to the federal and Massachusetts constitutions and opposing Communism. The committee's recommendations were submitted through a poll to members of the BBA for their approval.[84]

In response to these proposals, a group of eleven Massachusetts lawyers, including Harvard Law Professors Paul A. Freund and Mark DeWolfe Howe, issued a protest to the Boston Bar Association. Taking issue with the BBA's plea for lawyers "to forget for the moment that they are lawyers and accept the greater responsibility of citizens and patriots,"[85] the group explained:

> As members of the Massachusetts Bar we oppose the proposals precisely because we believe that our civic duty requires us to remember, and, not even momentarily, to forget, that we are lawyers. As lawyers we have been schooled by training and experience in the careful definition of ends and the skillful devising of means to attain those ends.
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> . . . .
>
> Let us content ourselves with the all-inclusive oath to support the Constitution, and not stimulate the invention of sub-loyalty oaths. For the rest, let us meet specific abuses within and without the profession by specific remedies, in the characteristic common-law way.[86]

They acknowledged that the times presented problems of "internal security" but that the bar was responsible for disciplining attorneys only for violations of the professional code, not for matters of national loyalty.[87] Moreover, it was the responsibility of the bar to provide "the voice of seasoned and constructive counsel" rather than perpetuate the anti-Communist frenzy.[88] Although the Massachusetts legislature did

83 *Id.* at 54.

84 *Record of the 40th Annual Meeting of the Massachusetts Bar Association at Plymouth, June 9, 1951*, MASS. L.Q., July, 1951, at 15, 15-19.

85 *Id.* at 19.

86 *Id.* at 20-21.

87 *Id.* at 20.

88 *Id.* at 21.

pass a law in 1951 making it a crime to be a Communist, the law requiring a loyalty oath of attorneys was not successful.[89] Ultimately, only a few states prescribed a loyalty oath for attorneys which included language that went beyond the promise to uphold state and national constitutions.[90]

As nearly all law teachers are members of the bar, the Association of American Law Schools (AALS) considered the ABA's proposals for the test oaths. The concern was that law teachers would be faced with the dilemma of having to choose between taking a test oath in order to remain a member of the bar and upholding principles of freedom of ideals, which test oaths inhibited, at the cost of losing bar membership.[91] The AALS' Committee on Academic Freedom and Tenure concluded that any requirement by a political or academic authority that law teachers subscribe to special oaths or take contractual statements as a condition of employment[92] violates the "principles of academic freedom and tenure adopted by our Articles of Association."[93] The Committee recognized an exception for persons who had direct governmental responsibilities or access to classified information.[94]

B. *Erwin N. Griswold's Defense of Attorneys' Right to Plead the Fifth Amendment*

In reaction to what he perceived as a dearth of response from the

[89] S. Res. 774, 157 Gen. Ct. (Mass. 1951), "An act providing for the adjudication of certain organizations as subversive, and imposing penalties for membership in, or the furnishing of certain aid or assistance to subversive organizations," as amended, was approved by the Governor on November 17 as Chapter 805 of the Acts of 1951).

[90] *See* Ralph S. Brown, Jr. and John D. Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480, 483-97 (1952-1953) (survey of states gave the following results: Kentucky, Alaska, Colorado, Washington, and Oklahoma had some form of loyalty oath; one-third of the states, including New York, had direct loyalty questions going to moral character and fitness to practice law in their application forms; other states required an interview with a character committee at which questions about Communist membership were asked, as well as questions regarding political opinions; and at least seventeen states, including Massachusetts, had no form of loyalty investigation except the traditional attorney oath to uphold the federal and state constitutions); *see also* Konigsberg v. State Bar of California, 353 U.S. 252 (1957) (holding that California bar could not reject application based on mere fact of membership in Communist Party.); Schware v. Bd. of Bar Exam'rs of New Mexico, 353 U.S. 232 (1957) (holding that the fact of applicant's Communist membership did not support a finding that he lacked "good moral character" and that New Mexico deprived him of due process.).

[91] *Report of Committee on Academic Freedom and Tenure to Executive Committee*, 1951 ASS'N AM. L. SCH. 1951 PROC. 111.

[92] See, for example contractual statement required by Regents of the University of California, *in Report of Committee on Academic Freedom*, *supra* note 91, at 105.

[93] *Id.* at 112.

[94] *Id.* (citing to the Resolution of the Thirty-sixth Annual Meeting of the American Association of University Professors).

academic world to the impact of Senator Joseph McCarthy and his supporters on proceedings before legislative committees in which professors who refused to answer questions on Fifth Amendment grounds were deemed guilty, Erwin N. Griswold emerged as a proponent of an individual's right to invoke Fifth Amendment protections without any repercussions.[95] Griswold participated as a member of Harvard's faculty committee in Harvard Corporation's investigation of Professor Wendell Furry and other professors who refused to answer McCarthy's questions about Communist associates, and at the law school where he was the dean, Griswold conducted investigations of two students, Jonathan and David Lubell, suspected of Communist activity.[96] The Harvard policy was to disapprove of the use of the Fifth Amendment by the faculty before Congressional investigating subcommittees, but not to consider invocation of constitutional protection as grounds for firing the professors.[97] During its 1953 annual meeting, the American Association of University Professors adopted a resolution stating that a faculty member's invocation of the Fifth Amendment in response to questions of legislative committees was not a "justifiable cause for the dismissal of the faculty member," but that such invocation placed "a heavy burden of proof of his fitness to hold a teaching position" and an obligation upon the university "to reexamine his qualifications for membership in its society."[98] Their concerns appear to have been the effect of a Congressional inquiry upon a professor's status at the university rather than the fairness of the proceedings, methods of investigation, and implications drawn from it—issues that became the focus of Griswold's campaign.

Griswold first spoke on the topic of the Fifth Amendment upon invitation to the mid-winter meeting of the Massachusetts Bar Association in Springfield on February 5, 1954.[99] He traced the long

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[95] *See* ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE 192-93 (1992) [hereinafter GRISWOLD, OULD FIELDS].

[96] *See* Erwin N. Griswold, *The Individual and the Fifth Amendment,* NEW LEADER, Oct. 29, 1956, at 20 [hereinafter Griswold, *The Individual and The Fifth Amendment*], *in Griswold Papers*, Box 77, Folder 18, *supra* note 20; *Law Dean Defends Educators' Use of Fifth Amendment: Harvard Official Addresses 450 at Bar Banquet*, NEW ENGLAND NEWSCLIP AGENCY, Feb. 6, 1954, at 1, 21, *in Griswold Papers*, Box 93, *supra* note 20; *see also* GRISWOLD, OULD FIELDS, *supra* note 95, at 191-92.

[97] Thomas O. Morton, Jr., *One-Man Congressional Probes Attacked by Harvard Law Dean*, NEW ENGLAND NEWSCLIP AGENCY, Feb. 6, 1954, at 1, *in Griswold Papers*, Box 93, *supra* note 20.

[98] *Report of Committee on Academic Freedom*, *supra* note 91, at 118-19.

