# DID FORTUNE TELLERS SEE THIS COMING? SPIRITUAL COUNSELING, PROFESSIONAL SPEECH, AND THE FIRST AMENDMENT

## INTRODUCTION

Just under one in five Americans believe they have had contact with ghosts, and one in seven admit to visiting a psychic or fortune teller.[1] A recent Pew Research Center report found that many Americans blend traditional faith with "New Age" beliefs, including reincarnation, astrology, and belief in the spiritual energy of physical objects.[2]

Despite this broadening acceptance of a diverse array of spiritual and religious beliefs and practices, several states still have statutes in place that outlaw or allow municipalities to prohibit fortune telling, psychic, and astrology-related services.[3]

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[1] Pew Research Center, *Religion and the Unaffiliated*, RELIGION AND PUBLIC LIFE PROJECT (Oct. 9, 2012).

[2] *Id.*

[3] *See, e.g.,* N.Y. PENAL LAW § 165.35 (McKinney 2013) (criminalizing fortune telling for profit); S.D. CODIFIED LAWS § 9-34-16 (2004) (empowering every South Dakota municipality to prohibit clairvoyants, phrenologists, mind readers, fortune

The Supreme Court of California was the first to apply strict scrutiny and strike down a ban on fortune telling on free speech grounds in *Spiritual Psychic Science Church v. City of Azusa* in 1985,[4] and as recently as July 2012 a federal court struck down a ban in Louisiana.[5] Despite this, fortune tellers face an alternate means of restriction on their practice: licensing regulations.[6] After *Azusa,* for example, a number of California counties replaced bans on fortune telling with significant licensing fees and restrictions, and a number of states continue to burden the practice in this way.[7]

Patricia Moore-King, a spiritual counselor in Chesterfield County, Virginia, was subject to similar restrictions. In the county, those who want to open a business and who fall under the classification of "fortune teller" must pay, in addition to the regular business licensing fee, a $300 licensing flat tax, and allow for a background investigation, including fingerprinting.[8] They are also subject to zoning restrictions.[9] Believing the regulations imposed a violation on her First Amendment right to free speech, Moore-King challenged them in court, but she was unsuccessful.[10] A similar challenge to restrictions in the city of Selma, California was dismissed.[11]

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tellers, and fakirs); OKLA. STAT. ANN. § 931 (2002) (prohibiting fortune telling for profit); GA. CODE ANN. § 36-1-15 (2013) (allowing county governing authorities to prohibit fortunetelling and related activity for profit).

[4] Spiritual Psychic Science Church of Truth v. City of Azusa, 703 P.2d 1119, 1127-1129 (Cal. 1985).

[5] Adams v. City of Alexandria, 878 F. Supp. 2d 685, 691-92 (W.D. La. 2012) (declaring a city ordinance in Alexandria, LA unconstitutional).

[6] *See, e.g.,* Moore-King v. Cnty. of Chesterfield, 708 F.3d 560 (4th Cir. 2013) (*see infra* notes 14-15); Davis v. City of Selma, No. 1:12-CV-01362, 2013 WL 3354443, at *2, (E.D. Cal. July 3, 2013) (challenging licensing restrictions on spiritual counseling in the Selma, CA municipal code).

[7] *See, e.g.,* AZUSA, CAL., MUN. CODE § 18-463 (1971); LOS GATOS, CAL., MUN. CODE § 3.60.020 (1997); RIVERSIDE, CAL., MUN. CODE § 5.24.030 (1987); VALLEJO, CAL., MUN. CODE § 5.04.207 (1986). *See generally* Julie D. Cromer, *It's in the Cards: The Law of Tarot (and Other Fortunes Told),* in LAW AND MAGIC 24-25 (Christine A. Corcos, ed., 2010) (examining states that have instituted licensing regulations on fortune tellers).

[8] *Moore-King*, 708 F.3d at 563. *See also* CHESTERFIELD CNTY., VA., MUN. CODE § 6-44 (1998); *Id.* § 15-246 (2012).

[9] *Moore-King,* 708 F.3d at 563.

[10] *Id.* at 572.

[11] *Davis*, 2013 WL 335443 at *7 (dismissed for lack of standing).

This Comment argues that existing burdens on the practice of spiritual counseling are acting as surreptitious bans and are designed to stigmatize and suppress speech. Current regulation at the state and local level has been enacted as a means of marginalizing what should be considered protected speech under the First Amendment. Spiritual counselors' beliefs and the way those beliefs are communicated through interactions most closely resemble the relationship between a religious counselor and counselee, and they should be similarly free from the burden of undue regulation. While states have a valid interest in protecting citizens from fraud, it must be properly balanced with spiritual counselors' right to engage in their practice without excessive government intervention, especially when that intervention is aimed at the content of their speech.

This Comment will explore that balance. Part I will introduce the *Moore-King* case and provide background on the historical bias against spiritual counselors and the paternalistic reasons given for restriction of their speech. Part I will also examine how local and state governments have devised alternative methods of stigmatizing the practice with licensing restrictions in the face of outright bans being found unconstitutional. Part II will outline the constitutional problem of prosecuting spiritual counselors' speech as per se false or fraudulent, and argue that faith-based or metaphysically contested statements of fact cannot be adjudicated as false. Part III will examine the doctrine of professional speech in *Moore-King*—what it is, the purported rationale, how it has been applied and for what purpose, the value of its application across professions, and when it should *not* apply by distinguishing the practice of spiritual counseling. Part IV will discuss why, given the government's primary concern is fraud, there are alternative means of regulation that will allow for policing fraud without violating fortune tellers' speech rights.

## I. BACKGROUND

### *A. Moore-King v. County of Chesterfield*

Patricia Moore-King had been a self-described "psychic spiritual counselor, tarot card reader, and teacher" for nearly twenty years when she moved to Richmond, Virginia, and began

practicing.[12] In August of 2009, county authorities informed her that in order to continue, she was required to obtain a business license.[13] When Moore-King arrived to register her business, she learned that her practice fell within the definition of "fortune telling" as described by the Chesterfield County Code, a wide-ranging definition that includes "astrologist[s]," "spiritual reader[s]" and even "prophet[s]."[14] She later received a letter notifying her that she owed the county $343.75, for both the fortune teller flat tax and associated late fees.[15] Instead of paying the tax, Moore-King opted to challenge the licensing requirements, asserting violations of her First Amendment right to free speech and the free exercise of religion.[16]

The district court granted summary judgment to the county, holding that Moore-King's business constituted "quintessential deception" and therefore fell outside the realm of First Amendment protection.[17] On appeal, the Fourth Circuit affirmed the decision of the district court, but it disagreed with the characterization of fortune telling as "deceptive," instead finding that it was entitled to at least some measure of First Amendment protection.[18]

The court of appeals applied the professional speech doctrine, holding that because Moore-King engaged in a client-service, providing personalized advice to a paying client in light of the client's individual needs, the county could regulate her profession with general licensing provisions in order to protect the public without running afoul of the First Amendment.[19] The panel likened regulatory requirements for fortune tellers to those applied to law and medicine.[20]

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[12] PSYCHIC SOPHIE, http://www.psychicsophie.com (last visited Mar. 11, 2014).

[13] *Moore-King*, 708 F.3d at 564.

[14] *Id.*; *see* CHESTERFIELD CNTY., VA., MUN. CODE, § 6-1 (defining "fortune teller" as, "any person or establishment engaged in the occupation of occult sciences, including a fortune teller, palmist, astrologist, numerologist, clairvoyant, craniologist, phrenologist, card reader, spiritual reader, tea leaf reader, prophet, psychic or advisor or who in any other manner claims or pretends to tell fortunes or claims or pretends to disclose mental faculties of individuals for any form of compensation").

