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WHEN PRINCIPLED REPRESENTATION TESTS ANTIDISCRIMINATION LAW

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In this life we prepare for things, for moments and events and situations . . . . We worry about things, think about injustices . . . . Then, all of a sudden, the issue is not whether we agree with what we have heard and read and studied . . . . The issue is us, and what we have become.[1]

INTRODUCTION

At one point in time, every lawyer or would-be lawyer ponders the decision to become a lawyer. Some give it more consideration than others; some base their decisions on practical considerations while others contemplate lofty goals. For some, the decision is based on a realistic view of the legal profession and the roles lawyers play while, for others, the decision is premised on an unrealistic depiction of lawyers, Hollywood-style.

Whatever the configuration of conjured images of lawyers and the legal profession, each would-be lawyer must necessarily settle on a vision of where she belongs within these images and a set of aspirations to be obtained through entering the profession.

Have these aspirations been met? Is one disappointed by the reality of practicing law? Periodically, along the way from novice to experienced lawyer, one should ask the questions: as a lawyer, am I honoring the legal profession—"professionalism looking outward"; and as an individual, is my legal practice consistent with my own sense of right and wrong—"professionalism looking inward."

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1. ROBERT COLES, ERIK H. ERIKSON: THE GROWTH OF HIS WORK 39 (1970).

Often the answers to these questions are found in the decisions lawyers make about the clients and causes they represent.

Imagine an attorney who has built a reputation representing victims of race discrimination. Early in her career, when the law overwhelmingly favored her opponents, she persevered with a deep passion and certainty in the correctness of her cause. In her heart, she knew that the law and public sentiment were at odds with fundamental fairness and decency. Over time, her legal arguments and those of her like-minded colleagues began to erode the status quo. The legal and social environment—in part due to her efforts—began to change so that once unpopular notions and positions fell into favor and gained broad acceptance. This is why she became a lawyer: to help dismantle the unjust discrimination she observed and regarded as antithetical to a humane and decent society.

She sleeps well at night knowing that she has made a difference. She looks forward to each day with the knowledge that she will continue to make a difference. One day her 9:00 a.m. appointment arrives. A white woman explains that she was rejected from graduate school because the university she applied to had instituted an affirmative action program which she felt to be unconstitutional. Despite the attorney's pro-affirmative action stance, she sought the attorney's counsel because of her broad experience and understanding of the nuances of discrimination law.

The attorney politely informs the client that she cannot take the case. To her, affirmative action policies are a lawful response to historic invidious discrimination. She explains that she has devoted her practice to advancing racial equality, a legal principle in which she believes strongly, one which forms the bedrock of her individual sense of justice. She cannot in good conscience take the client's case for she cannot zealously represent her without silencing that inner voice that tells her the difference between what is right and what is wrong. The prospective client listens and asks whether the attorney could "in good conscience" take on the case of any Caucasian person with a similar claim of discrimination. The attorney replies that she cannot. Is the attorney engaging in race-based discrimination or is she declining the case for reasons of conscience?

The decision in *Stropnicky v. Nathanson*[2] disregards entirely the professional and personal considerations that drive the attorney's decision whether or not to accept a case, and focuses exclu-

2. 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997).

sively on societal concerns with eliminating discrimination. In so doing, it overlooks a long-lived deference accorded attorneys in the decision of whether to accept or decline a client's case and the legitimate rationale underlying such deference.

In *Stropnicky*, the Massachusetts Commission Against Discrimination ("Commission") held that attorneys' client selection decisions are to be regulated by the Massachusetts public accommodation law.[3] Ms. Nathanson, an attorney specializing in divorce law, refused to take Mr. Stropnicky's case because she had premised her practice on advancing the cause of women in the family law area in an effort to remedy past and present gender bias in the courts. Mr. Stropnicky had sought representation from Ms. Nathanson based on her reputation in the family law area.[4]

Mr. Stropnicky was the stay-at-home partner in the marriage, and, as the economically disadvantaged partner, sought out Ms. Nathanson who was well known for representing women who had such traditional roles.[5] Claiming that Ms. Nathanson had discriminated against him on the basis of his gender, Mr. Stropnicky brought the instant action before the Commission which fined Ms. Nathanson $5,000 for engaging in unlawful gender discrimination in violation of the Massachusetts public accommodation law.[6]

In deciding *Stropnicky*, a case of first impression in Massachusetts, the Commission entered a growing debate on whether lawyers and law firms are subject to public accommodation laws. Nowhere is there evidence that the Massachusetts Legislature intended the law to be applied to a lawyer's client selection decision. The Commission's decision, however, reaches to the deeper issue of whether lawyers are to retain traditional unfettered discretion in making client selection decisions or whether they are to be constrained in

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3. According to Massachusetts public accommodation law "any distinction, discrimination or restriction on account of . . . sex . . . relative to the admission of any person to, or treatment in any place of public accommodation" is unlawful. MASS. GEN. LAWS ch. 272, § 98 (1997).