[99] This was the first of a series of three speeches. The second speech was given as the Phi Beta Kappa address at Mount Holyoke College on March 24, 1954, and the third speech was given twice, first as the Edwin C. Caffrey Memorial Lecture before the New Jersey Institute for Practicing Lawyers in Newark on October 14, 1954, and second before the Connecticut Bar Association in Hartford on October 19, 1954. These three speeches were reproduced in ERWIN

history of legal provisions against self-incrimination, beginning in twelfth-century England as a result of controversies between the king and bishops, through the establishment of the privilege against self-incrimination in the common law of English courts in the latter half of the seventeenth century, to the adoption of a provision in the Massachusetts Constitution in 1780 which antedates that in the United States Constitution.[100] He hailed the Fifth Amendment as a sound provision of both federal and state laws, pointing out that the establishment of the privilege against self-incrimination "is closely linked historically with the abolition of torture."[101] He stated his position as follows:

> If a man has done wrong, he should be punished. But the evidence against him should be produced, and evaluated by a proper court in a fair trial. Neither torture nor an oath nor the threat of punishment such as imprisonment for contempt should be used to compel him to provide the evidence to accuse or to convict himself.[102]

Griswold's implication was that current Congressional procedures were infringing on the role of the courts. Through the use of two hypothetical cases involving college teachers summoned to appear before a Congressional investigating committee to answer questions about Communist involvement, Griswold illustrated his argument that an inference of guilt when an individual chooses to assert the Fifth Amendment privilege is unwarranted because it is "not the equivalent of an admission of criminal conduct."[103] He pointed out that there are many reasons other than guilt why a person may claim the privilege in a particular case.[104] In the two cases both professors, one an idealist and former member of the Communist party and the other an opponent of Communism who nevertheless showed interest in subversive organizations, could sincerely invoke the Fifth Amendment despite the fact that neither had done anything illegal at the time.[105]

In a later speech before the Connecticut Bar Association in

N. GRISWOLD, THE FIFTH AMENDMENT TODAY (1955) [hereinafter GRISWOLD, THE FIFTH AMENDMENT].

100 *Dean Erwin N. Griswold's Speech on Fifth Amendment*, 130 LEGAL INTELLIGENCER 335, 339, Mar. 16, 1954, *in Griswold Papers*, Box 88, Folder 3, *supra* note 20 [hereinafter *Dean Griswold's Speech*].

101 *Id.*

102 *Id.*

103 *Id.*

104 For a thorough analysis of reasons for asserting the Fifth Amendment privilege, see Daniel H. Pollitt, *The Fifth Amendment Plea Before Congressional Committees Investigating Subversion: Motives and Justifiable Presumptions: A Survey of 120 Witnesses*, 106 U. PA. L. REV. 1117, 1137 (1958) (concluding through empirical evidence that the term "Fifth Amendment Communist" is groundless with respect to reasons people plead the Fifth Amendment since in other settings the witness freely answers the same questions asked by committees with denials of the charge and with reasons for his silence before the committees).

105 *See Dean Griswold's Speech*, *supra* note 100.

October, 1954, Griswold was much more explicit than he had been in earlier speeches in his harsh criticism of the nature of the tribunal in which the legislative committee questioned witnesses.

> We are told that a legislative committee is not a court, and that court rules do not apply. We are told too that a committee or subcommittee is only conducting an investigation, not a trial, and that Congress or a legislature would be severely hampered in its law-making function if it were bound by cumbersome court rules. . . . Indeed, experience has taught us that the risks are very great in legislative investigations, which might suggest that this was a place where even greater safeguards should be imposed.[106]

Protection of the rights of the individual should be guaranteed and not put at risk depending upon the choice of forum. As Griswold explained in a radio interview on WABC, New York: "I do not think that that menace is at present at such strength or intensity or immediacy as to make it wise for us to overthrow the safeguards which have been the very heart of this country."[107] He went on to express the irony of the procedures utilized by the government: "We should not adopt in this country methods which are essentially Communist for the purpose of protecting ourselves against Communism."[108]

Griswold's ideas about specific treatment of attorneys who plead the Fifth Amendment were expressed during a debate with Tracy E. Griffin, a Seattle attorney and member of the ABA Committee to Study Communist Tactics, Strategy and Objectives, at the 78th annual meeting of the American Bar Association in Philadelphia in August of 1955.[109] Griffin stated the position of the ABA Committee to be that "any lawyer who pleads the Fifth Amendment should be immediately disbarred," however no such action had been taken against an attorney on that ground.[110] Griffin called for the yielding of individual rights in such circumstances because "[o]btaining the truth from a witness, establishing a fact material to the security of the United States, is more important to the general welfare and the public as a whole . . . ."[111] Griswold strongly opposed automatic disbarment, which would cause an individual's freedom and right to dissent to yield to the concern for

106 GRISWOLD, THE FIFTH AMENDMENT, *supra* note 99, at 63.

107 Interview by George Hamilton Combs, WABC, with Erwin N. Griswold, Harvard Law Dean, in New York, NY (Feb. 1, 1955), *in Griswold Papers*, Box 93, *supra* note 20.

108 *Id.*

109 *Harvard Law School Dean Backs Right To Take Fifth Amendment*, ALLEN'S PRESS CLIPPING BUREAU, Aug. 26, 1955, *in Griswold Papers*, Box 88, Folder 5, *supra* note 20. Since there is no transcript of the meeting, we must rely on accounts of the debate in articles and correspondence.

110 *Id.*

111 *See Attorneys' Use of '5th' Debated: Dean of Harvard and Coast Lawyer Disagree on Issue of Automatic Disbarment*, N.Y. TIMES, Aug. 25, 1955, at 12, *in Griswold Papers*, Box 77, Folder 18, *supra* note 20.

national security.[112] He conceded that when the conduct of an attorney who invoked the Fifth Amendment raised a question of security, an investigation was in order but one along the lines of a judicial inquiry rather than a Congressional hearing.[113] Through their traditional processes of fair and deliberate consideration, courts are better equipped to determine whether there exists a substantial basis for drawing a negative inference from an attorney's invocation of privilege under the Fifth Amendment.[114]

After Griswold's comments before the ABA were widely circulated, he became the target of much hate mail and was pressed to defend his positions on several occasions.[115] He received an inquiry from a tenured economics professor who was terminated from the University of Kansas City because he refused to submit to an investigation of his opinions and affiliations, and had his court complaint thrown out by a judge.[116] The professor was baffled at how a defender of academic freedom and civil rights, a reputation which Griswold was certainly building, could support the investigation of a lawyer who claimed the privilege of the Fifth Amendment.[117] Griswold's reply was simple: "Lawyers are officers of the courts, and their conduct is always subject to investigation."[118] He explained that any decision by a disciplinary committee of a bar association should be subject to review by a court. His belief that attorneys are not above the law and can equally be found to have committed an offense against the government is evident in the following: "I do not think that it can be successfully maintained in this setting, that a claim of privilege against self-incrimination, no matter what the question, is always completely colorless, as far as a lawyer is concerned."[119] Thus, there are situations in which a lawyer's use of the Fifth Amendment might give rise to a legitimate doubt as to his honesty and fitness to practice law. In several writings, in order to illustrate this point, Griswold gives the example of

[112] *Id.*

[113] *See id.*

[114] Griswold, *The Individual and the Fifth Amendment*, *supra* note 96. Griswold would have approved of the result in *Sheiner v. State*, 82 So. 2d 657 (Fla. 1955), in which the Florida Supreme Court held that it was error on the part of the trial court to infer guilt from an attorney's refusal to answer questions before a U.S. Senate subcommittee regarding his alleged membership in the Communist Party. Although the trial court in this instance did not afford the attorney due process by ordering disbarment, as evidence before the subcommittee did not prove the alleged charges and the attorney was denied the right to confront and cross-examine witnesses, trial judges have tools for a fair process not available in bar proceedings or congressional hearings.

[115] *See*, *in Griswold Papers*, Box 77, folders 17, 18, *supra* note 20.

[116] Letter from Horace B. Davis, Ph.D., to Dean Erwin N. Griswold, Harvard Law School (Sept. 6, 1955), *in Griswold Papers*, Box 77, Folder 16, *supra* note 20.

[117] *Id.*

[118] Letter from Erwin N. Griswold, Harvard Law School, to Dr. Horace Bancroft Davis, Ph.D. (Sept. 8, 1955), *in Griswold Papers*, Box 77, Folder 16, *supra* note 20.

