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Advocacy and Association

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ADVOCACY AND ASSOCIATION

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Holder v. Humanitarian Law Project (*HLP*)[1] is riddled with factual, procedural, and legal complexities. The litigation spanned twelve years.[2] The plaintiffs were a mixture of individuals and groups. The constitutional claims and the government interests were weighty.[3] The meaning and scope of the "material support" statute were highly contested.[4] But this much is clear: the United States government believed that in some circumstances a lawyer who filed an amicus brief on behalf of a client would be subject to criminal liability under the material support provision.[5] At the same time, the government and the Supreme Court were quick to emphasize that mere *membership* in one of these groups was not prohibited under the statute, for that would have violated the right of association.[6] So the freedom of association protects the right of a lawyer to join a group, but not to engage in legal advocacy on behalf of that group.

Margaret Tarkington's *Freedom of Attorney-Client Association* exposes the constitutional reasoning that leads to these counterintuitive conclusions.[7] More importantly, Professor Tarkington shows us why it matters, and why we would be wise to alter course. Rather than simply postulating yet another variant of the right of association,[8] she ably demonstrates why protections for our ability to form relationships and foster ideas are indispensable predicates to other First Amendment freedoms but not reducible to only those freedoms.[9]

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[1] 130 S. Ct. 2705 (2010).

[2] *Id.* at 2716.

[3] *See id.* at 2722–24.

[4] *See id.* at 2724–25.

[5] *Id.* at 2736 (Breyer, J., dissenting) (noting that "the Government's claim that the ban here, so supported, prohibits a lawyer hired by a designated group from filing on behalf of that group an *amicus* brief before the United Nations or even before this Court" underscores the problem with banning advocacy on the theory that such advocacy legitimizes the group's conduct).

[6] *Id.* at 2718 (majority opinion) ("Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing 'material support' to such a group.").

[7] Margaret Tarkington, *Freedom of Attorney-Client Association*, 2012 UTAH L. REV. 1071.

[8] *See, e.g.*, Tashjian v. Republican Party, 479 U.S. 208, 217 (1986) (referring to a right of "political association"); Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18, 622 (1984) (establishing the rights of intimate and expressive association).

[9] Although I will not belabor the point here, I think that Professor Tarkington's reliance on De Jonge v. Oregon, 299 U.S. 353 (1937), and Thomas v. Collins, 323 U.S. 516 (1945), illustrates the ways in which both the general right of association and the more specific application of attorney-client association are traceable to, and derivative of, the

As Professor Tarkington notes, *HLP*'s odd elevation of bare membership over an activity like legal advocacy illustrates the kind of results-oriented formalism that plagues current First Amendment approaches to the rights of speech and association.[10] That formalism misses in two directions: (1) by conflating the two rights and the values they represent; and (2) by ignoring the ways in which those rights complement and reinforce one another. The Court's decision in *Christian Legal Society v. Martinez*[11] illustrates the first kind of formalism.[12] Professor Tarkington highlights how *HLP* illustrates the second:

> [T]he Court ultimately concluded that the plaintiffs' free speech rights were not abridged because they were still free to "say anything they wish on any topic" and "may speak and write freely" about their concerns regarding their proposed clients. As characterized by the Court, the plaintiff attorneys were forbidden from engaging in "only a narrow category of speech"—namely, "speech to, under the direction of, or in coordination with" their desired clientele. In so holding, the Court interpreted the right of free speech separately from the right of association. Having endowed the attorneys with speech, but denied them the ability to speak *in association with* those who needed to hear what they had to say, the Court went on to find, in a very cursory passage, that there also was no violation of the plaintiffs' right of association.[13]

The result is striking: "By separating speech and association, the court undermined both rights."[14] And, as Professor Tarkington notes, in the context of attorney-client association: "The idea that attorney free speech rights are preserved by allowing attorneys to engage in 'independent advocacy,' but prohibiting *associated* advocacy is absurd."[15]

None of the preceding commentary means that *HLP*'s holding is necessarily wrong. The state also has important interests, and none weightier than its own national security. Chief Justice Roberts rightly acknowledges that "[e]veryone agrees that the Government's interest in combatting terrorism is an urgent

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First Amendment's right of assembly. *See, e.g.*, Tarkington, *supra* note 7, at 1084 n.74 and 1103 n.180. For a more detailed explanation, see JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

[10] *See* Tarkington, *supra* note 7, at 1100. *See also* Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978 (2011).