[15] *Moore-King*, 708 F.3d at 564-65.

[16] *Id.* at 565.

[17] Moore-King v. Cnty. of Chesterfield, 819 F. Supp. 2d 604, 618 (E.D.Va. 2011).

[18] *Moore-King*, 708 F.3d 560, 567 (4th Cir. 2013).

[19] *Id.* at 568.

[20] *Id.* at 570.

The court also dismissed Moore-King's claim that the regulatory scheme interfered with her free exercise of religion under the First Amendment.[21] Moore-King claimed that her beliefs combined the "words and teachings of Jesus" with "the New Age movement . . . a decentralized Western spiritual movement that seeks Universal Truth and the attainment of the highest individual potential."[22] The court, with little analysis, found that her beliefs did not "occupy a place in her life parallel to that filled by the orthodox belief in God"[23] and that her beliefs "more closely resemble[d] . . . a way of life, not deep religious convictions shared by an organized group deserving of constitutional solicitude."[24]

### *B. Historical Bias Against Spiritual Counseling*

#### 1. Bans Upheld

While there has been little development in spiritual counseling regulation and very few cases that explore issues like those in *Moore-King,* there is an abundance of precedent with regard to hostility toward spiritual counseling as a practice. Laws prohibiting and criminalizing spiritual counseling were enacted soon after the birth of the nation, and while they have been loosened and in some cases abolished, the stigma attached to the practice, and the characterization of spiritual counselors as "cheats, frauds and [an] imposition on the credulous" remains.[25]

Through the late 1970's, bans on the practice of spiritual counseling survived multiple challenges.[26] A popular refrain from courts during this time was that it was within states' police power to protect its citizens' interests from spiritual counselors, whose activities were inherently deceptive or fraudulent.[27] This is illustrated in *In re Bartha*, where a woman offering tarot card

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[21] *Id.* at 572.

[22] *Id.* at 564.

[23] *Id.* at 571 (internal citation omitted).

[24] *Id.*

[25] Craig Freeman & Stephen Banning, *Rogues, Vagabonds, and Lunatics: How the Right to Listen Cleared the Future for Fortunetellers,* in LAW AND MAGIC 34 (Christine A. Corcos, ed., 2010).

[26] *See, e.g.,* State v. Kenilworth, 54 A. 244 (N.J. 1903); Mitchell v. City of Birmingham, 133 So. 13 (Ala. 1931); *In re* Bartha, 63 Cal. App. 3d 584 (Cal. Ct. App. 1976).

[27] *In re Bartha*, 63 Cal. App. at 591.

readings and selling "occult supplies" was arrested for violating the prohibition on fortune telling activities in the Los Angeles municipal code.[28] In upholding the conviction, the court held that the right to freedom of speech, "does not prevent the Legislature from regulating or prohibiting commercial enterprises which are harmful to the public welfare," noted that whether the woman intended to defraud was of no significance, and held that because the business of fortune telling is "inherently deceptive," it was within the power of the city to outlaw it.[29]

### 2. Bans Overturned on First Amendment Grounds

Nine years later, a California case signaled a shift in the way courts approached the question of whether bans on spiritual counseling activities violated the counselors' First Amendment right to freedom of speech.[30] In general, the First Amendment prohibits the government from limiting speech or expressive conduct because of disapproval of the ideas that are expressed.[31] Further, there is no sweeping governmental power to restrict expression because of its message, ideas, subject matter, or content.[32] With some notable exceptions for narrow categories of

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[28] *Id*. at 587. LOS ANGELES, CAL., MUN. CODE. § 43.30 (1983) prohibited any

> person [from] advertis[ing] by sign, circular, handbill or in any newspaper, periodical, or magazine, or other publication or publications, or by any other means, to tell fortunes, to find or restore lost or stolen property, to locate oil wells, gold or silver or other ore or metal or natural product; to restore lost love or friendship, to unite or procure lovers, husbands, wives, lost relatives or friends, for or without pay, by means of occult or psychic powers, faculties, forces, crafts or sciences, including clairvoyance, spirits, mediumship, seership, prophecy, astrology, palmistry, necromancy, cards, talismans, charms, potions, magnetism or magnetized articles or substances, oriental mysteries, magic of any kind or nature, or numerology. No person shall engage in or carry on any business the advertisement of which is prohibited by this section.

[29] *In re Bartha*, 63 Cal. App. at 591.

[30] Spiritual Psychic Science Church of Truth v. City of Azusa, 703 P.2d 1119 (Cal. 1985). *See also*, Marks v. City of Roseburg, 870 P.2d 201, 203 (Or. Ct. App. 1983) (finding an ordinance enjoining palmistry for profit unconstitutional under Article I, Section 8 of the Oregon Constitution, which forbade laws restraining, "the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever . . . " but did not reach the First Amendment question).

[31] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

[32] Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

especially harmful speech,[33] the government can regulate speech only if it meets the burden of strict scrutiny: there must be a compelling state interest in regulation, and the regulation must be narrowly tailored to serve that interest.[34]

In *Spiritual Psychic Science Church v. City of Azusa*, a city ordinance that prohibited the practice of spiritual counseling was struck down on First Amendment grounds.[35] The court held that the ban was aimed at the communicative aspect of fortune tellers' speech and that it was overbroad, an undue burden on free expression, and it was not the least restrictive means of achieving the city's interest in protecting its citizens from fraud.[36]

Similar bans have been routinely overturned on First Amendment grounds over the last two decades.[37] Still, outright bans on spiritual counseling activities remain good law in some states—though they may not be rigidly enforced[38]—and hostility toward spiritual counseling remains high.[39]

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[33] Content-based restrictions on speech have been permitted only when confined to a few "historic and traditional categories." United States v. Alvarez, 132 S.Ct. 2537, 2544 (2012) (internal citations omitted). *See, e.g.,* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (speech integral to criminal conduct); Brandenberg v. Ohio, 395 U.S. 444 (1969) (advocacy likely to incite imminent lawless action); Miller v. California, 413 U.S. 15 (1973) (obscenity); N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (defamation); N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (speech presenting some grave and imminent threat that the government has the power to prevent); Va. Bd. of Pharmacy v. Va. Consumer Council, Inc., 425 U.S. 748 (1976) (fraud); New York v. Ferber, 458 U.S. 747 (1982) (child pornography); Virginia v. Black, 538 U.S. 343 (2003) (true threats).

[34] *R.A.V.*, 505 U.S. at 395.

[35] *Azusa,* 703 P.2d at1130.

[36] *Id.* at 1127-29.

[37] *See, e.g.,* Rushman v. City of Milwaukee, 959 F. Supp. 1040 (E.D. Wis. 1997); Angeline v. Mahoning Cnty. Agric. Soc'y, 993 F. Supp. 627 (N.D. Ohio 1998); Argello v. City of Lincoln, 143 F.3d 1152 (8th Cir. 1998); Trimble v. City of New Iberia, 73 F. Supp. 2d 659 (W.D. La. 1999); Nefredo v. Montgomery Cnty., 996 A.2d 850 (Md. 2010); Adams v. City of Alexandria, 878 F. Supp. 2d 685 (W.D. La. 2012).

[38] Michael Wilson, *Telling Fortunes, and, From Time to Time, Also Taking Them*, N.Y. TIMES, Aug. 6, 2011, at A13 (describing the forty-four-year-old New York law against fortune telling for profit as "news to several fortune tellers," and that spiritual counselors' "neon-sign storefronts seem to outnumber bank branches in some neighborhoods.").