[119] *Id.*

the attorney who is called to appear before a grievance committee of a bar association on a complaint from his client that he has embezzled "the poor widow's funds" and refuses to answer the bar committee's questions on the ground of self-incrimination.[120] Griswold would call for the disbarment of that attorney assuming there is evidence connecting the lawyer with the crime and he fails to give any appropriate response.[121] What distinguishes the experience of many lawyers during this time period from the above scenario is that their claim of Fifth Amendment privilege standing alone was deemed evidence of the facts of sedition involved. On the whole, the loyalty review process denied individuals the rights of "fair notice of the charges against them, the presumption of innocence, and an opportunity to confront their accusers."[122] There was a lack of evidence in Congressional investigations which ordinarily in a criminal case in court would result in a directed verdict in favor of the defendant.[123]

Griswold drew a distinction between what is morally the right thing to do and what is legally justified. He posited that solutions to these matters of whether an individual should be compelled to speak against his interests "are essentially moral rather than legal or even political."[124] Most of the college professors who claimed the Fifth Amendment privilege "were wrong in doing so, even though they were legally justified," and he was "inclined to think that it would have been better, in most cases, if they had answered the questions."[125] Griswold claimed never to have advised anyone to assert the privilege against self-incrimination because he felt it was wiser to simply answer the questions fully and frankly.[126] He acknowledged that when the matter on the whole was viewed as a moral matter, then any line of questioning regarding one's beliefs or the imposition of an oath attesting to one's loyalty to the United States could be considered wrong.[127] The

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[120] *See, e.g.*, Erwin N. Griswold, *The Fifth Amendment Today*, 39 MARQ. L. REV. 191, 202 (1955-56) [hereinafter Griswold, *The Fifth Amendment Today*].

[121] *Id.*

[122] DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 148 (2003) (referring to loyalty review boards examining public employees).

[123] *See* Griswold, *The Fifth Amendment Today*, *supra* note 120, at 202. Griswold quotes a transcript from a Congressional hearing, where a senator conducting the investigation tells the attorney-witness: "[I]n Congressional committee hearings there is no such thing as cross-examination by an attorney for a party. This is in the nature of a grand jury proceeding. You do not have that right . . . . I will announce [the rules of procedure of this committee] when I desire." *Id.* at 194. Consequently, the invocation of the Fifth Amendment was largely prompted by the nature and style of questioning. *See id.* at 195.

[124] Letter from Erwin N. Griswold, Dean, Harvard Law School to Richard L. Plasket, Western Maryland College (Mar. 7, 1957), *in Griswold Papers*, Box 77, Folder 17, *supra* note 20.

[125] *Id.*

[126] Interview with Erwin N. Griswold, *supra* note 107.

[127] *See* Letter from Erwin N. Griswold to Richard L. Plasket, *supra* note 124.

atmosphere of rampant suspicion allowed the government to cast its net widely, relying upon group identity rather than individual conduct, thereby calling into question the activities of many innocent people. Griswold supported a particularized investigation of attorneys suspected of seditious activity that was aimed at discovering whether an attorney offered aid to a Communist with the purpose of furthering anti-American activity, so that the guilty could be separated from the innocent. Although Griswold insisted that courts be the final arbiter in these cases, he doubted the ability of even the courts through the mechanism of judicial review to effect the necessary change in the government's attitude with respect to these issues.[128]

III. CURRENT RESTRAINTS ON THE ATTORNEY ROLE

The proposed loyalty oaths of the 1950s, which were to be required in addition to the oaths upon admission to the state and federal bar, underscored the idea that lawyers are not just agents of state governments, but also agents of the federal government. Federal interests could be reflected in the requirement of a separate loyalty oath that went beyond the lawyer's oath upon admission or ethical standards expressed in the rules of professional responsibility. The national government has a right to protect its interests, but a fine balance must be struck between guaranteeing civil liberties and protecting against any impairment to governmental authority to defend our liberty.[129] There are times when the relationship between an attorney and his client may be compromised for a higher purpose of national unity and strength. Since lawyers are in the unique position of influencing public opinion on matters of politics, economics, and social policies, stricter regulation of their activities may be justified.

A. *The Case of Lynne Stewart Does Not Set the Standard for Material Support*

The modern day approximation of the guarantee of patriotism that the loyalty oaths of the 1950s were to accomplish among members of

[128] *See id.*

[129] *See* Chief Justice Vinson, majority opinion in Am. Commc'ns Ass'n. v. Douds, 339 U.S. 382, 445 (1950) (Court held constitutional the provision of the Labor Management Relations Act, 1947, 29 U.S.C. § 159(h) (2006), requiring officers of a labor organization to file affidavits stating they are not Communist Party members and do not believe in the overthrow of government.). This decision is consistent with *Ex parte Garland* since officers are not required to make statements as to their *past* conduct.

the bar is the application of the statute prohibiting material support of terrorist activity to attorneys. Professor David Cole has criticized the material support laws because they "do not require proof that an individual intended to further any terrorist activity."[130] The material support statute makes it a crime to provide material support, defined broadly to include tangible things—"currency," "weapons" or "explosives," and individuals, namely "personnel"—as well as intangibles—"training," and "expert advice or assistance"—to one of the terrorist organizations designated by the Secretary of State.[131] The statute is objectionable because it does not take into consideration "the purpose or effect of the actual support provided."[132] Absent any requirement of proof, the statute bases guilt of terrorist activity "solely on the individual's connection to others who have committed illegal acts."[133] Depending on its application, then, the statute may implicate the value of freedom of association. As it pertains to the work of an attorney, the material support statute can conceivably capture the legal advice that an attorney provides his client. Such application raises issues of the extent to which the government can impose restrictions on the matters attorneys handle and their relationship with their clients during the course of representation.

The conviction of Lynne Stewart, New York civil rights lawyer, in February of 2005, for assisting her client, Sheik Omar Abdel Rahman, an Islamic cleric, in communicating with his followers about a conspiracy to kill and kidnap persons in a foreign country is the first example of the application to an attorney of the material support statute.[134] Rahman was serving multiple life sentences for conspiring to bomb tunnels and bridges in Manhattan.[135] The government originally charged Stewart with conspiring to provide material support or resources to a foreign terrorist organization in violation of 18 U.S.C. § 2339B, and with providing and attempting to provide such material

[130] David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 9 (2003).

[131] 18 U.S.C. § 2339A(b)(1) (2006) ("[M]aterial support or resources" means "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials."); 18 U.S.C. § 2339B (2006) *and* 8 U.S.C. § 1189(a)(1), (c)(2) (2006) (giving criteria for designation of terrorist organizations).

[132] Cole, *supra* note 130, at 9-10.

[133] *Id.* at 10.

[134] Alissa Clare, *We Should Have Gone to Med School: In the Wake of Lynne Stewart, Lawyers Face Hard Time for Defending Terrorists*, 18 GEO. J. LEGAL ETHICS 651, 652 (2005); *see* 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), 18 U.S.C. § 2339B (2006); United States v. Sattar, 314 F. Supp. 2d 279, 295-96 (S.D.N.Y. 2004).

[135] Cole, *supra* note 130, at 3 (citing United States v. Rahman, 189 F.3d 88 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000)).

support and resources to a foreign terrorist organization under 18 U.S.C. § 2339B and 2.[136] Stewart's conduct fell within the definition of material support, specifically the statute's proscription of the use of "communications equipment" and "personnel" for terrorist aims.[137] Stewart acted as a liaison between the Islamic Group and Rahman; audio and video surveillance of meetings between Stewart and Rahman in prison revealed that Stewart facilitated communication between her client and the Islamic Group.[138] She also issued a press release on behalf of Rahman, through a reporter for Reuters News Service in Cairo, stating that he opposed cease fire in Egypt.[139] Stewart was aware that her actions violated the directives under the United States Bureau of Prisons' Special Administrative Measures (SAMs) which were instituted in October, 2001 to govern lawyers' visits with clients who were charged with, or convicted of, crimes of terrorism.[140] A superceding indictment was returned on November 19, 2003, charging Stewart with conspiring to provide and conceal material support to a foreign terrorist organization under 18 U.S.C. § 2339A (2003), and the actual provision and concealment of that support under 18 U.S.C. §§ 2339A and 2.[141] Under these new charges, the government was required to show proof that Stewart had the specific intent to aid a terrorist organization in its criminal acts.[142]

Reaction from the legal community to the eventual conviction of Lynne Stewart in 2005 for conspiracy, material support and making false statements, and to her sentence to twenty-eight months in prison and automatic disbarment,[143] has been focused on how the application of anti-terrorism legislation in such instances violates civil liberties from the constitutional perspectives of the freedom to express viewpoints under the First Amendment and of the right to counsel under the Sixth Amendment.[144] On a symbolic level, the feeling is that the

[136] Counts One and Two of Indictment at 10-11, 20, United States v. Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart & Mohammed Yousry, No. 02 Cr. 395 (S.D.N.Y. Apr. 9, 2002), *available at* http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf.