4. *See Stropnicky*, 19 M.D.L.R. at 39.

5. *See id.* at 40.

6. *See id.* Place of public accommodation is "any place, whether licensed or unlicensed, which is open to and accepts or solicits the patronage of the general public . . . ." MASS. GEN. LAWS ch. 272, § 92A (1997). The Commission found that the definition was broad enough to include a law office. Other jurisdictions addressing whether professionals fall within the definition of a "public accommodation" have found otherwise. *See* Robert T. Begg, *Revoking the Lawyers' License to Discriminate in New York: The Demise of a Traditional Professional Prerogative*, 7 GEO. J. LEGAL ETHICS 275, 335-43 (1993).

making such determinations by the competing policy concern of eliminating discrimination.

This paper will address how the *Stropnicky* decision intrudes into the important discretion historically accorded lawyers in deciding whether to represent a client. By seeking to require an attorney to undertake a matter that he would otherwise refuse as a matter of conscience, the decision pits the rules that regulate lawyers against themselves. Not every lawyer will be able to meet the requirements of zealous advocacy under conditions of personal, political or ideological aversion. Whereas the rules permit an attorney to decide for herself whether a client's best interests will be advanced when these interests clash, application of the Massachusetts public accommodation law, without regard to these ethical and professional considerations, threatens both an attorney's professional autonomy in matters of conscience as well as serve to undermine a client's well being, and ultimately the legal profession. Part I is a concise review of the professional responsibility rules that pertain to the attorney's duties and prerogatives in the selection of a client. These rules, which regulate and offer guidance to facilitate the avoidance of conflicts of interest and other ethical dilemmas, have always recognized the importance of placing the client selection decision squarely within the attorney's discretion. Part II proposes an analytical framework for assessing the internal and external factors which underlie such discretion as articulated by the professional responsibility rules. Part III focuses on the ways in which laudable antidiscrimination principles may collide with the professionalism concerns that accord a lawyer discretion in deciding whether or not to represent a prospective client. Part IV applies the analytical framework set forth in Part II to the facts of *Stropnicky*. The conclusion suggests how antidiscrimination principles can coexist with ethical and professional considerations that support discretionary client selection decision-making without compromising either principle.

I. PROFESSIONAL RESPONSIBILITY AND THE CLIENT SELECTION DECISION

The legal profession did little to regulate its membership prior to the turn of the 19th century. By 1909, however, many state bar associations had embraced, in one form or another, the Canons of Professional Ethics ("Canons").[7] Among the 32 Canons originally

7. In 1908, the American Bar Association adopted a set of rules for lawyers called

adopted by the American Bar Association, Canon 31, which dealt with the matter of discretion in the client selection process, provided that "[n]o lawyer is obliged to act either as [an] advisor or advocate [by] every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what [employment] he will accept as counsel . . . ."[8] The American Bar Association's subsequent adoption of the Model Code of Professional Responsibility ("Model Code") and the Model Rules of Professional Conduct ("Model Rules") has not fundamentally altered the substance of these rules as currently found in each state's code of ethics or professional responsibility.[9]

Sensitive to its monopoly on the practice of law, the legal profession has long recognized the need of its membership to act so as to secure representation for all persons.[10] Accordingly, the Model Code and the Model Rules set forth regulations and aspirational goals in an effort to ensure the ethical and honorable practice of law, eliminate practices that serve to discredit the profession, and provide guidelines for attorneys to follow to minimize the likelihood of improper or conflicted representation. Today, the Model Code and the Model Rules adhere to the general principle that, absent conflict, an attorney is encouraged to take on a client's cause. With this precept in mind, however, the rules qualify this requirement by sanctioning an attorney's decision to refuse a client's case for good cause.[11] These rules of professional conduct

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the Canons of Professional Ethics. Most states adopted the Canons through legislation, court rules, or as rules of the state bar. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 55-56 (1986).

