

Western New England Law Review

Volume 20 20 (1998)

Issue 1 *TWENTIETH ANNIVERSARY ISSUE:
SYMPOSIUM - A DUTY TO REPRESENT?
CRITICAL REFLECTION ON STROPNICKY v.
NATHANSON*

Article 3

1-1-1998

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Recommended Citation

Gabriel J. Chin, *DO YOU REALLY WANT A LAWYER WHO DOESN'T WANT YOU?*, 20 W. New Eng. L. Rev. 9 (1998), <http://digitalcommons.law.wne.edu/lawreview/vol20/iss1/3>

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DO YOU REALLY WANT A LAWYER WHO DOESN'T WANT YOU?

GABRIEL J. CHIN*

Lawyers should be permitted to reject clients on the basis of sex, race, religion, national origin and sexual orientation, that is, on grounds which law and morality require be prohibited as selection criteria in virtually every other area of life. It is not that I approve of such discrimination; to the contrary, in my view no respectable, decent lawyer would discriminate on the basis of race, religion, or other arbitrary basis in the absence of a compelling reason. Nor am I unaware of the harm caused by racism and other forms of invidious discrimination in our society.¹ But I believe few attorneys are

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In this essay, I refer to the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969) ("MODEL CODE"), which has been adopted by many states. The Model Code is composed of "Canons," which are broad, general principles, Ethical Considerations ("EC's") which are designed to explain the Canons, and Disciplinary Rules ("DR's"), the violation of which can give rise to disciplinary action. I also refer to the ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983) ("MODEL RULES"), which many states have adopted in place of the Model Code. The Model Rules are composed of binding rules, the violation of which can give rise to disciplinary action, and official comments, which are guides to interpretation.

Special thanks to Chris Iijima, who has been a valued friend as well as a thoughtful, generous, and frank commentator on this and other writings for the three years we have served together as colleagues at Western New England College School of Law. I also wish to acknowledge an article which cogently covers many of the issues I address in a slightly different context. See Brenda Jones Quick, *Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 5 (1993).

1. Indeed, much of my professional career has been devoted to writing about the ugly history of racism in America. See, e.g., AFFIRMATIVE ACTION AND THE CONSTITUTION (Gabriel J. Chin ed., forthcoming 1998); GABRIEL J. CHIN, SUMI CHO, JERRY KANG & FRANK WU, BEYOND SELF-INTEREST; ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE: A POLICY ANALYSIS OF AFFIRMATIVE ACTION, reprinted in 3 UCLA ASIAN-PAC. AM. L.J. (forthcoming 1998); Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151 (1996) [hereinafter Chin, *The Plessy Myth*]; Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996); Gabriel J. Chin & Denise Morgan, *Breaking into the Academy: The Michigan Journal of Race and Law Guide to Programs for Aspiring Law Professors*, 1 MICH. J. RACE & L. 551 (1996); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimina-*

likely to discriminate,² and any other answer would disserve our system of justice without helping, and perhaps impairing, the needs of those seeking legal services. The ruling of the Massachusetts Commission Against Discrimination (“MCAD”) that attorney Judith Nathanson is liable for discriminating against a male would-be client³ is a mistake.

A minor reason the MCAD’s decision is misguided is that the rule is unenforceable. Unlike restaurants, barber shops or apartment complexes, in most law offices, there is no bill of fare listing standardized prices for more-or-less similar services. Accordingly, in law practice, unlike areas where discrimination law applies, unwanted clients could readily be run off by rendering a high estimate that is not objectively unreasonable, predicting a loss, or proposing an expensive strategy. Moreover, a frisson, sparks, a feeling of confidence, are the critical factors a client uses in choosing counsel (the existence of “rainmakers”—law firm partners whose reason for being is to bring in business because of their charm, social connections, or former high government office—is conclusive proof of this point). A cool reception coupled with a hint of impoliteness will convince virtually all prospective clients that they have not yet found the right counsel. Finally, a persistent would-be client can be peremptorily rejected on the pretext that the attorney is not qualified to handle the matter, that there is an actual or potential conflict, or that the attorney is simply too busy and thus is ethically required to decline the employment. While this is true with discrimination in other contexts, it is not true that a renter of apartments, say, will have so many pretexts that will be so readily demonstrated and so difficult to falsify. In many fields of law practice, each case really is materially different.⁴ Only those lawyers

tion and the Constitutional Law of Immigration (unpublished manuscript on file with author).