[39] After being contacted by the American Civil Liberties Union, and after being advised by legal counsel that the spiritual counseling ban would likely not withstand a First Amendment challenge, some members of the city council of Meridian, Miss. cited their personal beliefs in voting to uphold the ban on three separate occasions, before eventually overturning it in August of 2011. *See* Jennifer Jacob Brown, *Fortune Telling*

3. Licensing Requirements and Fees as De Facto Bans

Rather than banning spiritual counseling outright, some cities approached the issue indirectly by enacting strict licensing restrictions and requiring enormous fees from any person seeking to practice spiritual counseling, effectively shutting them out of the business community. The city of North Miami, Florida, for example, levied a $1,875 fee on any person seeking a spiritual counseling license, more than ten times the amount imposed on other occupations.[40] When challenged, the court struck down the fee, finding that it was so large it acted as a deterrent rather than a reasonable revenue-raising strategy.[41] For similar reasons, the $1,000 fee imposed on spiritual counselors by the City of Jacksonville was found to be illegal and void.[42] As noted earlier, however, the County of Chesterfield's $300 licensing flat tax was upheld as reasonable.[43] Several other states have similar restrictions in place in order to tax or license spiritual counseling, with some cities instituting new regulations as a replacement after outright bans were struck down.[44]

### *C. The First Amendment and Belief in Supernatural Phenomenon That Cannot Be Proven or Disproven*

Concerns about spiritual counseling as an "inherently deceptive" enterprise raise the question of First Amendment protections for speech that might be false, or speech that cannot be proven. Two major cases address this issue.

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*Ban Lifted,* MERIDIAN STAR, Aug. 17, 2011, *available at* http://www.meridianstar.com/local/x377184003/Past-and-future/; *see also, Past and Future*, MERIDIAN STAR, Aug. 18, 2011, *available at* http://www.meridianstar.com/local/x850302242/Fortune-telling-ban-lifted. The ban was replaced with zoning restrictions, which prohibit spiritual counseling within 500 feet of any residence, child care facility, funeral home, school, park, or playground. The zoning restrictions also require an additional Special Use permit, which allows for "intensive review" before permitting fortune telling in certain locations. *See* MERIDIAN, MISS., MUN. CODE, Appendix A, ART. II §340 (2011); *Id.* §720.11 (2011); ART. III § 1400 (2011).

[40] City of N. Miami v. Williams, 555 So. 2d 399 (Fla. App. 1989).

[41] *See id.*

[42] Consol. City of Jacksonville v. Dusenberry, 362 So. 2d 132, 133 (Fla. App. 1978).

[43] *See supra* note 18-20 and accompanying text.

[44] *See supra* note 7.

### 1. United States v. Ballard: Protection For Religious Claims That Might Be False

The Supreme Court embraced the right of citizens to believe in supernatural phenomena that they could not prove, and warned against the danger of making personal religious views "suspect before the law" in *United States v. Ballard.*[45] In *Ballard*, a mother and son who claimed that they were mediums and had the supernatural power to heal were convicted of fraud.[46] While the Court reversed and remanded the judgment of the lower court which had vacated the couple's convictions, it did hold that the truth of the couple's religious doctrines was rightly withheld from the jury.[47] In his majority opinion, Justice Douglas noted that "[m]en may believe what they cannot prove . . . . Religious experiences which are as real as life to some may be incomprehensible to others."[48] In his dissent, Justice Jackson went even further, stating that he would have dismissed the entire case, and railed against the "business of judicially examining other people's faiths."[49]

### 2. United States v. Alvarez: Protection For False Statements of Fact

Content-based restrictions on speech have been allowed, in general, only when confined to the narrow categories that have a historical foundation in the Court's tradition of free speech.[50] False statements of fact may be unprotected when they pose special harms, such as perjury or fraud.[51] Absent those special harms, however, garden variety lies and even knowing falsehoods are protected under the First Amendment.[52] In *United States v. Alvarez*, the Supreme Court found that a man who lied about receiving the Congressional Medal of Honor intended to deceive—but not defraud—in his statements and therefore engaged in

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[45] United States v. Ballard, 322 U.S. 78, 87 (1944).
[46] *Id.* at 79.
[47] *Id.* at 81.
[48] *Id.* at 86.
[49] *Id.* at 94 (Jackson, J., dissenting).
[50] United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).
[51] *Id.* at 2546-47.
[52] *Id.* at 2547.

protected speech.[53] The court warned against government intervention in order to "preserve the truth," noting, "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[54]

### *D. Licensing and the Professional Speech Doctrine*

Laws licensing spiritual counselors as professionals raise the question of the contours of the professional speech doctrine. While it has been mentioned by Supreme Court Justices "only in passing"[55] and has been deemed one of the "least developed areas of First Amendment doctrine,"[56] the professional speech doctrine has been applied when there is a "collision between the power of government to license and regulate those who would pursue a profession . . . and the rights of freedom of speech . . . ."[57]

#### 1. Thomas v. Collins

The doctrine was first recognized in Justice Jackson's concurrence in *Thomas v. Collins*, a case concerning a union member's right to solicit members without an organizing card.[58] In his concurring opinion, Justice Jackson examined the balance between the First Amendment and the right of the state to intervene by regulating professions. He presented the theory that the state owes a duty to "shield[] the public against the untrustworthy . . . or against unauthorized representation of agency," and he found that a licensing system was an acceptable way for the state to do so.[59]

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[53] *Id.* at 2551.

[54] *Id.* at 2550-51 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

[55] Stuart v. Huff, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011) ("Just what 'professional speech' means and the degree of protection it receives is even less clear; the phrase has been used by Supreme Court justices only in passing.").

[56] David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843 (2006).

[57] Lowe v. SEC, 472 U.S. 181, 228 (1985) (White, J., concurring).

[58] Thomas v. Collins, 323 U.S. 516 (1944).

[59] *Id.* at 545 (Jackson, J., concurring).

### 2. Lowe v. SEC

The professional speech doctrine was revisited in *Lowe v. SEC*, regarding the right of a disbarred investment advisor to circulate a newsletter containing investment advice.[60] In his concurring opinion, Justice White stated that "[t]he power of government to regulate the professions is not lost whenever the practice . . . entails speech."[61] In observing that law was a "speaking profession" subject to governmental licensing, Justice White noted that although there is abundant speech in the profession, states can unquestionably require high standards of certification and proficiency before admitting attorneys to the bar without running afoul of the First Amendment:[62]

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession . . . . If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.[63]

The few judicial decisions that apply the professional speech doctrine have not clearly defined its limitations.[64] Scholars who have written on the issue suggest a model that "defines permissible regulation . . . largely by reference to the role of the profession in society and accepted professional norms."[65]

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[60] *Lowe,* 472 U.S. at 183.

[61] *Id.* at 228. (White, J., concurring).

[62] *Id.* at 228-29.

[63] *Id.* at 232.

[64] Moldenhauer, *supra* note 56, at 843.

[65] Moldenhauer, *supra* note 56, at 883. Moldenhauer further describes a model that identifies professional speech as "a personalized communication given in the context of a fiduciary-like relationship between a person who adheres to a shared body of professional knowledge and values and that person's client." *Id.* at 892. *See also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions,* 147 U. PA. L. REV. 771 (1999) (arguing that when identifying professional speech, "The threshold determination for enforcement of professional norms will therefore be whether the speech is uttered in the course of *professional practice* and not merely whether the speech was uttered by a professional."). *Id.* at 834 (emphasis added).