[137] *See* United States v. Sattar, 314 F. Supp. 2d 279, 295-96 (S.D.N.Y. 2004).

[138] Clare, *supra* note 134, at 653.

[139] *Id.*

[140] Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL'Y 299, 367 (2007).

[141] *See* Indictment, United States v. Ahmed Abdel Sattar, Yassir Al-Sirri, Lynne Stewart & Mohammed Yousry, No. Si 02 Cr. 395 (S.D.N.Y. Nov. 19, 2003), *available at* http://www.lynnestewart.org/IndictmentSuperceding.pdf.

[142] *See Sattar*, 314 F. Supp. 2d at 295-96.

[143] *See* Matter of Stewart, 834 N.Y.S.2d 157 (N.Y. App. Div. 2007) (finding that Stewart ceased to be an attorney upon conviction, and therefore, her resignation could not be accepted).

[144] *See, e.g.,* Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 176 (2003) (arguing that an expansive definition of "material support" in the statute undermines First and Sixth Amendment protections by including a range of legal activities with respect to terrorist

case "implicates many of the values that lie at the core of the criminal justice system."[145] From the common law perspective of the role of the attorney, concerns about the government's potential infringement upon the evidentiary rule of attorney-client privilege have been raised by such a scenario.[146] Finally, through the lens of the rules of professional responsibility, an argument could be made that the government violated the broader rule of confidentiality between attorney and client which would apply to matters communicated in confidence between Stewart and Rahman, as well as to all information relating to the representation.[147] However, any infringement upon the attorney-client relationship is justified since a felony was committed or about to be committed. Under Model Rule 1.6(b)(2), a lawyer may reveal client confidences "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."[148] Although it is not mandatory for a lawyer to reveal the client's misconduct to the authorities in these circumstances, Stewart was not allowed to "counsel or assist" Rahman in activity that she knew was criminal or fraudulent.[149] Since Stewart was aiding and abetting terrorism in assisting Rahman in the commission of a crime, she violated Model Rule 1.2(d),[150] and therefore, under Rule 1.16(a)(1),[151] was obligated to withdraw her representation when it became evident that her involvement would lead to a transgression of the rules of professional conduct and would threaten to violate national security law.

Elaine Cassel, law professor and freelance writer, suggests that a professional reprimand such as a sanction from the New York State Bar,

organizations); Tamar R. Birckhead, *The Conviction of Lynne Stewart and the Uncertain Future of the Right to Defend*, 43 AM. CRIM. L. REV. 1 (2006) (closely analyzing the Special Administrative Measures and arguing that this regulation has led to the violation of the Sixth Amendment's protection of attorney-client communications).

145 *Id.* at 50.

146 *Id.* at 13-14; Clare, *supra* note 134, at 659.

147 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 3 (2007).

148 MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) (2007).

149 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) cmt. 7 (2007). Comment 7 states: "Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent."

150 Rule 1.2(d) states: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007).

151 Rule 1.16(a)(1) states: "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law." MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2007).

rather than disbarment, would have been appropriate for Stewart but for the political climate in which the federal government oversees all matters concerning security, thus allowing an aggressive prosecutorial approach against an attorney.[152] She argues: "Surely 9/11 provides an argument for increasing punishment of bona fide terrorists. But not for surveilling and punishing their lawyers, too."[153] Such perspective on the Stewart matter overlooks the vantage position that attorneys have in society, namely their function in helping the public to form sound opinions, and their corresponding heightened responsibility to adhere to the law. For this reason, the role of an attorney has unique tensions. Merely by the services they provide, they can be very instrumental in furthering terrorist activity, and therefore should be equally subject to the Patriot Act as interpreted by the courts.[154] But in this instance, Stewart was not performing the work of an attorney. As such, these matters should not be left to disciplinary trials before hearing panels of state bar associations, which would apply variable standards, potentially resulting in disparity across the country.[155] The secrecy that surrounds many lawyer disciplinary matters means that there is potentially little value to other members of the bar who may face the same precarious situation with their clients.[156] As officers of the court, attorneys in Stewart's position should stand trial in court when allegations of conduct threatening the government have been made so that the evidence can be fully developed and tested in a forum that provides all constitutional safeguards. Lawyer disciplinary proceedings are not entirely criminal in nature, as only some of the due process protections

[152] *See* Elaine Cassel, *The Cases of Lynne Stewart, Clive Stafford Smith, and Navy JAG Lawyer Charles Swift: Government Retaliation Against Attorneys for Terrorism Suspects*, FINDLAW, Oct. 19, 2006, http://writ.lp.findlaw.com/cassel/20061019.html. *See also* David Cole, *The Lynne Stewart Trial*, NATION, Mar. 7, 2005, *available at* http://www.thenation.com/doc/20050307/cole (arguing that although Stewart "crossed the line from zealous advocacy to wrongful conduct . . . [a]t most she deserves a disciplinary proceeding before the bar").

[153] *See* Cassel, *supra* note 152; *see also* Elaine Cassel, *The Lynne Stewart Guilty Verdict: Stretching the Definition of 'Terrorism' To Its Limits*, FINDLAW, Feb. 14, 2005, http://writ.news.findlaw.com/cassel/20050214.html. Targeting Rahman, the government learned of Stewart's aid to Rahman through surveillance of her visits initially under the 1994 Foreign Intelligence Surveillance Act. Under SAMs, the Bureau of Prisons was able to conduct videotape and audiotape surveillance of Stewart's communications with Rahman.

[154] "[T]he law should prevent lawyers from leveraging their professional status to pursue a course of operational solidarity with terrorism that extends well beyond a lawyer's core functions." Margulies, *supra* note 144, at 212.

[155] In most jurisdictions, the burden of proof borne by the disciplinary agency of a state bar with respect to the allegations stated in the formal charges is clear and convincing evidence, although the processes for appeal differ. *See* Telephone Conference with Ellyn S. Rosen, *supra* note 8.

[156] At the investigatory stage of a grievance, the matter is kept confidential. Grievances against a lawyer are not made public until a formal complaint is filed with the disciplinary hearing panel. Thus the public would not learn of private dispositions of a disciplinary matter or a dismissed complaint. *See* Telephone Conference with Ellyn S. Rosen, *supra* note 8.

that apply to defendants in criminal proceedings are available.[157] Moreover, such proceedings would not have been commensurate with Stewart's criminal activity. At the hearing on Stewart's appeal before the Second Circuit Court of Appeals on January 29, 2008, Justice Walker emphasized that Stewart was not acting within the parameters of attorney conduct by reminding those present that the "serious aspect to this case . . . [is] that a lawyer is sworn to uphold codes of conduct and ethics and behave in a particular way."[158] Stewart "abused her position as a lawyer and lied to the government" when she signed attorney affirmations that she would abide by the regulations established by SAMs.[159]

Just as Griswold insisted upon court review of any attorney who asserted the Fifth Amendment in the face of evidence connecting the attorney with seditious activity against the country, the same argument should apply to lawyers in today's climate of national suspicion. Discussion then should focus on *how* courts should interpret applicable statutory provisions with respect to attorneys, not on *whether* they should. If more cases linking attorney's counsel with terrorist plots come before the courts, we might expect the development of categories of attorney conduct that are actionable under the material support statute and guidelines for determining a fair sentence.