2. We are now living under the scheme that I support. The traditional rule is that “a lawyer may refuse to represent a client for any reason at all [for example] because the client is not of the lawyer’s race” CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 573 (1986). *But cf.* Robert T. Begg, *Revoking the Lawyer’s License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 *GEO. J. LEGAL ETHICS* 275 (1993); Quick, *supra* note *, at 5-6 (noting that some jurisdictions are considering or have adopted antidiscrimination rules which govern client selection).

3. See *Stropnick v. Nathanson*, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997). Stropnick was a homemaker who sought the assistance of Judith Nathanson, an attorney specializing in divorce work, representing women. Nathanson declined to accept Stropnick as a client, on the ground that he was a man.

4. As EC 2-7 explains: “The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter,

stupid (or principled) enough to be candid are likely to be targets.⁵

An additional subsidiary reason the MCAD erred is the certainty that such a rule will have paradoxical consequences if applied broadly. In *Wisconsin v. Mitchell*,⁶ the Supreme Court held constitutional a "hate crime" statute which enhanced penalties if the defendant's crime was motivated by prejudice. The defendant in that particular case was a *black* man who assaulted a *white* victim.⁷ While violence against a person of any race, religion, or gender is deplorable, it was a small irony that in the test case, the statute was used to enhance the punishment of a person who belonged to the very group the law was designed to protect. But *Mitchell* was an ironic *exception*; the statute, in time, will be applied to protect more people of color than it harms.

In this context, the MCAD decision created not an ironic exception, but an ironic *general rule*. Here's why: Affirmative action notwithstanding, the American legal system has not systematically subordinated or ignored the needs of whites and men. Accordingly, it is hardly surprising that few lawyers felt the need to devote their practices in a formal way to the interests of whites, or to form public interest law firms aimed at ending subordination of males.⁸

and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services." MODEL CODE EC 2-7.

5. In his response to this essay, Professor Iijima decries these facts, but he does not deny them. To the contrary, he suggests that Judith Nathanson should have invoked the "permissible grounds" that "she didn't like him," that she disapproved of "his reasons for trying to retain her," as well as the fact that her practice was aimed at the law's "effect and impact on women's status in society." Here, Professor Iijima suggests that Nathanson invoke a pretextual reason; Nathanson's actual motivation was that she "did not represent men in divorce proceedings." *Stropnicki*, 19 M.D.L.R. at 39. His argument illustrates how likely it is that a pretext will be available in almost any situation. Indeed, if Professor Iijima is right, and an attorney can avoid liability simply by saying that they "didn't like" the client (especially in cases like this, where the lawyer never even talked with the client before rejecting him), then there is no possibility that any lawyer other than Nathanson will be subject to the rule; Professor Iijima has identified a one-size-fits-all excuse applicable to every client and every case a lawyer wishes to avoid.

6. 508 U.S. 476 (1993).

7. *See id.* at 479-80.

8. I am not being sarcastic here. There may well be pockets in the law where men (or even whites) are mistreated. For example, the Supreme Court is now considering a statute where children born out of wedlock to female citizens are treated more favorably, for immigration purposes, than children born out of wedlock to male citizens. *See Miller v. Albright*, 117 S. Ct. 1551 (1997). What I am saying is that while injustices against any group should be thought about and remedied, those against whites and males will be fewer in number by orders of magnitude, thus requiring fewer lawyers to address them, and which in any event have not resulted in systematic subordination in the way that white supremacy and sexism have.