8. CANONS OF PROFESSIONAL ETHICS Canon 31 (1908).

9. Approximately 40 jurisdictions have adopted some form of the Model Rules of Professional Conduct while the remaining jurisdictions continue to apply a form of the Model Code of Professional Responsibility. *See* STEVEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 3-5 (3d ed. 1992).

10. *See* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 87 (1978). Hazard criticizes this antiquated rationale, reasoning that "liberal admission to the legal profession has much weakened the monopoly." *Id.*

11. Lawyer's are obligated to accept appointments from the bench:

> A lawyer shall not seek to avoid an appointment by a tribunal to represent a person except for good cause, such as . . . (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

MODEL RULES OF PROFESSIONAL CONDUCT ("MODEL RULES") Rule 6.2 (1994). "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant." *Id.* cmt. 1. Similarly, "A lawyer is under no obligation to act as [an] advisor or advocate for every person who may wish to become his client; but in

serve the dual purpose of maintaining the highest standards of professionalism[12] so that clients may be assured the best representation possible, while at the same time recognizing a lawyer's need for autonomy when deciding whether to undertake a cause for which the lawyer may feel a profound commitment or aversion.

II. Two Faces of Professionalism

A. *Professionalism Looking Outward*

Lawyers wield great power and influence in the American society. Lawyers serve as the guardians of our law-dependent democratic society. They have been and will continue to be key players in shaping how individuals and institutions deal with the great issues of our time. As guardians, lawyers are gatekeepers of the substance, process and procedures of law enabling parties to articulate, prosecute and defend individual claims. It is through legal representation that clients are assured open, equal and fair access to courts and our system of justice.

The various rules of professional responsibility which require zealous advocacy, loyalty, confidentiality, and championship of the oppressed, poor and unpopular, serve to ensure equal access to the courts, reinforce the high ideals of law in society and highlight the important public service performed by lawyers. Such rules define the standards of conduct demanded of lawyers as well as provide the basis upon which sanctions may be meted out when a lawyer fails to meet these standards. The 1908 Canons of Professional Ethics provided that the lawyer had an obligation to give "entire devotion to the interests of the client, warm zeal in the maintenance and defense of his rights and the exertion[s] of [the lawyer's] utmost learning and ability."[13] Today, Canon 7 of the Model Code provides that "[a] lawyer should represent a client zealously within the bounds of the law."[14] From the perspective of professionalism looking outward, the legal community recognizes that lawyers, by

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furtherance of this objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment." Model Code of Professional Responsibility ("Model Code") EC 2-26 (1996).

12. There is debate as to whether the professional rules articulate the highest standards of professionalism or a minimal standard to which a lawyer must adhere. Without responding to the debate, it is assumed that, in theory, one of the purposes of the rules is to inspire lawyer conduct which meets the highest standards of professionalism.

13. ABA Canons of Professional Ethics Canon 15 (1908).

14. Model Code Canon 7.

fulfilling their roles as legal technicians and undertaking a client's cause indifferent to their own personal beliefs, serve the greater good of securing the availability of legal services to all, along with unqualified advocacy.[15] As is discussed below, the rules are directed at ensuring that an attorney fully appreciates the extraordinary commitment she is making to devote the full extent of her legal skills, intelligence and abilities to the representation of the client before she agrees to take on a matter. As the rules anticipate, such an undertaking is not always possible.

B. *Professionalism Looking Inward*

An attorney's decision to accept or decline the responsibility associated with undertaking a client's case cannot be evaluated solely on the basis of what is best for the client or what is best for the profession. Without question, such a decision also calls for an inquiry into what is reasonable to expect from an attorney.[16] It is no surprise that lawyers can feel passionate about the causes they champion, that they may even base their professional *raison d'etre* on the passionate representation of such cases. Accordingly, the very same standards of professionalism that call for an attorney to take on a cause may, at times, require a degree of fidelity to a client's cause that a lawyer finds impossible to muster. This paradox emerges when a lawyer is asked to represent a client whose cause she regards as repugnant. The Model Code's response that "[a] lawyer is under no obligation to act as advisor or advocate for every

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15. The metaphor of attorney as "cab driver" applied to English Barristers: "He takes whomever beckons to whatever destination may be commanded." HAZARD, *supra* note 10, at 89. Under the "cab driver" model, even the most repugnant legal claims were entitled to be argued and provided an intellectual challenge for the oral advocate. In contrast, professional rules have protected American lawyers from forced representation of clients or causes the lawyer regards as repugnant. Ironically, the cab driver metaphor may be applicable to American lawyers today out of business necessity.