B. *The Case of Marc S. Triplett, Ohio Public Defender: The Potential Imposition of a Loyalty Oath Where No Link to Terrorism Is Evident*

The only other court case to date to discuss the application of anti-terrorism legislation to attorney representation came out of Ohio in 2006, and involved a state public defender who posed a far less real threat to national security than Lynne Stewart. The Supreme Court of Ohio in *State ex rel. Triplett v. Ross* faced the question of whether certification provisions under the Ohio Patriot Act should apply to court-appointed attorneys representing indigent persons.[160] Ohio is the

[157] Lawyers are entitled to notice of the charges against them, and have the rights to present evidence (usually pursuant to the state's rules of evidence), to confront contrary witnesses, and to assert the Fifth Amendment protection against self-incrimination. *See, e.g.*, *In re* Ruffalo, 390 U.S. 544 (1968); Spevack v. Klein, 385 U.S. 511 (1967). But the double jeopardy clause is not applicable in disciplinary proceedings, when a lawyer is both disciplined and criminally prosecuted for the same misconduct. *See, e.g.*, *In re* Chastain, 532 S.E.2d 264 (S.C. 2000).

[158] Transcript of Hearing, United States v. Stewart, No. 06-5015-CR (2d Cir. Jan. 29, 2008); *See also* Mark Hamblett, *Circuit Hears Stewart Arguments: Judges Consider Intent, Knowledge*, N.Y. L.J., Jan. 30, 2008, at 1.

[159] Hamblett, *supra* note 158, at 1. Justice Walker was critical of Federal District Court Judge Koeltl for not considering terrorism in the sentencing guidelines when issuing Stewart a sentence of twenty-eight months in prison.

[160] 855 N.E.2d 1174 (Ohio 2006).

only state to have enacted its own Patriot Act designed to implement provisions of the USA Patriot Act. Effective April 14, 2006, the Ohio Patriot Act requires persons doing business with a government entity or applicants under final consideration to complete a declaration certifying that they do not provide material assistance to a terrorist organization.[161] The language in the definition of "material support or resources" tracks that of the definition of these terms in 18 U.S.C. § 2339A(b).[162] An affirmative answer or the failure to answer "no" to a series of questions[163] effectively means that the applicant has provided material assistance to a terrorist organization, resulting in the denial of a state license, contract or employment with the state or one of its entities.[164] As applied to an attorney, these broad questions could equally pertain to any client the attorney has represented in the past as to any client he is representing at the time he is employed by the state, which cases would not necessarily have any connection to the work for which the state is contracting him.

Plaintiff Marc S. Triplett, an attorney licensed to practice law in Ohio who accepted court appointments to represent indigent persons, brought this action against the judge and clerk of Bellefontaine Municipal Court and the court itself ("respondents"). Triplett sought a writ of prohibition ordering respondents to cease requiring public defenders to complete the form declaring material assistance/nonassistance, not to disqualify such attorneys from court appointments for not completing the form, and not to remove him from the list of eligible attorneys for appointments.[165] In his brief, Triplett

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[161] OHIO REV. CODE ANN. §§ 2909.32, 2909.33, & 2909.34 (West 2008).

[162] For purposes of the Ohio Patriot Act, "'material support or resources' means currency, payment instruments, other financial securities, funds, transfer of funds, financial services, communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." OHIO REV. CODE ANN. § 2909.21(I) (West 2008).

[163] The six questions are as follows: "(1) Are you a member of an organization on the U.S. Department of State Terrorist Exclusion List? . . . (2) Have you used any position of prominence you have within any country to persuade others to support an organization on the U.S. Department of State Terrorist Exclusion List? . . . (3) Have you knowingly solicited funds or other things of value for an organization on the U.S. Department of State Terrorist Exclusion List? . . . (4) Have you solicited any individual for membership in an organization on the U.S. Department of State Terrorist Exclusion List? . . . (5) Have you committed an act that you know, or reasonably should have known, affords 'material support or resources' to an organization on the U.S. Department of State Terrorist Exclusion List? . . . (6) Have you hired or compensated a person you knew to be a member of an organization on the U.S. Department of State Terrorist Exclusion List or a person you knew to be engaged in planning, assisting, or carrying out an act of terrorism? . . ." *See* OHIO REV. CODE ANN. §§ 2909.32(A)(2)(b), 2909.33(A)(1) & 2909.34(A)(1) (West 2008).

[164] OHIO REV. CODE ANN. §§ 2909.32(C); 2909.33(B), (C) & (D), § 2909.34(B) & (C) (West 2008).

[165] Complaint for a Writ of Prohibition, State *ex rel.* Triplett v. Ross, No. 2006-0742, 2006 WL 1333268, at *4 (Ohio Apr. 14, 2006). In the alternative, Triplett sought a writ directing

argued that respondents were attempting to regulate the practice of law and discipline of attorneys by conditioning payment for his representation upon his completion of the declaration form, and that pursuant to the state constitution, the Ohio Supreme Court has exclusive authority to do so.[166] Respondents argued that they were simply following the requirements of the statute and denied having made any rule regarding the practice of law, as Triplett remained on the list of court appointed counsel except that he was prohibited from being paid from government funds and essentially had to practice *pro bono* since he refused to complete the declaration form.[167] Responding to Triplett's original complaint asking the court to rule on the constitutionality of Sections 2909.32 and 2902.33 of Ohio Revised Code Annotated as applied to attorneys, respondents noted that an action for declaratory judgment rather than a writ of prohibition was the proper avenue for such an action.[168] Triplett later altered his initial arguments, stating that his claim was not that the Ohio Patriot Act alone or as applied to him was unconstitutional but rather that respondents were not authorized by the act or other mandate to demand that he sign the oath.[169]

The court in a *per curiam* decision held that Triplett's eligibility for a court appointment was not dependent upon his completion of the certification requirement of the Ohio Patriot Act since he did not receive funding "in an aggregate amount greater than $100,000 per year," as specified in Section 2909.33(C).[170] Therefore, the respondents' requirement of Triplett and other attorneys making less than $100,000 from court appointments was an unauthorized exercise of judicial power.[171] In reality, Triplett made far less than $100,000 per year, a fact to which the parties stipulated; the highest amount paid to any attorney representing indigent defendants in Logan County in Ohio was about $45,000 for 2005.[172] By basing its decision on this statutory monetary requirement, the court avoided addressing the issue of whether the respondents were infringing upon the exclusive power of the Ohio Supreme Court to regulate the practice of law as well as the more difficult question of the constitutionality of the declaration form.

Respondents to show cause for requiring the completion of the form for court appointments.

166 Merit Brief of Relator, Marc S. Triplett, State *ex rel.* Triplett v. Ross, 855 N.E.2d 1174 (Ohio 2006) (No. 2006-0742), 2006 WL 2351214, at *4-8.

167 Merit Brief of Respondents, *Triplett*, 855 N.E.2d 1174 (No. 2006-0742), 2006 WL 2643104, at *10-12.

168 *Id.* at *12.

169 Merit Reply Brief of Relator, Marc S. Triplett, *Triplett*, 855 N.E.2d 1174 (No. 2006-0742), 2006 WL 2643105, at *8.

170 State *ex rel.* Triplett v. Ross, 855 N.E.2d 1174, 1183-84 (Ohio 2006) (emphasis omitted).

171 *Id.* at 1184.

172 Merit Brief for Office of Pub. Defender & Ass'n of Criminal Def. as Amici Curiae Supporting Marc S. Triplett, Triplett, 855 N.E.2d 1174 (No. 2006-0742), 2006 WL 2351215, at *1-2.

The court avoided passing judgment on Triplett's assertions of the offensiveness of the declaration requirement, which he referred to as a "near loyalty oath reminiscent of that famous question of the communist witch hunt,"[173] since that concerns policy issues to be resolved by the legislature.[174] In response to Attorney Triplett's argument that the Ohio Patriot Act would prevent attorneys from representing terrorists since merely taking on such clients would constitute prohibited material assistance,[175] the Ohio Supreme Court drew a distinction between legal representation of terrorists and "material support or resources" under the act.[176] The court's statement on this issue is unsatisfying because there are multiple perspectives on when representation of a terrorist crosses the line into support of terrorism, which the court failed to address.