However, virtually every lawyer has friends or classmates who went to law school because they wanted to help people who have historically been subordinated by law or who have had unequal access to the legal system. Judith Nathanson will not be alone among the lawyers and public interest law firms dedicated to the needs of women, members of particular races, or natives of particular countries, who will be sitting ducks for prosecution if this decision stands.⁹

Even if progressive lawyers were not likely to be disproportionately affected, I would still question the ruling. Lawyers should have the right to use their lives for their private interests, that is, people should be allowed to choose to become political lawyers. While I understand and support, say, an NAACP Legal Defense and Education Fund, and would disdain a similar group dedicated to the supposed termination of white subordination, there is no reason that an NAAWP LDEF should not be allowed to try to pursue its political agenda through law, no matter how wildly misguided it might be. Indeed, the Supreme Court has recognized that the practice of law “undertaken to express personal political beliefs and to advance” political objectives in some circumstances has First Amendment protection.¹⁰

Further, I agree with Professor Harpaz that serious First Amendment issues arise that do not arise in other public accommodation contexts when lawyers are compelled to speak on behalf of clients.¹¹ Woolworth’s lunch counters and bowling alleys are not asked to advance (or even know about) their customers’ interests as people. Even physicians’ relationships with their patients have a different moral content; it would be appalling, for example, if an

9. Professor Iijima also believes that Judith Nathanson and other progressive lawyers should be allowed to have selective practices—that is, he agrees with me that this decision is wrong. If Professor Iijima favors an asymmetrical rule, that is, one permitting women and people of color to discriminate against whites in the selection of clients, while requiring whites and men to select neutrally, in spite of certain strong reasons for that solution, it seems foreclosed by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

10. *In re Primus*, 436 U.S. 412, 422 (1978); see also *NAACP v. Button*, 371 U.S. 415 (1963).

11. See Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49 (1998); cf. Brenda Jones Quick, *Regulating a Lawyer’s Discriminatory Conduct: Constitutional Limitations*, 21 OHIO N.U. L. REV. 897 (1995) (analyzing Michigan’s proposed ethical rules). The analysis is different, of course, for unlawful harassment or discrimination in employment that happens to be committed by an attorney. See, e.g., Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996).

emergency room doctor chose to let a heart attack victim die untreated upon discovering that the patient was a tobacco executive; many would applaud an attorney who refused, on principle, to offer legal assistance to the very same executive in an emergency situation, and would find it wrong to force a lawyer to lend their skills to a client engaged in a cause the lawyer found immoral.¹²

If the movement lawyer or the lawyer who objects to a client on principle are easier cases, the situation involving the unadulterated racist is more difficult. What is to be done, that is, with a nonpolitical lawyer with a nonpolitical practice; the real estate specialist who takes every house closing that walks in the door, say, and has no objection to saying or writing whatever is customary, but only on behalf of a client who is white. Still more troubling would be a lawyer who rejected clients on forbidden grounds not because the attorney's own principles were implicated, but to satisfy the perceived preferences of other clients or colleagues who would feel more comfortable dealing with, or being part of, a firm with a white or straight or male clientele. Even in these contexts, lawyers should be free to reject clients on discriminatory grounds. Whether or not a lawyer's interest in autonomy would be sufficient to justify this result, the legal system is interested in its own integrity, in justice, and thus, in preventing clients from going into cases where from the beginning it is clear that they are likely to be shafted.

The relationship between lawyer and client is privileged, confidential, and fiduciary.¹³ Because a lawyer is required to "represent a client zealously within the bounds of the law,"¹⁴ the relationship is, in a real sense, intimate; even parents, priests, and physicians are not required to devote such single-minded dedication to those they are close to. A lawyer who fails "to seek the lawful objectives of [the] client through reasonably available means"¹⁵ has violated the ethical proscriptions of the profession. The drafters of the ethical rules made the decision that it was necessary to put in black and white that, for example, a lawyer may not "[k]nowingly use perjured testimony or false evidence."¹⁶ I doubt doctors need to be

12. Indeed, the ethical rules provide that "representing a client does not constitute approval of the client's views or activities." MODEL RULES Rule 1.2, cmt. 3. "The terms upon which representation is undertaken may exclude specific objectives Such limitations may exclude objectives . . . that the lawyer regards as repugnant" *Id.* cmt. 4. Even a hired gun is not necessarily available to every would-be employer.

13. See WOLFRAM, *supra* note 2, at 145-48 & ch. 6.

14. MODEL CODE Canon 7.

15. *Id.* DR 7-101(A)(1).

16. *Id.* DR 7-102(A)(4).

reminded, say, that they should not help a patient who needs a liver transplant by harvesting one from a convenient passer-by.