### *E. Licensing and the Clergy Malpractice Doctrine*

In providing counseling services for parishioners, clergypersons and churches have been confronted with claims alleging clergy malpractice—specifically, that clergy were negligent in performing religious counseling.[66] Courts have repeatedly refrained from allowing recovery in these cases because of the religious dispute involved and the entanglement with the First Amendment Establishment Clause.[67] Courts have also refrained from imposing the same duty of care on religious counselors that is required of secular counselors or mental health professionals, finding that courts should not be involved in determining the "nature of advice a minister should give a parishioner."[68]

#### 1. Nally v. Grace Community Church

In *Nally v. Grace Community Church,* the Supreme Court of California declined to find a group of pastors guilty of clergy malpractice when they failed to refer a suicidal young man to licensed secular counselors.[69] The Court noted that clergy were exempt from the licensing requirements applicable to other domestic counselors, and that creating a standard of care for religious counseling would "climb the wall of separation of church [and state] and plunge into the pit on the other side that certainly has no bottom."[70]

Notably, the deference given to religious counselors and the recognition of the danger associated with the government constructing boundaries around their practice methods has not yet been extended to those who provide spiritual counseling. Instead, regulatory authorities have perpetuated the negative stigma

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[66] Constance Frisby Fain, *Minimizing Liability for Church-Related Counseling Services: Clergy Malpractice and First Amendment Religion Clauses*, 44 AKRON L. REV. 221, 224 & n.8 (2011).

[67] *Id.* at 223.

[68] Bladen v. First Presbyterian Church of Sallisaw, 857 P.2d 789, 797 (Okla. 1993). *See supra* note 66 (citing Nally v. Grace Cmty. Church, 763 P. 2d 948 (Cal. 1988) and White v. Blackburn, 787 P.2d 1315, 1318-19 (Utah Ct. App. 1990)).

[69] *Nally*, 763 P.2d at 964.

[70] *Id.* at 954 (alteration in original) (citation omitted).

associated with spiritual counselors by singling out their speech and tightly restricting it through regulatory burdens.

## II. LICENSING AS THE NEW FORM OF CENSORSHIP: HOSTILITY IN TRADITIONAL BANS AND THE NEW TREND IN BURDENS

Hostility toward spiritual counseling was evident in laws forbidding the "crafty sciences" for more than a hundred years before challenges to them reached the state appellate courts.[71] The practice of spiritual counseling, including clairvoyance, fortune-telling, tarot-card reading and astrology, has been litigated in court nearly as long as the earliest developments in modern First Amendment jurisprudence.[72] When challenges did arise, they were generally upheld, and courts cited states' right to protect their citizens as justification.[73]

The following section illustrates the long-held hostility toward the practice of spiritual counseling and the manifestation of that hostility through different forms of censorship. Regulatory schemes should raise suspicion when they act to marginalize unpopular speech or when regulators implicitly 'take sides' in the debate about the value or validity of supernatural claims by limiting access to spiritual counselors in the name of consumer protection.

### *A. For Your Own Good: Traditional Bans and Paternalism*

Spiritual counseling practices have long been viewed with suspicion and often outright disdain.[74] A 1799 law forbidding New

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[71] Freeman & Banning, *supra* note 25, at 34.

[72] *See, e.g., In re* Wedderburn, 151 P.2d 889 (Cal. Ct. App. 1944) (rejecting the claim of free speech violation and affirming the conviction of Lillian Apgar, jailed for "engag[ing] in or carry[ing] on the business of telling futures by means of psychic powers, prophecy, clairvoyance and magic.").

[73] Freeman & Banning, *supra* note 25, at 34-35.

[74] *See, e.g.,* People v. Ashley, 172 N.Y.S. 282. (Sup. Ct. NY 1918). In upholding the conviction of a woman arrested for fortune telling and denying her religious claim, the judge cited early English statutes and Blackstone's Commentaries on fortune telling:

> Witches appear to have been in bad repute in all jurisdictions since 2000 B.C.; but witches, bad as they were, always occupied a different plan from mere 'fortune tellers.' The latter have always been classified with rogues and mountebanks and generally disreputable members of society, to be summarily dealt with for the good of the community.

*Id*. at 283-84.

Jersey citizens to practice spiritual counseling withstood a challenge from an Atlantic City palm reader in a 1903 case where the court found the counselor's right to engage in her practice was outweighed by the state's interest in protecting the "simpleminded."[75] Similarly, in 1896, the Supreme Court of Michigan upheld the conviction of an astrologer and psychic under that state's disorderly persons law by pointing to an English statute stating, "every person pretending or professing to tell fortunes . . . shall be deemed a rogue and a vagabond"[76] and pointed to a corresponding English case that held "[n]o person who was not a lunatic could believe [that] he [the respondent] possessed such power."[77]

Eighty years later, as challenges to spiritual counseling bans increased, states' justification for them persisted. In *In re Bartha* in 1976, the California Court of Appeals echoed the reasoning of courts who upheld spiritual counselors' convictions in the early part of the century, holding that it was within the police power of the city to determine what is inherently deceptive and prohibition of activities related to fortune telling was necessary in order to protect the "gullible, superstitious, and unwary."[78]

Since the nineteenth century, the putative right of the state to protect people who are too feeble to protect themselves from their own choices has persisted in the cases upholding convictions of spiritual counselors.[79] Rather than allow citizens to decide for themselves whether or not spiritual counseling has value, the states have taken a pre-emptive, prophylactic stance and used a paternalistic, for-your-own-good justification when banning or burdening spiritual counselors' speech.[80]

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[75] State v. Kenilworth, 69 N.J.L. 114, 115 (N.J. 1903); Freeman & Banning, *supra* note 25, at 34.

[76] People v. Elmer, 67 N.W. 550, 551 (Mich. 1896) (citing 5 GEO. IV. CHAP. 83, § 4); Freeman & Banning, *supra* note 25, at 34.

[77] *Elmer*, 67 N.W. at 551 (third alteration in original) (citing Penny v. Hanson, 16 Cox, Cr. Cas 173 (1887)).

[78] *In re* Bartha, 63 Cal. App. 3d 584, 591 (Cal. Ct. App. 1976).

[79] Freeman & Banning, *supra* note 25 at 34-35. *See also* Moore-King v. Cnty. of Chesterfield, 708 F. 3d 560, 570 (4th Cir. 2013) ("[T]he government's regulatory response [may be] based on the nature of the activity and the need to protect the public.").

[80] Moore-King v. Cnty of Chesterfield, 819 F. Supp. 2d 604, 618 (E.D. Va. 2011) (when the Moore-King case was before the district court, Judge Gibney underscored the need for regulation of spiritual counselors, expressing concern for "[t]he gullible, the

### *B. Turning the Corner: The New Trend in Burdens*

Starting in the 1980's, however, courts began to view spiritual counseling bans through the lens of the speaker, rather than focusing solely on the listener.[81] Increasingly, these laws were considered restrictions based on the content of the counselors' speech, and they were struck down upon failing to meet the required strict scrutiny standard of review.[82] Since the shift in *Marks* and *Azusa,*[83] there have been no published cases where a ban on spiritual counseling or fortune telling withstood a First Amendment challenge on free speech grounds.[84]

Given the increasing First Amendment concerns raised when spiritual counseling was banned outright, cities found alternate means of suppression: through licensing fees. Some cities imposed fees on spiritual counselors that were so large that they acted as de-facto bans. The fee imposed by the city of North Miami, Florida, for example, was more than ten times the amount required for most other occupations.[85] It was struck down as an unreasonable revenue-raising device, as was a similar $1,000 fee on spiritual counseling in Jacksonville, Florida.[86]

In *Moore-King*, however, the $300 flat tax instituted in Chesterfield County, Virginia was upheld as reasonable regulation of a profession.[87] The circuit court compared the fee imposed on spiritual counselors to similar licensing fees on attorneys, but the structure of the tax on spiritual counseling was markedly different

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infirm, and the weak . . . [who] may believe that she actually provides valuable psychological or business insights . . . .") *Id.*

[81] Freeman & Banning, *supra* note 25, at 37-39. The authors outline the Court's evolution from laws that protect the "overly susceptible," toward laws that protect the listeners "right to hear" starting with *Miller v. California*, 413 U.S. 15 (1973) – where the court used a reasonable person standard when examining potentially obscene material rather than focusing on sensitivities – through the series of commercial speech cases in the 1970's and early 1980's including *Cent. Hudson Gas and Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980). Regarding advertisements, the Court in *Cent. Hudson* said: "[People] will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them . . . . *Id.* at 562.