Moreover, the court's decision implies that application of the Ohio Patriot Act to attorneys engaged in legal services for the state which amount to *more than* $100,000 annually would not be deemed an infringement upon an attorney's choice of whom to represent. While public defenders in Ohio, as anywhere in the country, are unlikely to make more than $100,000,[177] and therefore, the risk of the certification requirement being applied to them is very low, it is conceivable that Ohio could contract an attorney for business-related services for the state whose fees would exceed this amount. If we are to read the opinion as narrowly applying to public defenders, then this would not be a fair inference from the opinion. Regardless of the actual number of attorneys that this law could affect, the use of such a requirement as a way to confirm the national loyalty of attorneys is troubling because it is an instance of a state government imposing a restriction on the attorney-client relationship and justifying it in the name of national security concerns when the representation is unrelated in any legitimate way to terrorism.

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[173] "Are you now or have you ever been a member of the Communist Party?" Merit Brief of Relator, Marc S. Triplett, *Triplett*, 855 N.E.2d 1174 (No. 2006-0742), 2006 WL 2351214, at *14. At the conclusion of his brief, Triplett posed the following questions: "Do they seriously fear that absent the oath requirement for appointed counsel, counsel's fees will go to advance the efforts of Al-Qaeda? If an Ohio attorney does give material aid to terrorists, is the requirement of the oath going to unearth that fact? And if an attorney were discovered to be supporting terrorists in some fashion other than the proper role of legal representation, that is a felony which properly may be prosecuted as such and, of course, would justify disciplinary action by this Court. Respondents have no role in either remedy." *Id.*

[174] *Triplett*, 855 N.E.2d at 1185.

[175] Merit Brief of Relator, Marc S. Triplett, *Triplett*, 855 N.E.2d 1174 (No. 2006-0742), 2006 WL 2351214, at *12.

[176] *Triplett*, 855 N.E.2d 1174 at 1185.

[177] According to the *2006 Public Sector & Public Interest Attorney Salary Report* published by NALP, the median entry-level salary for public defenders is approximately $43,000, while a public defender with 11-15 years of experience makes about $65,000. *NALP Publishes New Report on Salaries for Public Sector and Public Interest Attorneys*, NALP.ORG., Sept. 1, 2006, http://www.nalp.org/2006nalpnewreportonsalaries.

Presently there are not enough cases in which the provisions against materially supporting terrorism under 18 U.S.C. § 2339B, or the comparable Ohio statute, have been applied to attorneys in order for there to be definable parameters by which attorneys may structure their representation in such situations.[178] Concerns have been raised that the Military Commission Act, which broadly defines unlawful enemy combatants as those who "'purposefully and materially supported hostilities against the United States or its co-belligerents,'" could be applied to attorneys in the future as well.[179]

C. *What Standards Apply to Attorneys in an Increasingly Globalized Practice?*

Prior scholarship has identified conflicts between the legal profession's vision of the law as experienced in the bar's regulation of attorney conduct, through its enforcement of the state's rules of professional responsibility, and the state's vision of the law governing attorney behavior.[180] The argument that lawyers define themselves in terms of legal communities with specific normative visions that may conflict with that of the state government may be broadened by considering the additional layers of conflict posed by implications of federal legislation on the attorney role (as seen with the USA and Ohio Patriot Acts) and international norms that affect an attorney's representation of causes with global ramifications. The failure of the International Code of Ethics[181] to impact the behavior of American attorneys, as the code's influence cannot be traced in judicial opinions or in ethics opinions of the ABA or state bar associations,[182] has cast doubt on a workable model of a global set of rules that state and federal

[178] *But see* Meyerstein, *supra* note 140, at 369-72, discussing the experiences of Clive Stafford Smith, the Legal Director of Reprieve, a UK-based anti-death penalty advocacy organization, and Lieutenant Commander Charles Swift who represent suspected terrorists being held in Guantanamo. The government has restricted contact between lawyers and detainees by narrowing the scope of "legal mail" and limiting the number of face-to-face meetings to three. *Id.* at 371.

[179] *See id.* at 372 (citing Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C.)); *see also* Cassel, *supra* note 152.

[180] Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1390, n.1 (1992) (citing Robert M. Cover, *The Supreme Court, 1982 Term Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) and Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986)).

[181] The International Code of Ethics, first adopted by the International Bar Association ("IBA") in 1956 and revised in 1988, along with the General Principles, drafted by the Professional Ethics Standing Committee of the IBA, has been endorsed by a number of IBA member organizations. INT'L CODE OF ETHICS app. N (Int'l Bar Ass'n 1988).

[182] My research assistants did not uncover any reference to the International Code of Ethics in either judicial or ethical opinions.

courts would feel compelled to apply in cases spanning the borders of nation-states.[183] However, some legal scholars have argued for the existence of certain universal principles capable of transcending the differences in the three main legal cultures of the world—common law, civil law, and Islamic law—as well as the sub-groups of legal cultures existing in one nation.[184] One example of a universal rule of law capable of extending across national boundaries is the law of mercy that governs the procedures by which prisoners are to be tried, whose justification can be found generally in the rights of humanity.[185] An attorney sensitive to universal principles of ethical lawyering in deciding how to represent his client may be faced with conflicting standards of conduct. There are times when attorney conduct may not violate a law or applicable rule of professional responsibility in the country and state where he is admitted or where he is practicing, but may violate an instrument of international law, such as a treaty, or more generally universal concepts of morality. Given the license that American courts exercise in applying the rules of the forum even when the terms of a treaty would dictate a different result,[186] there has not been a noticeable perception of ethical conflicts between American standards and those of a foreign country. The conflict may become more apparent when an American attorney is practicing in a foreign jurisdiction.[187] The formation of partnerships with foreign lawyers[188]

[183] Scholars have criticized the International Code of Ethics' potential for effectiveness. *See, e.g.*, Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 LEGAL ETHICS 29, 56 (1999); H.W. Arthurs, *A Global Code of Legal Ethics for the Transnational Legal Field*, 2 LEGAL ETHICS 59, 67 (1999).

[184] *See* David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1442 (2006). Seipp points out that American law "has always allowed some core universality, some morality or sense of justice that transcends U.S. boundaries," in contrast to the foreign legal idea of positivism which teaches that law can only bind the territory of the sovereign that created the law. *Id.* at 1443. The *ius gentium*, or law of all people, is a Roman law concept. *See id.*

[185] *See* Quincy's argument to the jury to apply the "law of mercy—a law applying to us all—a law, founded in principles that are permanent, uniform and universal, always conformable to the feelings of humanity, and the indelible rights of mankind" at the trial of the British Captain Preston which led to his acquittal, as cited in Coquillette, *supra* note 30.

[186] *See, e.g.*, Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 524 (1987) (finding, in discovery dispute over obtaining documents and information in France, that the Hague Evidence Convention did not provide exclusive procedure, thereby allowing district courts to disregard foreign nation's blocking statute); Medellin v. Texas, 128 S. Ct. 1346 (2008) (holding, in case involving Vienna Convention, that U.S. ratification of treaties is not enforceable in American courts unless Congress enacted implementing statutes or treaty is self-executing).

[187] *See* John W. Brooks & Roberta Vassallo, *Attorney Cathy's Continuing Quandary, or, Can the Gatekeeper Initiative Be Reconciled with the Multi-Jurisdictional Practice of Law?* 41 INT'L LAW. 59 (2007) (in series of hypotheticals authors illustrate, through example of Gatekeeper Initiative adopted by European Union and implemented by member states through legislation, the dilemma faced by U.S. attorney when his state's ethical rules conflict with local professional responsibility laws in foreign country where he is handling a case).

[188] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-423 (2001) (deciding that U.S. lawyers may form partnerships with foreign lawyers for practicing law, despite absence

and the out-sourcing of legal services to foreign lawyers not admitted to practice in any U.S. jurisdiction[189] are further instances of how the globalization of legal practice is raising increased concerns over maintenance of client confidentiality and other ethical problems.