There are powerful reasons that both legal culture and legal rules impose a special duty of loyalty on attorneys towards their clients. One reason is that people come to lawyers for help when they have emergencies or problems that are difficult or consequential. When the legal profession slanders the medical profession, we sometimes say "at least we don't bury our mistakes." But of course, we do; in the context of capital cases, for example, lawyers hold the very lives of their clients in their hands.¹⁷ Even in routine civil matters, a lackadaisical lawyer can do a great deal of harm—if a lawyer performed a bad title search and then forgot to buy title insurance, if a lawyer blows the statute of limitations on a personal injury claim, if a lawyer ineptly defends a tort action—and individuals and families can be seriously damaged. Under our law, judges and juries are given ultimate power over the lives and property of Americans, yet they have little or no independent ability to gather facts. The presence of a single-minded advocate for each party is the only thing that makes this system reasonable and possible.¹⁸

The other major reason that lawyers are supposed to go into cases with zeal is that their errors are often difficult or impossible to repair after the fact. In civil cases, courts staffed by judges who are themselves lawyers sometimes hesitate to hold a lawyer liable for

17. Bad lawyering has killed many clients. *See, e.g.*, *Coleman v. Thompson*, 501 U.S. 722 (1991) (affirming death sentence and refusing to hear claim because defendant's lawyer filed notice of appeal three days late); *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari) (describing inadequacies of counsel). *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime, but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

18. This is not always the case with the other professionals Professor Iijima mentions. A pharmacist, for example, while employing great learning and skill, performs fixed technical tasks. It involves no discretion to determine how to fill a prescription for 100 ten milligram capsules of penicillin. Because the pharmacist ordinarily does not even need to see the patient (in the law, there is no analogy to the mail-order pharmacies which are now earning an expanded share of the market), nothing turns on good will or bad between the professional and the client. Moreover, if the pharmacist errs, that fact is readily and objectively verifiable; with very little research, even a layman can understand that if a prescription for Seldane is filled with Dalmane, a mistake has been made. Of course, a pharmacist could conceivably act with criminal malice, poisoning a customer because of their race or religion, for instance, or intentionally failing to warn of some known hazard. But such people are beyond the reach of ethical rules, and are already regulated by penal law. Professor Iijima is quite right, however, when he suggests that my rule would apply to psychiatrists and clergypersons, who, in my scheme, are more like lawyers. No rule of ethics should force a patient on a therapist who does not want them to get well, or a penitent on a clergyperson who wants their soul to burn in Hell.

good-faith conduct; under the “barrister rule,” applicable in many jurisdictions, an attorney cannot be held liable for malpractice for an honest exercise of professional judgment.¹⁹ In addition to showing what may be a high level of fault, dissatisfied clients ordinarily must show that they would have won (or not lost)²⁰ and bear the burden of quantifying the amount of their loss, which may be difficult to do.

Disciplinary sanctions are also unlikely for a blunder that looks like it could be a good faith mistake. Notwithstanding a duty of competence imposed by both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct, an isolated error, even a serious one, will often be overlooked. In *In re Meyers*,²¹ for example, the Arizona Supreme Court refused to discipline an attorney who failed to appear at a scheduled hearing before the Immigration and Naturalization Service, citing, among other reasons, their observation that “most decisions and official ABA policy insist that a single instance of ordinary negligence is not a disciplinary violation.”²²

Ironically, in criminal cases, where life or liberty is in the balance, the likelihood of judicial redress for attorney error is even more minute.²³ In some states, appointed counsel is immune from suit.²⁴ In states which allow suits, the majority rule is that for a defendant to prevail in a malpractice claim, they must show that they were in fact innocent—not that they would have been acquitted but for the attorney’s errors, but that they did not do the crime.²⁵ While relief from a conviction is sometimes possible based on ineffective assistance of counsel, the standard is very high, and even lawyers who slept through trials or showed up in court drunk²⁶ have been found to have been perfectly satisfactory counsel. The

19. See, e.g., *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980) (en banc).

20. See, e.g., *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524, 526 (Iowa 1983).

21. 795 P.2d 201 (Ariz. 1990).