[82] *See supra* note 37.

[83] *See supra* note 30.

[84] As of February, 2014.

[85] *See supra* notes 40-41.

[86] *See supra* note 42.

[87] *See supra* notes 19-20 and accompanying text.

than what was imposed on businesses generating similar revenue.[88] Chesterfield County generally exempted any business from licensing fees if they expected to generate less than $10,000 per year and imposed no business tax at all for businesses generating less than $200,000 in revenue annually.[89] Although some other retailers, such as large alcoholic beverage retailers, carnivals, and circuses were subject to flat taxes like those charged to spiritual counselors, only spiritual counseling practices were subject to a fine if they failed to secure a permit.[90]

The licensing tax in *Moore-King* is less overt than an outright ban and does not impose an exorbitantly high fee. But, the amount of the tax levied on spiritual counselors is irrelevant. In *Forsyth County v. Nationalist Movement,* the Supreme Court struck down a county ordinance that tied the fee charged for a public assembly or parade to the content of the speech involved.[91] Finding that even a nominal fee would not withstand a First Amendment challenge, Justice Blackmun noted, "A tax based on the content of

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[88] Moore-King v. Cnty of Chesterfield, 819 F. Supp. 2d 604, 613 (E.D. Va. 2011). Judge Gibney outlined the difference when Ms. Moore-King's case was before the district court:

> For most businesses, the licensing fee is determined by gross revenue. If a business generates less than $10,000 in revenues, no fee is imposed. If a business generates more than $10,000 but less than $200,000, a nominal fee of $10 is imposed. For most businesses, no business tax is levied upon those with less than $200,000 in revenue . . . . Licensure fees for fortune tellers, however, are handled somewhat differently. . . . All fortune tellers, regardless of revenue, must pay "a license tax of $300," and the fine for fortune telling without a license is set at "not less than $50 nor more than $500 for each such offense.

*Id.* (citations omitted).

[89] *Moore-King,* 819 F. Supp. 2d at 613. Ms. Moore–King registered with the Commissioner of Revenue on Aug. 6, 2009, and estimated that her revenue for that year would be less than $10,000. *Id.* at 611.

[90] *Id*. at 613.

[91] Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 133-34 (1992).

> The county envisions that the administrator, in appropriate instances, will assess a fee to cover the cost of necessary and reasonable protection of persons participating in or observing . . . [the] activity. In order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed.

*Id.* at 134 (citations omitted).

speech does not become more constitutional because it is a small tax."[92]

Moreover, the manner in which the fee is imposed, especially compared to businesses generating similar revenue, suggest that Chesterfield County has a singular goal in mind—to censor speech that the county is suspicious of or disagrees with, and to create a burdensome imposition that seeks to discourage spiritual counselors from setting up and maintaining their practice. While less restrictive than an outright ban, licensing restrictions in the form of a flat tax, regardless of amount, are aimed at the content of spiritual counselors' speech and should likewise trigger strict scrutiny.

## III. FAITH BASED STATEMENTS ARE PURE, PROTECTED SPEECH

### *A. Fraud is Unprotected, but False Statements of Fact Receive Heightened Protection*

When Xavier Alvarez told other members of the Three Valley Water District Board in Claremont, California that he was a recipient of the Congressional Medal of Honor, he violated The Stolen Valor Act, a federal criminal statute which punished false claims about military medals with possible fines and imprisonment.[93] In striking down the statute under strict scrutiny, the Court rejected the government's claim that false statements receive no First Amendment protection.[94] In his opinion for the Court, Justice Kennedy noted that, "the common understanding [is] that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."[95]

Outside of the categories that have a foundation in the Court's historical tradition of free speech, false statements of fact may not be protected if they pose special harms, such as perjury or false claims to fraudulently receive a benefit, such as an offer of

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[92] *Id.* at 136.
[93] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012).
[94] *Id.* at 2551.
[95] *Id.* at 2544.

employment or other material advantage.[96] Mr. Alvarez's speech posed no such special harm, as the Court found no intent to defraud, only to deceive, in his statements, and therefore his speech was protected.[97]

At the very least, spiritual counselors' speech deserves the same level of protection. Without proof of fraud or other special harm, spiritual counselors' speech is merely part of society's "open, dynamic, [and] rational discourse."[98] Consumers may choose to utilize spiritual counselors and believe what they hear, or disbelieve and voice that personal skepticism, or they may express their suspicion by choosing not to patronize them at all. The *Alvarez* Court underscored the power of public discourse and counter-speech as a remedy for false speech or speech disagreed with, rather than any need for the government to intervene and light the way.[99]

### *A. Statements That Are Not Demonstrably False Should Receive Even Greater Protection*

Spiritual counselors are not asserting false statements of fact, but rather faith-based claims or contested spiritual questions. This is distinguishable from Mr. Alvarez's claim about the Congressional Medal of Honor, which could be disproven as a matter of simple, demonstrable, historical fact. In arguing that low-value speech like Mr. Alvarez's, contains "false statements about easily verifiable facts," Justice Breyer's concurring opinion argued that intermediate, not strict, scrutiny of review should apply.[100] Still, in applying a less stringent standard of review, he found that false factual statements are not completely without

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[96] *See supra* note 51.

[97] *Alvarez,* 132 S. Ct. at 2551.

[98] *Id.* at 2550.

[99] *Id.*

[100] *Id.* at 2551-52 (Breyer, J., concurring) ("In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so . . . . Sometimes the Court has referred to this approach as 'intermediate scrutiny' . . . .").

value, can be useful in public and social contexts, and that the statute failed to meet intermediate scrutiny given its overly burdensome impact on speech.[101]

Consumers visit fortune tellers for various reasons—even those who are skeptical may visit purely for entertainment purposes or to engage a curiosity. Still others may find genuine solace in the assurances or predictions made.[102] Given the increased measure of protection for even low-value false statements, one could argue that even if spiritual counselors' speech is easily disproven or false, it has some social value and deserves at least equal protection to the speech described in *Alvarez*. But, speech that is faith-based and cannot be disproven as a matter of simple historical fact—the type of speech spiritual counselors share in their sessions—should be entitled to even greater protection.

### *B. Faith-Based and Supernatural Claims Should Receive the Highest Level of Speech Protection*

Unlike Mr. Alvarez's lie about the Congressional Medal of Honor, which was demonstrably false and could be proven false,[103] statements of spiritual counselors and their supernatural beliefs are far closer to opinion than fact. Supernatural statements and personally-held beliefs about them are not readily subject to objective verification, the way an unearned medal is. Even

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[101] *Id.* at 2553.