These realities of legal practice today have led international legal scholars to urge judges deciding matters involving conflicts of professional rules to look across borders to discover wider ramifications of conduct in the development of international norms. This idealistic approach seems more appealing than the traditional, more mechanical construction of conflicts law, as outlined in both the Model Rules of Professional Conduct[190] and CCBE Code,[191] making the application of a professional rule dependent upon where the contract was signed or where the tort giving rise to the professional misconduct occurred.[192] The belief that universal ethical norms exist outside a set of rules finds its basis in experiential evidence of attorneys basing their decisions on how to conduct their practice on these universal norms of what constitutes justice. In his review of Jack Goldsmith and Eric Posner's book *The Limits of International Law*,[193] Paul Berman disputes the authors' argument that states obey international law norms only when it is in their best interests to do so through his identification of an

of applicable provision in Model Rule 5.4). The ABA acknowledges that "[t]he law and ethical standards applicable to the legal profession in foreign countries will differ from some of the law and ethical standards that apply to U.S. lawyers," most notably in the area of client confidentiality. *Id.*; *see* D.C. Bar Op. 278 (1998), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion278.cfm (concluding that members of D.C. Bar may practice law in partnership with foreign lawyers not licensed in U.S. when "appropriate steps are taken to ensure the association will not compromise the D.C. Bar member's ability to uphold ethical standards").

[189] *See* NYC Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006) (calling for rigorous supervision of non-lawyer, preservation of client confidences, and avoidance of conflicts of interest).

[190] For an analysis of the improvements provided by Comment 7 to the current version of Model Rule 8.5, as well as practical applications, see Natalie E. Norfus, *Assessing the Recent Revisions to Model Rule 8.5: How Do the Changes Affect U.S. Attorneys Practicing Abroad, Specifically Those Practicing in Japan?* 36 GEO. WASH. INT'L L. REV. 623 (2004).

[191] The Council of the Bars and Law Societies of the European Community, in promulgating the CCBE Code which affects lawyers of the European Community Member States, has arguably been most successful in establishing mandatory ethical requirements for attorneys whose practice crosses national borders. *See* Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code, Part I: An Analysis of the CCBE Code of Conduct*, 7 GEO. J. LEGAL ETHICS 1, 18-19 (1993). The "standardization" of ethical rules across Member States can be contrasted with the Model Rules in the United States where ethical regulation occurs on a state-wide basis, rather than on a national basis. *Id.* at 44. In situations where a European lawyer is subject to multiple ethics codes reflecting the unique legal traditions of each country involved, the CCBE Code provides clear rules designating the applicable state rule depending on the context of the matter. *See id.* at 45.

[192] Conversation with Paul Schiff Berman, Dean, Ariz. State Univ. Sandra Day O'Connor Coll. of Law, at the Int'l Law Colloquium, Temple Univ. Beasley Sch. of Law, in Philadelphia, Pa. (January 23, 2007) (notes on file with author).

[193] JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

international legal consciousness whereby the values of international law are internalized or understood by a lawyer as required.[194] Under Berman's analytical framework, international legal norms can alter what government actors and populations consider to be "right, natural, just, or in their interest," and this happens in the absence of any authority coercing compliance with international law.[195] Problems arise when an attorney's adherence to guidelines in morality outlined by an international instrument cause him to run the risk of disobeying his national authority. The best example of this phenomenon is that of military lawyers and officers following provisions on the fair treatment of prisoners in the Geneva Conventions, specifically those concerning detention and interrogation of terrorist suspects, who potentially face conflict with the administration's view of the applicability of the principles in these international bodies of law.[196]

If attorneys are to reliably structure their representation of clients according to the rules of professional conduct, then those rules should reflect the various sources of ethical standards, both national and international, that come to bear upon an attorney's responsibilities. As demonstrated above, they presently fail to do so. Given the difficulty of drafting such a comprehensive code and the continued phenomenon of federal judges applying a mixture of professional rules, procedural rules, and their own extemporaneous rules, then perhaps we should not look to the Model Rules or state versions of the rules to provide mandates that carry the threat of discipline should they not be followed. It may be more realistic to utilize them solely as guiding principles, much as the International Code of Ethics has functioned, and leave it to the discretion of judges and the justice of court proceedings to determine what violations the attorney practicing before that court may have committed, as well as the appropriate consequences. Judges

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[194] Paul Schiff Berman, *Seeing Beyond The Limits of International Law*, 84 TEX. L. REV. 1265, 1280-92 (2006).

[195] *Id.* at 1269 (internal quotation marks omitted).

[196] *See id*. at 1291-92, n.112 (citing memoranda of the Air Force, Army, Navy, and Marine Offices of the Judge Advocate General expressing protest to "extreme" interrogation techniques permitted during the War on Terror which conflict with the moral approach that has traditionally been their training); *see also* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. The case of former Lieutenant Commander Matthew Diaz, who anonymously provided classified information on Guantanamo detainees in January of 2005 to the Center for Constitutional Rights in New York, also illustrates the dilemma an attorney faces when he feels a greater compulsion to follow universal notions of morality and fairness than the standards of ethical conduct dictated by his profession. *See* Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES, Oct. 21, 2007, § 6, at 78. But the decision of the D.C. Circuit Court that Guantanamo detainees are not entitled to constitutional rights via habeas corpus claims under the Geneva Conventions because they are non-citizens detained outside the territorial boundaries of the United States, *see* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), was reversed and remanded by the Supreme Court, 128 S. Ct. 2229 (2008), which stated that foreigners held under indefinite detention have the right to seek release in civilian court.

would have the flexibility to consider whether that attorney should follow international norms and customs that may be relevant to the particular case he is handling and make an assessment of the integrity of the attorney when his motives are called into question.

CONCLUSION

The history of loyalty testing in the United States teaches us that harms that seem real and threatening at the time often prove in retrospect to be exaggerated. Efforts by the ABA and state bar associations in the 1950s to impose universal loyalty testing on their members failed because they implied a presumption of guilt that was fiercely resented by attorneys and effectively regulated an attorney's choice of client without any evidence of his involvement in a security threat. This is not to say that the threat of Communism was not real—indeed there were plots to overthrow the United States and nuclear warfare was being created for this purpose[197]—or that attorneys in those times never violated the attorney oath and facilitated subversive activity against the United States, warranting punishment by the law and disbarment.[198] However, there was no mechanism in place to make the

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[197] *See, e.g.*, JOSEPH ALBRIGHT & MARCIA KUNSTEL, BOMBSHELL: THE SECRET STORY OF AMERICA'S UNKNOWN ATOMIC SPY CONSPIRACY (1997); KATHERINE A.S. SIBLEY, RED SPIES IN AMERICA: STOLEN SECRETS AND THE DAWN OF THE COLD WAR (2004); H. MONTGOMERY HYDE, THE ATOM BOMB SPIES (1982).