22. *Id.* at 204 n.3; see also *Attorney Grievance Comm’n v. Kemp*, 641 A.2d 510 (Md. 1994) (holding that “careless” failure to file necessary papers did not warrant discipline).

23. The distinguished criminal law scholar Francis Allen writes that appellate standards of review as applied are more lenient in civil cases than in criminal, notwithstanding formal rules to the contrary. See FRANCIS A. ALLEN, *THE HABITS OF LEGALITY: CRIMINAL JUSTICE AND THE RULE OF LAW* 52 (1996).

24. See, e.g., *Dziubak v. Mott*, 503 N.W.2d 771 (Minn. 1993).

25. See 3 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 25.3 (4th ed. 1996).

26. See *Bright*, *supra* note 17, at 1835.

late Jesse Romero was represented in a capital case by an attorney who, after thanking the jury and promising to be brief, made a plea for his client's life which is reprinted here in full: "You are an extremely intelligent jury. You have a man's life in your hands. You can take it or not. That's all I have to say."²⁷ Even though the attorney never came right out and asked the jury to spare his client's life, the Fifth Circuit found the attorney not to be ineffective.²⁸

Because lawyers are important, and their mistakes not easily rectified, the ethical norms of the profession correctly discourage and arguably prohibit a lawyer from taking a case where their representation may be impaired. The Model Code states that "a lawyer should decline employment if the intensity of his personal feeling . . . may impair his effective representation of a prospective client."²⁹ Similarly, the Model Rules provide that "a lawyer shall not represent a client if . . . the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."³⁰ When Judith Nathanson said to Joe Stropnick, "you're better off with somebody else," she not only gave advice of great practical value, she also complied with a principled ethical obligation of the profession.

It could be argued that the client should decide, that is, a client should be able to compel an attorney to accept a client notwithstanding counsel's objection to the client's characteristics. The client should be free to compromise his or her chances of winning in favor of what may be that client's greater interest in exposing and punishing discrimination. But the stakes go beyond those of the client's interests; the justice system has an interest in ensuring that parties to actions are represented by committed counsel. By way of analogy, some conflicts of interest between lawyer and client are not waivable, even if the client consents.³¹

27. *Romero v. Lynaugh*, 884 F.2d 871, 875 (5th Cir. 1989).

28. *See id.*

29. MODEL CODE EC 2-30.

30. MODEL RULES Rule 1.16(a).

31. Professor Iijima seems to suggest that professional regulation is somehow patronizing, and that clients should be allowed to choose. Perhaps this libertarian model would be better—why should some distant bureaucrat or legislature require an engineering degree for a bridge builder, or a bar exam for a lawyer when individual citizens acting in the free market are in the best position to evaluate risk and what qualifications they are willing to pay for; how arrogant of the law to interfere with freedom by arbitrarily insisting that no one, for example, may perform surgery or write prescriptions without some sort of medical training. Nevertheless, in a thousand ways, and for some powerful reasons, American law has not taken this approach.

Biased lawyers should not represent people for whom they hold an irrational hate and fear for the same reasons that biased judges should not preside over trials. As Justice Anthony Kennedy wrote as a Ninth Circuit judge, even the “slightest indication” of “racial bias” is enough in many cases to require recusal of a judge.³² In *Tumey v. Ohio*,³³ the Supreme Court held that a trial by a biased judge was per se reversible error, regardless of the evidence of guilt or of how the trial would have been different before an impartial tribunal. The reason for this result is obvious and applies equally to biased counsel: the hundreds of decisions to act or not to act, countless remarks made and not made, and many debatable judgement calls which went one way or the other, on and off the record, will rarely be subject to reliable post-trial scrutiny. It may be that Terry Lee Goodwin would have been sentenced to death even if his lawyer had not described him to the jury as a “little old n***** boy,”³⁴ and that Jose Guzman’s lawyer did his very best work even though he called Guzman a “wetback” before the jury that sentenced him to death,³⁵ but we can never know for sure.³⁶ The coercive power of the ethical rules and the public accommodation statute should not be used to compel the initiation of a situation which, from the beginning, portends a dubious result.