[102] In striking down the Shelby County, Tenn. ordinance which prohibited spiritual counseling activities in cities with a population greater than 400,000, Judge Jenkins examined the appeal of spiritual counselors, remarking,

> Now, why does the fortune- teller exist and flourish in this country? Why do people in this so-called enlightened age grab the daily newspaper to see what their sign of the Zodiac predicts for them that day? . . . It is man's nature to be curious . . . . History is replete with his attempts to discover the pattern of his destiny. . . . There appear before [fortune tellers] the old, the young, the gay and the gray, of all races and creeds, all tormented about their dream of the future. The fortune-teller cannot solve it,—probably cannot foretell it,—but to those crying out for surcease from sorrow, even for the moment, they give hope for the future.

Canale v. Steveson, 458 S.W.2d 797, 798-99 (Tenn. 1970).

[103] *Alvarez*, 132 S. Ct. at 2543 ("Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning.").

further, many, including Ms. Moore-King, feel that their spiritual counseling practice is an integral part of their faith and that their religious beliefs are intertwined with the counseling services they offer.[104] In overturning the city ordinance banning spiritual counseling in *Adams v. City of Alexandria*, a Louisiana district court rejected the city's argument that spiritual counselors' activities should be banned because they are based on fraudulent predictions supported by "no demonstrable facts:"[105]

> The danger of the government deciding what is true and not true, real and unreal, should be obvious. For example, some might say that a belief in God or in a particular religion, for example, or in the "Book of Revelations" is not supported by demonstrable facts . . . . If there is to be progress for mankind, men and women must be allowed to dream, imagine, and be visionaries for the future even if there are then no "demonstrable facts" to support their fantasies. And they should be able to share their dreams, imaginations and visions with others free of government interference.[106]

While spiritual counseling activities have long been met with skepticism,[107] a significant minority of Americans—including many who identify primarily as Christians—combine their Christian faith with New Age themes, including reincarnation and astrology.[108] The speech of spiritual counselors explores these themes. Moreover, to designate the entire practice as one worthy of suspicion ignores the growing trend among those who interweave elements of traditional faith with other, less mainstream views. The line between beliefs and facts is "blurry at

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[104] Moore-King v. Cnty of Chesterfield, 708 F. 3d 560, 564 (4th Cir. 2013). *See also* Davis v. City of Selma, No. 1:12-CV-01362, 2013 U.S. Dist. WL 3354443, at *1, (E.D. Cal. July 3, 2013) ("Ms. Davis [alleges her] spiritual counseling activities are founded on and motivated by her fundamental religious principles and beliefs").

[105] Adams v. City of Alexandria, 878 F. Supp. 2d 685, 690 (W.D. La. 2012).

[106] *Id*. at 690-91.

[107] *See supra* notes 76-78.

[108] Pew Research Center, *"Nones" on the Rise*, RELIGION AND PUBLIC LIFE PROJECT (Oct. 9, 2012). Twenty-four percent of the public overall and 22% of Christians say they believe in reincarnation — that people will be reborn in this world again and again. And similar numbers (25% of the public overall, 23% of Christians) believe in astrology. *Id.*; *see generally*: PAUL HEELAS & LINDA WOODHEAD, THE SPIRITUAL REVOLUTION: WHY RELIGION IS GIVING WAY TO SPIRITUALITY (2005) (discussing the growth of new forms of spirituality and changes in traditional faith).

best,"[109] and the government should not be the sole judge of what is true, or which beliefs deserve respect and deference, however obvious it may seem to non-believers.

*United States v. Ballard* further supports the theory that supernatural claims cannot be adjudicated as false. In *Ballard*, a mother and son were indicted and convicted of fraud due to their involvement in the "I AM" movement and for promoting themselves as chosen "divine messengers."[110] The lower court found that Mrs. Ballard and her son were making representations about their healing powers that they knew were false, and that they intended to defraud in their scheme.[111] On appeal, the Supreme Court held that the jury should not have been able to determine the truth or falsity of the Ballard's claims, but that the jury *could* determine whether or not the Ballard's believed the representations they made.[112] In writing for the majority, Justice Douglas noted that although the religious views of the Ballard family "might seem incredible, if not preposterous . . . if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain."[113]

Designating, for example, *all* spiritual counselors who want to practice in Chesterfield County, Virginia as "suspect" by subjecting them to a unique tax allows county regulators to decide that spiritual counselors' speech is inherently less valuable than other speech on spiritual matters (including speech occurring in churches) and therefore must be preemptively burdened and scrutinized. Giving regulators such wide discretion allows a

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[109] Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1041 (E.D. Wis. 1997).

[110] United States v. Ballard, 322 U.S. 78, 79 (1944). The "I AM" movement was originally founded by Guy Ballard, who died before the trial of his wife and son. Ballard claimed to have been chosen by the "ascended master" Saint Germain to transmit his words to mankind, and claimed that power transferred to other members of his family. The Ballards represented that they had the power to cure disease through faith healing and sold phonograph records that promised to grant salvation. At the time of Guy Ballard's death, the Movement had been in existence for about twenty years. I.H.RUBENSTEIN, CONTEMPORARY RELIGIOUS JURISPRUDENCE 60-61 (1948).

[111] *Ballard,* 322 U.S. at 79.

[112] *Id.* at 83.

[113] *Id.* at 87.

government entity to attempt to draw the line between truth and falsity, undoubtedly entering Justice Douglas's 'forbidden domain.'

### 1.The Need For Strict Scrutiny

The warning in *Ballard*, that scrutiny of one religious practice by the government opens the door to future scrutiny of others, underscores the argument that skepticism about, or outright disbelief of, spiritual counselors' claims should not be grounds for persecuting them on the basis of those beliefs. Some spiritual counseling may be insincere, and it has been proven that some who engage in it set out to defraud customers of their money[114]—a reality that plagues other spiritual or religious-based practices for profit, including televangelism.[115] This Comment argues that it is possible to be highly skeptical of spiritual counselors while simultaneously finding that their claims deserve protection under the First Amendment—unless it is proven that they deceived clients with the intent to defraud.[116]

Many spiritual counselors claim to believe they possess supernatural or paranormal powers and consider the advice they impart to be religious or spiritual in nature.[117] There are also serious doubts about the validity of paranormal claims and activities related to them.[118] Whether one side or the other is

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[114] A Florida woman was recently convicted of fraud for actions associated with her practice as a spiritual counselor. Jane Musgrave, *Psychic-Scam Defendant Gets Four Years in Prison and Ordered to Repay $2.2 Million,* PALM BEACH POST, (Jan. 13, 2014), http://www.palmbeachpost.com/news/news/crime-law/psychic-scam-defendant-gets-4-years-in-prison-and-/ncmry/.

[115] *See, e.g.,* Richard N. Ostling & Joseph J. Kane, *Jim Bakker's Crumbling World: The Founding Father of PTL is Charged With Fraud, and More,* TIME, Dec. 19, 1988 at 72; Ann E. Marimow & Hamil R. Harris, *Maryland Pastor Gets 27 Months in Prison,* WASH. POST, (Jul. 30, 2012), http://www.washingtonpost.com/local/crime /2012/07/30 /gJQABlQeLX_story.html.

[116] In his dissent in *Ballard*, Justice Jackson notably argued that protection should be taken even further, that it was not possible to separate "what is believed from considerations as to what is believable" and that while he could see in the Ballard's teachings "nothing but humbug, untainted by any trace of truth . . . that does not dispose of the constitutional question whether misrepresentation of religious experience or belief is prosecutable; it rather emphasizes the danger of such prosecutions." *Ballard,* 322 U.S. at 92 (Jackson, J., dissenting).