[198] *See* REPORT BY THE COMMITTEE ON UN-AMERICAN ACTIVITIES, *supra* note 24, at 26-75. For example, Alger Hiss was convicted in the U.S. District Court for the Southern District of New York on two counts of perjury for testifying falsely before a grand jury when questioned about whether he turned over any documents of the State Department, where he held a policymaking position, or other government organization to Whittaker Chambers or to any other unauthorized person. United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951). Hiss was disbarred from the Massachusetts Bar on August 1, 1952 and later reinstated. *In re* Hiss, 333 N.E.2d 429 (Mass. 1975); *see also* Braverman v. Bar Ass'n. of Baltimore City, 121 A.2d 473 (Md. 1956) (court convicted attorney of conspiracy to violate section 2 of the Smith Act, 18 U.S.C. § 2385, for advocating an overthrow of U.S. government by force and violence, sentenced him to three years in prison, and affirmed the order of disbarment, but attorney was later reinstated). For cases involving attorney misconduct in the course of representing defendants indicted for conspiracy, see *In re* Sawyer, 360 U.S. 622 (1959) (reversing Ninth Circuit Court of Appeals' ruling affirming one-year suspension of attorney who criticized Smith Act and government's proof in case in which she was defense counsel.); s*ee also* United States v. Sacher, 182 F.2d 416 (2d Cir. 1950), *aff'd* Sacher v. United States, 343 U.S. 1 (1952) (Second Circuit held that evidence of contemptuous remarks by counsel and failure to follow the court's rulings during trial warranted the convictions of attorneys Harry Sacher, Richard Gladstein, George W. Crockett, Jr., Louis F. McCabe, Abraham J. Isserman, and Eugene Dennis, who appeared *pro se*). Harry Sacher was disbarred by the U.S. District Court for the District of New York, but later reinstated when the Supreme Court declared permanent disbarment "unnecessarily severe." Sacher v. Ass'n of the Bar of the City of New York, 347 U.S. 388, 389 (1954), *rev'g* Ass'n of the Bar of the City of New York v. Sacher, 206 F.2d 358 (2d Cir. 1953). Abraham J. Isserman was disbarred from the New Jersey Bar, but reinstated nine years later. *In re* Isserman, 172 A.2d 425 (N.J. 1961). Isserman's disbarment from the U.S. District Court for

distinction between fair representation and participation in the client's illegal activities. From 1950 through 1953, the opinions of the Vinson Court embodied the anxieties over the threat of the spread of Communism, upholding statutes designed to incriminate Communist sympathizers, thereby justifying the tactics of the FBI and legislative investigative committees in the name of protecting precious democratic ideals and national security.[199] Some regulation by the government was necessary to protect against potential security threats, but the universal restrictions upon practice attempted by the bar proved to be unwarranted. Erwin Griswold opposed automatic disbarment for attorneys who claimed the Fifth Amendment when faced with charges of Communist activities or sympathies, and rather supported an investigation into the attorney's conduct under such circumstances and an examination that had all the procedural safeguards of any criminal trial in court.[200] He did not propose leaving such matters to bar governance. Griswold's proposal with respect to the process of discovering the truth satisfied the interests of both the government and attorneys. In answer to the government's concerns, he supported interrogation of an attorney when there was evidence connecting him with a crime. He also answered the legitimate fear of being presumed guilty that attorneys who pled the Fifth Amendment had as well as attorneys representing criminals. Under his construct, there was no presumption of guilt; the government had to prove an attorney violated the law before a finding of guilt could be made.

The same measured approach should be taken today. The courts, not the state bars, are the forums best suited to pass on the fitness of attorneys who have been accused of "materially supporting" the terrorist activities of their clients. The burden of proof is upon the government to show that the attorney has participated in his client's illegal acts.[201] The evidentiary standard in any proceeding should be fairly high. Guidelines for the type of evidence that can be admitted in cases of this nature have not been fully developed yet. We are well beyond the times illustrated at the start of this Article when an attorney could be called to answer questions about his political affiliations, involvement, or beliefs when they bore no nexus to the case he was handling before the court.

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the District of New York was reversed by the Second Circuit since it was not commensurate with his conduct in *Dennis* as compared with that of the other five defense attorneys. Ass'n of the Bar of the City of New York v. Isserman, 271 F.2d 784 (2d Cir. 1959).

[199] William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 433-34 (2001).

[200] *See Attorneys' Use of '5th' Debated*, *supra* note 111; *see also* Griswold, *The Individual and the Fifth Amendment*, *supra* note 96, at 23.

[201] *See* Cole, *supra* note 122, at 106-07 (discussing cases requiring the government to prove that an individual specifically intended to further a group's illegal activities, where there was no punishment for "guilt by association").

This is why the certification forms in the *Triplett* case as applied to the public defender when there was no evidence of his handling cases involving terrorists were arguably unconstitutional. Courts must distinguish legitimate counterintelligence information and FBI activity from politically motivated witch hunts. If a judge were to determine by clear and convincing evidence that an attorney has actively participated in terrorist activity that is the subject of the case at bar, then an order for withdrawal from representation should issue. This would not be an unfair regulation of the attorney-client relationship by the court if that determination were based on reliable evidence. I do not believe that the courts must determine that the proposed crime of the client is certain to cause mass destruction before prosecuting the attorney under the material support statute because mere implication of the attorney in a significant threat calls into question that attorney's integrity. Particularized investigation of attorney activity, avoiding the overzealousness of the McCarthy era where the net was cast too widely and guilt was determined by association, is the right approach for courts.

In his discussion of the shifting boundaries between "operational and positional solidarity" in the attorney-client relationship in terrorism cases, Professor Peter Margulies proposes a nuanced approach that courts should take in prosecuting attorneys who engage in operational solidarity with terrorist activity.[202] He calls for the court to engage in an analysis of the terms in the material support statute that applies the vagueness doctrine such that "a statute should yield a reasonably clear construction of prohibited conduct."[203] But the statute should not necessarily be adjudged void on the basis of vagueness. Even if "material support" is arguably so broad as to encompass legal advice that when given by the attorney was not intended to be used for illegal means but is processed by the client in such a way that furthers his terrorist plot, the court can still choose to interpret these terms narrowly so as to protect the attorney role, or it can signal to the legislature that specificity in the definition of "material support" as applied to legal representation is necessary. As for the type of information that can be admitted in these cases, Margulies recommends that surveillance of attorney-client communications occur only if there is an individualized showing by the government that less severe measures, such as restrictions on communications with third parties or the media, have failed to prevent collusion between the attorney and client in illegal acts.[204] This proposal is consistent with a particularized inquiry into an attorney's conduct. It requires dispensing with the attitude that the

202 *See* Margulies, *supra* note 144, at 195.
203 *Id.* at 204.
204 *Id.* at 210.

privacy between an attorney and client is sacrosanct, and that all communications, even those not covered by the attorney-client privilege, should be protected from disclosure to the courts. Finally, Margulies proposes that the court should not admit evidence of an attorney's support of violence, such as prior statements, unless it has a specific connection to the offense charged.[205] This suggestion also seems reasonable. The exclusion of evidence of past endorsements of unpatriotic activity is consistent with the *Garland* doctrine that individuals cannot be punished for past conduct or stated beliefs, and with arguments raised in the Griswold papers that a nexus between the crime at issue and the suspect activity of the attorney must be shown before an inference of guilt can be made.

Griswold expressed skepticism that the courts in the 1950s could bring about a change in the minds and hearts of government officials who insisted on presuming guilt of disloyalty to the United States before it was proven.[206] I am far more confident that the courts today can effectively ward off any attempt by the government to overzealously prosecute attorneys in the precarious position of representing suspected terrorists. The case of Lynne Stewart should not engender fear that the criminal defense bar will be prevented from performing its important role in society by the looming threat of prosecution under the "material support" provision of the USA Patriot Act because the Stewart case was a rare instance of an attorney getting too involved in her client's illegal activities. The mere fact of representing an unpopular client will *not* implicate a criminal defense attorney, as that would be a violation of the Sixth Amendment. In the future, courts will have to grapple with the gray areas of "material support" and eventually a body of law will evolve that provides a spectrum of attorney activity in the course of representing a client that may be deemed more or less in violation of the law. Until legal precedents provide such guideposts, attorneys should trust the courts to carefully consider the particular circumstances surrounding their representation of clients, such as the history and nature of the relationship, the extent of information about future illegal activity shared with the attorney, and the magnitude of the potential threat to national security that the client's intended activity poses. While this proposal will satisfy those attorneys who maintain a belief in the legitimacy of promises of truth and fidelity to the Constitution that they made upon the oath of admission to the bar, for those fierce defenders of the First Amendment, this solution of a deliberate process is unsatisfactory because just asking attorneys such questions violates the Constitution. The lessons of history should direct judges to tread lightly in this sensitive area so as not to disrupt the relationship of trust

[205] *Id.* at 211.
[206] Letter from Griswold to Plasket, *supra* note 124.

between attorney and client unless there is a high degree of certainty that it is justified.