Of course, if lawyers were obligated not to discriminate and enjoined to take clients they did not want, they would still be subject to contractual, fiduciary, and ethical duties to act in the interests of their clients. Many or most attorneys would comply just as, say, conscripts in the United States armed forces typically perform adequately. However, as the Model Code recognizes, an attorney’s “obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.”³⁷ Good representation cannot be forced out of recalcitrant counsel. The gulf between good representation and representation giving rise to

32. *United States v. Conforte*, 624 F.2d 869, 881 (9th Cir. 1980); *see also* Chin, *The Plessy Myth*, *supra* note 1, at 165 n.94 (citing other cases).

33. 273 U.S. 510, 523 (1927) (holding that due process prohibits conviction based on a trial presided over by a biased judge).

34. *Goodwin v. Balkcom*, 684 F.2d 794, 805 n.13 (11th Cir. 1982) (reversing conviction).

35. *See Ex parte Guzman*, 730 S.W.2d 724, 736 (Tex. Crim. App. 1987) (affirming conviction and death sentence).

36. The person with the best idea of what could have been done is likely to be the biased lawyer. The work product doctrine and attorney-client privilege may prevent anyone else from finding out what that lawyer knows.

37. MODEL CODE EC 6-5.

disciplinary or malpractice liability is broad and deep; in that gap lay the wrecks of thousands of cases not only that could have been won, but that resulted in injustices.

The history of the law is repleté with tragedies inflicted by attorneys whose representation was not motivated, at least to a significant degree, whether for love or money, by a desire to aid the client. I am most familiar with erroneous outcomes in the context of criminal prosecutions, although I am sure there are examples from many other areas of legal practice. In the Jim Crow South, lawyers representing African-American men accused of rape, robbery, or murder often waived appeal after a perfunctory trial, not in exchange for a plea bargain or some form of leniency, but just to move things along. Executions could come within a week of the alleged crime.³⁸ While both sides of criminal practice attract some of the most dedicated and public-spirited attorneys, in some states, appointments defending criminal cases are readily available, attracting lawyers whose dockets are not filled with private cases, yet fees are capped at a level low enough that some of the lawyers who take them are those whose reputation or ability leaves them no other alternative. Others feel pressure to do very little work, for example, pleading guilty at any excuse.³⁹ Although not necessarily motivated by racism, the record of injustice caused by attorneys who were not committed to their clients' interests is strong reason not to create more such situations.⁴⁰

It may also be worth noting that discrimination claims in this context have important practical differences from many other kinds of discrimination. In most discrimination cases, the plaintiff actually wants the apartment, or the promotion which is at issue, and the law is intended to make biased employers, landlords, and other decisionmakers transact business without regard to their racism or sexism. Here, however, a sensible client of color who was motivated primarily by a desire for legal victory would almost never choose to retain a racist attorney—Joe Stropnicky did not want

38. Cf. *Powell v. Alabama*, 287 U.S. 45 (1932) (reversing conviction in one of the "Scottsboro Boys" cases and describing inadequacies of the trial).

39. See, e.g., Jeff Rosenzweig, *The Crisis in Indigent Defense: An Arkansas Commentary*, 44 ARK. L. REV. 409 (1991).

40. A number of articles set forth chilling examples of the kind of representation which has been found to be constitutionally adequate. See, e.g., Bright, *supra* note 17; Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

Judith Nathanson after she told him she limited her practice to women but would nevertheless represent him.⁴¹ Litigation is unlikely to reform the souls of racist lawyers, and, I argue, the law should not encourage biased lawyers to accept employment where they could harm clients. Thus, while litigation would serve the purpose of exposing biased attorneys, which would help would-be clients steer clear, lawsuits would not serve the traditional purposes of achieving a substantive end for the client and reforming inappropriate behavior.

Perhaps people who cannot enthusiastically represent every segment of society should not be allowed to be lawyers at all. However, such a rule would generate evasion, not disbarment. Moreover, lawyers who are members of groups which have been the targets of discrimination, and thus have reason to resent the perpetrators of that discrimination, might well be disproportionately caught up by this rule. On a more principled basis, one of the penetrating insights of critical race theory and feminist jurisprudence is just how many thoughts which in many Americans are so deeply ingrained as to be imagined as facts of nature are in fact legacies of patriarchy and racism. If infection with invidious prejudice is disqualifying, many of us may have cause to worry; none of us are entirely self-created, and all of us are affected by cultural beliefs which are not really our fault.