[117] *See supra* note 104.

[118] *See, e.g.,* JAMES RANDI, THE TRUTH ABOUT URI GELLER (1982); MICHAEL SHERMER, THE BELIEVING BRAIN (2011); ROBERT L. PARK, VOODOO SCIENCE: THE ROAD FROM FOOLISHNESS TO FRAUD (2000) (expressing skepticism).

correct is immaterial to this Comment's claim. Without proof of intent to defraud, the right to communicate with others about spirituality and religious beliefs—paranormal or otherwise—should be protected. When regulation of that protected right is challenged, it should be subject to careful scrutiny to ensure that the state's compelling right to protect its citizens from unscrupulous practice is not achieved by broadly adjudicating spiritual counselors' beliefs as inherently false and then subsequently limiting consumers' access to them.

In attempting to find this balance, the Fourth Circuit found that Chesterfield County, Virginia's regulations on spiritual counselors were allowable because they were merely limitations on professional speech and "fit comfortably" into that First Amendment doctrine.[119] The county successfully argued that licensing regulations, like the $300 tax, were constitutionally appropriate because Ms. Moore-King, "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances."[120] The next section will examine the purpose and intent of professional licensing, circumstances in which licensing restrictions do not apply, and where spiritual counseling activities fit when analyzing licensing restrictions and professional speech.

## IV. WHY SPIRITUAL COUNSELING IS NOT PROFESSIONAL SPEECH

### *A. Licensing to Promote the State Interest in Competency and Integrity*

The purpose of licensing laws, in general, is to protect the public from harm associated with "unscrupulous or incompetent practice."[121] While licensing laws vary among professions, they have some general commonalities, such as requiring a professional to complete certain educational requirements, pass examinations, and agree to adhere to standards of professional conduct.[122] In addition, many licensing programs allow the entity that sets the

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[119] Moore-King v. Cnty. of Chesterfield, 708 F. 3d 560, 569 (4th Cir. 2013).

[120] *Id.* (citation omitted).

[121] Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 887-88 & n. 13. (2000).

[122] *Id.* at 887.

standards authority to grant or deny a license depending on the applicant's fitness to practice.[123]

To become a licensed attorney in Moore-King's home state of Virginia, for example, the Virginia Board of Bar Examiners requires applicants to have received a juris doctor degree from an accredited law school and pass the two-part state bar exam.[124] In addition, the applicant must satisfy character and fitness requirements, and the Board has the right to deny admission if the applicant is deemed unfit.[125] The main purpose of the screening, according to the Board, is to "assure the protection of the public and safeguard the system of justice."[126]

In the majority of cases, courts have held that licensing requirements like those of the Virginia Bar are a reasonable means of pursuing the legitimate government interest of protecting the public.[127] If a person engages in the practice of law without meeting the necessary requirements, does not adhere to the imposed requirements, or otherwise violates the standardized rules of the profession, his or her actions are punishable.[128]

### *B. The Exception: Exemption of Religious Counselors From Licensing Restrictions*

The practice of religious counseling, conversely, has traditionally been exempt from licensing regulations and courts have been reluctant to embrace the tort of clergy malpractice, in part because of difficulty in defining the "professional services" of a cleric.[129]

In *Nally v. Grace Community Church,* the parents of a twenty-four-year old who had committed suicide attempted to sue the pastors who had provided their son with counseling sessions, alleging "clergyman malpractice," in part because the pastors did

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[123] *Id.*

[124] VA. CODE ANN. § 54.1-3926 (2009).

[125] VA. CODE ANN. § 54.1-3925.1 (2009).

[126] 18 VA. ADMIN CODE § 35-10-30 (2013).

[127] *See* Kry, *supra* note 121, at 889.

[128] VA. CODE ANN. § 54.1-3904 (2009). *See also,* VIRGINIA STATE BAR PROFESSIONAL GUIDELINES R. 5.5 (2013), *available at* https://www.vsb.org/pro-guidelines/index.php/rules/law-firms-and-associations/rule5-5/.

[129] Bladen v. First Presbyterian Church, 857 P.2d 789, 796 (Okla. 1993). *See also* Nally v. Grace Cmty. Church, 763 P.2d 948 (Cal. 1988).

not refer their son to licensed mental health professionals once his condition worsened.[130] The church in question employed fifty counselors, in addition to publishing books and selling recordings on the topic of biblical counseling.[131] The man's parents claimed that the church was negligent in the training of counselors, and that those counselors exacerbated their son's feelings of guilt and depression.[132]

The Supreme Court of California dismissed the action, finding in part that standards for religious counseling are "vague and dependent on the personal predilections of the individual counselor or denomination, and not officially or formally adopted by any organized body of counselors."[133] The court also noted that the state legislature had exempted the clergy from any licensing requirements that might apply to non-religious marriage or family counselors and in doing so, "recognized that access to the clergy for counseling should be free from state imposed counseling standards . . . ."[134]

The counseling methods of clergy—who often accept compensation for their services[135]—are difficult to standardize. In order to determine whether a religious counselor breached his or her duty of care, a court would have to formulate the standard and apply it uniformly across denominations.[136] Courts have been hesitant to wade into that activity, or to define the nature of a clergy-parishioner relationship.[137] The Supreme Court of Utah considered the task impossible and unconstitutional, and such an establishment would encourage "an excessive government entanglement with religion," in violation of the First Amendment's Establishment Clause.[138] While spiritual counseling activities are similarly broad and difficult to standardize, they have not yet received the same level of deference from regulatory authorities.

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[130] *Nally*, 763 P.2d at 952.
[131] *Id.* at 964-65.
[132] *Id.* at 952.
[133] *Id.* at 953.
[134] *Id.* at 959-60.
[135] *Id.* at 965.
[136] Fain, *supra* note 66, at 230.
[137] Bladen v. First Presbyterian Church, 857 P.2d 789, 797 (Okla. 1993).
[138] Franco v. Church of Jesus Christ of Latter Day Saints, 21 P.3d 198, 206 (Utah 2001).

### *C. The Parallel Between Spiritual and Religious Counseling*

While there are informal societies for those who engage in spiritual counseling activities, astrology, or tarot,[139] there are no comparable requirements for education, examination, or a set of standards in order to become a 'professional' as there are for attorneys, licensed marriage counselors, or even taxi-drivers. No state body exists to measure spiritual counselors' readiness to practice, nor are there guidelines to which spiritual counselors must adhere to in order to maintain a standard of professionalism.

Regulating spiritual counselors as 'professionals' incorrectly implies that a measureable standard of competency exists that can separate competent spiritual counselors from incompetent ones, or the ethical from the unethical. Unlike a bar exam failure, which prevents an aspiring lawyer from becoming a certified attorney, or a set of ethics rules by which practicing attorneys must abide, there is no real method to achieve a parallel purpose for spiritual counselors.

Moreover, the array of belief systems attributed to religious counselors and pastors are similar to those who are considered spiritual counselors or fortune tellers. In Chesterfield County, for example, the umbrella definition of 'fortune teller' for the purposes of the licensing fee includes wide ranging activities, drawing on several different belief systems and techniques, including "spiritual reader" and even "prophet" which arguably encompass more traditional religious faiths.[140] Religious counseling is similarly amorphous, and differs among denominations and in its application.[141]

The professional speech doctrine, according to Justice White's concurrence in *Lowe,* allows the government to limit members of a certain profession to those who meet the standards and licensing requirements.[142] Faith-based or otherwise non-provable statements like those imparted by Ms. Moore-King during spiritual counseling sessions cannot be considered 'inside' or 'outside' of the standards of a profession when those standards do

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[139] *See, e.g.,* AMERICAN TAROT ASSOCIATION, http://www.ata-tarot.com/; AMERICAN SOCIETY FOR PSYCHICAL RESEARCH, INC., http://www.aspr.com/.