[11] 130 S. Ct. 2971 (2010).

[12] *Id.* at 2985 (concluding that the petitioner's "expressive-association and free-speech arguments merge . . . ."). For my critique of this conflation in *Martinez*, see John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 HASTINGS L.J. 1213, 1233–34 (2012).

[13] Tarkington, *supra* note 7, at 1082 (citations omitted); *see also id.* at 1080.

[14] *Id.* at 1082. *Cf. id.* ("Considered in combination, the *HLP* Court's ruling on free speech and free association works to deny the core attributes of each right.").

[15] *Id.* at 1084.

objective of the highest order."[16] And that objective is facilitated by appropriate law enforcement activities and the use of criminal law, including criminal conspiracy law. Although these kinds of tools are not impervious to abuse, the activity they target is an appropriate focus of potential restrictions. Lawyers advocating on behalf of clients are not.

Professor Tarkington and I share similar worries about the reasoning and rhetoric of *HLP*. I am less persuaded by—or at least more cautious about—the theoretical arguments that she advances to ground the idea of attorney-client association. I will focus on two of them: the instrumental argument and the democratic argument.[17]

Professor Tarkington's instrumental argument is that the right of association "is essential to secure the other rights expressly guaranteed by the First Amendment."[18] Her reasoning resembles the Supreme Court's explanation for the right of "expressive association" first announced in *Roberts v. United States Jaycees*.[19] The problem with this analytical move is that its instrumental focus converts a foundational right into a derivative one.[20] Our freedom to form relationships and groups stands on its own without the need to harness it for the advancement of other First Amendment freedoms.

Professor Tarkington's second theoretical focus is the democratic argument: the First Amendment's freedoms "work together to preserve the American form of government."[21] I do not disagree with this normative impulse or its connection to the sources that Professor Tarkington enlists. But I worry that the focus on preserving "the American form of government" risks morphing a protection against government into a defense of government.

What, then, is the reason for protecting this idea of attorney-client association? Professor Tarkington gestures toward what I believe is the best answer when she discusses Vincent Blasi's checking theory of the First Amendment.[22] I think, however, that a more powerful argument draws from an even deeper suspicion of state power, one that jealously guards the tools and resources available to us to push back against that power. Like lawyers who argue on behalf of clients.

In my view, one of Professor Tarkington's most important insights is the connection that she draws between legal advocacy and attorney-client association. As she writes: "Legal advocacy is associated advocacy."[23] This nice turn-of-phrase

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[16] Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (2010).

[17] Professor Tarkington's third argument—that guilt is personal—is both interesting and plausible but has less to do with the kinds of associational observations that I offer here.

[18] Tarkington, *supra* note 7, at 1077.

[19] 468 U.S. 609 (1984); *see id.* at 622.

[20] *See* INAZU, *supra* note 9, at 127, 140–41.

[21] Tarkington, *supra* note 7, at 1090.

[22] *Id.* at 1091 (citing Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND RES. J. 521 (1977)).

[23] Tarkington, *supra* note 7, at 1084.

underscores one of the ways in which informal politics precedes formal politics. The lawyer as advocate (who files briefs and delivers arguments) flows out of the lawyer as counselor (who listens to clients, shapes arguments, and forms relationships). In this sense, Professor Tarkington's focus on attorney-client association mirrors the ways in which many groups function as the pre-political spaces in which ideas and relationships are formed in the first place. It is not enough for us to focus on the moment of expression (or the moment of advocacy) because we will never arrive at these moments without sufficient protection for the background circumstances in which they are crafted.[24] That to me is the core reason that we must be vigilant to protect the groups out of which ideas and advocacy emerge. These protections are not absolute—we will rightly worry about and constrain criminal activity, threats of violence, and improper uses of power. But in policing those lines, we should be cognizant of the state's ability to encroach too deeply, to describe too uncharitably, and to control too rigidly. In this sense, *HLP*'s rhetoric may be more dangerous than its holding. Professor Tarkington has helped us see why this is the case.

[24] *See* INAZU, *supra* note 9, at 5.