This argument contains its own limiting principle. Because granting lawyers the right to choose is based on a desire to promote justice and accuracy in the system as a whole, lawyers cannot be allowed unfettered discretion to bow out where the system needs their participation. In the context of court appointments for indigent clients or those otherwise unable to obtain legal services, then, lawyers should be subject to being drafted into service even over their protest. An attorney compelled to represent a client unwillingly may well provide less satisfactory services than in a voluntary engagement, but if the alternative is no counsel at all, compelled counsel is the best alternative.

The legal system would also be severely damaged if attorney choice led to a return to Jim Crow. We have attorney choice now without Jim Crow, which reassures me of the reasonableness of my assumption that the market for attorneys is a buyers' market. While the rules say that "[l]egal representation should not be de-

41. See *Stropnick v. Nathanson*, 19 M.D.L.R. (Landlaw, Inc.) 39, 40 (MCAD Feb. 25, 1997).

nied to people who are unable to afford legal services,"⁴² many of those with legal needs but no money are in for a disappointing search for legal services regardless of their race, sex, or sexual orientation. However, clients with cash, whether for a house closing or a tender offer, are unlikely to be refused legal services by virtually any lawyer or law firm in virtually any part of the country. Based on principle or political correctness, neither the newest law grad hanging out a shingle, nor the whitest of white shoe Wall Street firms is likely to believe that discouraging black, gay, or female trade will add lustre to their business reputation.⁴³ If I am wrong—if homosexuals, people of color, or women with money have difficulty in getting representation, or if any significant number of attorneys, in fact, exercised their privilege to turn away business of the wrong hue—then it might be that the benefit to be gained by forcing matches between lawyer and client would be worth inaccuracy and injustice in some number of cases.

At bottom, the foreseeable exceptions to the ideal of neutral client selection are unlikely to either limit access to legal services or promote segregation; the existence of lawyers who select clients based on political commitment has had no discernable impact on the availability of lawyers in the market. There will be some dis-

42. MODEL RULES Rule 1.2, cmt. 3.

43. I have some modest and unscientific empirical support for these positions. In the course of preparing this essay, I spoke with a partner in a large Los Angeles law firm. The partner is a person of color active in civil rights work as well as litigation for his large corporate clients. "The way law firm economics are today," he told me, "the only color that matters is green. If a client has cash to pay a retainer, they can get representation from almost any large firm." I also spoke with a Springfield lawyer who was part of a small firm engaged in criminal practice. That attorney, also a person of color, told me that "retail" individual clients with cash would be welcomed by most solo practitioners or small firms regardless of their race or gender.

A quick Westlaw search and a review of an annotated United States Code revealed no cases brought under 42 U.S.C. § 1981 (1991), a federal civil rights statute prohibiting discrimination in contracting, in which a client sued an attorney for refusal to accept employment on the basis of race, religion, or national origin. (I found one case in which a lawyer sued a former client for race discrimination, *see Mass v. McClenahan*, 893 F. Supp. 225 (S.D.N.Y. 1995), and another in which a lawyer sued an office building for discriminating based on the race of the lawyer's clients, *see Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) (Stevens, J.)). I also found no cases or ethics opinions dealing with allegations of discrimination by lawyers in client selection decided under CALIFORNIA RULES OF PROFESSIONAL CONDUCT 2-400 (1994), NEW YORK JUDICIARY LAW DISCIPLINARY RULES 1-102(a)(6), or NEW JERSEY RULES OF PROFESSIONAL CONDUCT 8.4(g), all of which prohibit some forms of discrimination. This sketchy evidence suggests that either discrimination by lawyers in selection of clients is not a frequent problem, or, if it is, ethical rules enforced through litigation have not proved to be a remedy.

criminator, but they are better dealt with by conversion rather than coercion. The legal profession as an institution will decline the opportunity to discriminate. Allowing bigoted zealots to practice law does no more real harm than allowing bigoted zealots to publish or teach. Neither their numbers nor their conduct are consequential enough to make us consider compromising the interest of the legal system in fairness and accuracy.