[140] *See* CHESTERFIELD CNTY., VA. CODE OF ORDINANCES Sec. 6-1.

[141] Fain, *supra* note 66, at 230.

[142] Lowe v. SEC, 472 U.S. 181, 228-29 (1985) (White, J., concurring).

not exist. Further, any attempt to establish such standards would require the state to take positions on supernatural issues that cannot be proven, such as the truth or falsity of spiritual counselors' beliefs about the future, or even the methods used to interpret tarot cards. Just as the California Supreme Court stated that "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations,"[143] the state is similarly unequipped to choose which spiritual counselors are professional, and which are not.

The Fourth Circuit found that Ms. Moore-King's activities deserved some measure of First Amendment protection.[144] The notion that her activities fit neatly into the professional speech doctrine, however, stretches the doctrine's principles and places spiritual counseling into a class of professional activity where it does not belong. Instead, Ms. Moore-King's speech and the themes it explored should have been considered pure speech, and the county's attempt to restrict it a regulation based upon content and viewpoint, triggering strict scrutiny of review.

## V. WHY REGULATION TARGETING SPIRITUAL COUNSELORS FAILS STRICT SCRUTINY

### *A. First Prong: The Compelling State Interest in Protecting Consumers*

Increased protection for the speech of spiritual counselors should not be interpreted as advocacy for elimination of all oversight. The government's interest in protecting consumers from fraudulent spiritual counselors is worthy, but given the possible First Amendment implications, the regulations should be no more restrictive than is necessary to achieve the goal of combating fraud.[145] A licensing fee that taxes all spiritual counselors because they *might* commit fraud at some point in the future extends far beyond that objective. The *Azusa* court reasoned similarly for a more precise balance between regulation and speech, stating "[i]t

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[143] Nally v. Grace Cmty. Church, 763 P.2d 948, 960 (Cal. 1988).
[144] *See* Moore-King v. Cnty. of Chesterfield, 708 F.3d 560, 567 (4th Cir. 2013).
[145] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992).

is irrelevant that punishing fraud may be less convenient than prohibiting all situations in which a potential for fraud arises."[146]

### *B. The Problematic Prong: Narrow Tailoring and the Sufficiency of Existing Law*

In the course of overturning an outright ban on spiritual counseling, when reaching the 'narrow tailoring' prong of strict scrutiny in *Nefredo v. Montgomery County,* the Maryland Court of Appeals asserted that an ordinance was already in place to sufficiently meet the county's interest in protecting fraud, finding "the [c]ounty has advanced absolutely no legitimate reason why an ordinance directed at speech is necessary to combat fraud when there are speech-neutral anti-fraud laws that are already in effect . . . ."[147]

Returning to *Moore-King*, Virginia has existing laws that would apply to fraud or unfair trade practices in spiritual counseling.[148] Other states have successfully prosecuted spiritual counselors who have violated the law by committing fraud.[149] The added burden of a licensing tax, beyond the cost of a regular business license and investigation, is not the most narrowly tailored approach to effectively police fraud, especially when there is no evidence that the funds collected will directly advance the state's interest in combating unlawful activity.[150]

The Supreme Court faced similar questions concerning the overbreadth doctrine in *Ashcroft v. Free Speech Coalition*. There,

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[146] Spiritual Psychic Sci. Church v. Azusa, 703 P.2d 1119, 1129 (Cal. 1985) (citing Schneider v. State, 308 U.S. 147, 164 (1939)).

[147] Nefedro v. Montgomery Cnty. 996 A.2d 850, 863 (Md. 2010).

[148] VA. CODE ANN. § 18.2-178 (2009).

[149] *See* Musgrave, *supra* note 114.

[150] It is not clear from the language of the code that the required $300 is used for the purpose of policing fraud. It is instead referred to as a "flat tax" on the practice of fortune telling. Other businesses "which pose a risk to the public" are also subject to the tax, but at significantly lower rates, including junk dealers ($50) and adult business operators ($100). CHESTERFIELD CNTY., VA. CODE OF ORDINANCES Secs. 6-49 (2004) & 6-41.1 (2001). *See also* Murdock v. Pennsylvania, 319 U.S. 105, 113-14 (1943) (finding a flat licensing tax on Jehovah's witnesses who solicited door-to-door unconstitutional in part because of the disconnect between the purpose of the license and the fee charged: "It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment.").

the Court struck down a law banning virtual pornographic images that did not depict an actual child participant.[151] In finding the statute substantially overbroad, Justice Kennedy stated that while the state interest in protecting children was a worthy one, the statute would potentially chill the "speech" in certain artistic portrayals and that the ban was unconstitutional.[152] The Court held that the government "may not suppress lawful speech as the means to suppress unlawful speech . . . the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . . ."[153]

Requiring all spiritual counselors in Chesterfield County to pay a flat tax illustrates the 'suppression of lawful speech to reach unlawful speech' outlined in *Ashcroft*. The blanket restriction burdens every applicant in the hopes of discovering bad actors—essentially charging a 'you might be a fraud tax'— rather than finding and punishing those who actually commit fraud.

Additionally, a narrower approach already exists in the county's regular business license standards.[154] Spiritual counselors must pay thirty-seven dollars (a fee similar to other occupations) and submit to a background investigation by the Chief of Police before being granted a business license.[155] The Chief of Police may screen the applicant for prior misconduct and the code allows for suspension of a permit if a violation of state or federal law occurs.[156] Moreover, the Chesterfield County Code states that the business license fee is directly applied to the cost of the investigation.[157] There is no similar provision for the flat tax, and no evidence that the $300 is used to directly advance the state interest in protecting consumers from fraud.[158] Accordingly, relying on existing law is the most narrowly tailored way to protect from fraud while also allowing spiritual counselors to

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[151] Ashcroft v. Free Speech Coal., 535 U.S. 234, 258 (2002).

[152] *Id.* at 244.

[153] *Id.* at 255 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973)).

[154] CHESTERFIELD CNTY., VA. CODE OF ORDINANCES, § 15-246 (2012).

[155] *Id.*

[156] *Id.*

[157] *Id.* ("A fee of $37.00 to cover the costs of investigation of the applicant and processing of the application shall be paid to the treasurer of the county when the application is filed.").

[158] *See supra* note 150.

exercise their right of free speech without overly burdensome government intervention.

## CONCLUSION

The practice of spiritual counseling has long faced prejudice and persecution in the United States. But, more Americans than ever embrace the New Age themes traditionally associated with spiritual counseling, and acceptance for less traditional belief systems is undoubtedly growing. Wholesale bans on spiritual counseling have been successfully challenged on First Amendment grounds, but states and municipalities continue to burden spiritual counselors' right to practice by erecting financial and administrative hurdles and licensing restrictions, evidence of lingering prejudice.

While regulators may disagree with its themes and be highly skeptical of its validity, spiritual counseling cannot be deemed inherently false, no more than any other spiritual practice that makes unverifiable, supernatural claims. Concerns about consumer protection can be sufficiently addressed by existing state laws that apply to all businesses, making the additional restrictions on spiritual counselors' speech unnecessary and overly burdensome. The First Amendment requires that spiritual counselors be given freedom to communicate with those who seek their guidance without excessive government intervention. Regulatory schemes that target the speech of spiritual counselors violate the First Amendment and should be invalidated by courts.

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