16. "Judge George Sharswood's 'Essays on Professional Ethics,' delivered to the graduating class of the law department of the University of Pennsylvania in 1854," formed the basis of the 1908 Canons of Professional Ethics. E. Wayne Thode, *The Ethical Standards for the Advocate*, 39 TEX. L. REV. 575, 580 (1961). In his address, Judge Sharswood asked: "'But what are the limits of his duty when the legal demands or interests of his client conflict with his own sense of what is just and right? This is a problem by no means of easy solution.'" *Id.* at 581. Judge Sharswood offers that "[c]ounsel have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand, which offends [sic] his [sic] sense of what is just and right . . . ." *Id.* (quoting George Sharswood, *Professional Ethics*, 32 A.B.A. REP. 81, 96 (1907)).

person who may wish to become [a] client,"[17] along with the Model Rules' comment that "[a] lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant,"[18] serve the interests of both the client and the compromised attorney. The client is benefitted by an attorney's refusal to represent him in a matter when the attorney is incapable of fully representing the best interests of the client by providing zealous representation. Relatedly, the attorney is spared the intellectual and emotional hardship of undertaking an action for which there is an ideological dislike, or worse, disdain, resulting in a personal/professional integrity conflict.

Much of the time, a client's cause and the legal argument that supports it lack partisan interests to an attorney. Contract disputes typically involve persons and circumstances that do not rouse an attorney's intense ideological or political interests. Sometimes, however, an attorney is asked to take on a case which requires advocacy of a legal position and a construction and presentation of facts in a manner that is inconsistent, perhaps even in direct conflict, with strongly held beliefs. Such representation may place the attorney in the position of fighting for a vision of the law and of society she condemns. For this reason, perhaps more than any other, the rules encourage an attorney to decline representation under such circumstances. In this regard, Professor Geoffrey Hazard comments that the notion of a lawyer as a mere agent of the client

> assumes that the law is a settled and acknowledged body of rules. It assumes that the lawyer as advocate in court simply helps the judge 'understand' the rules and 'discover' their application to specific situations. It assumes that the lawyer as counsellor takes the rules as fixed channels into which transactions must be fitted. It ignores altogether the role of the lawyer as lobbyist. Most important, it ignores the fact that legal rules are now recognized as being more or less uncertainly positioned guidelines in a large field of forces. These forces include general normative concepts of equality, utility, property, and charity, and the realities of political and economic power.[19]

Hazard's assertion leads to the inevitable conclusion that "lawyers necessarily are to some degree political actors," and that "[a] posi-

17. MODEL CODE EC 2-26.
18. MODEL RULES Rule 6.2 cmt. 1.
19. HAZARD, *supra* note 10, at 89.

tion adopted by a lawyer on behalf of a client thus influences, even if in a small way, the configuration of the law itself."[20]

Despite efforts to mollify an attorney's discomfort with the prospect of certain types of representation vis-a-vis rules which condone, and even praise such representation, no rule can cure the psychological and ethical conflicts that will sometimes arise. This discomfort is further compounded by the fundamental nature of legal advocacy. For in order to prepare a case, it is essential that an attorney embrace a set of facts and structure and present a persuasive and oftentimes passionate argument. While the rules encourage attorneys to accept unpopular cases without fear of reprisal to reputation,[21] it is easy to do so when one is indifferent to the cause. Furthermore, to require an attorney to represent a client whose cause she finds repugnant is to forcibly intrude into one's private belief system. Most of the time, an attorney's decision to decline to represent an undesirable client or cause is a permissible exercise of professional autonomy under the rules. There are times, however, when because of a convergence of cause and client, such refusal resembles class-based discrimination which society, through its laws and collective conscience, finds intolerable.

III. DISCRIMINATION IN THE SELECTION OF CLIENTS

A. *Public Policy Against Discrimination*

The legal profession has not uniformly adopted ethical rules which prohibit discriminatory conduct in the practice of law.[22] However, lawyers' conduct is subject to regulation by a host of constitutional and legislative dictates. To date, there has been no universal application of antidiscrimination principles to the client selection decision.

In recognizing the need to eliminate class-based discrimination, federal and state legislatures have enacted numerous laws in an effort to fulfill the goals of equality. Federal legislation prohibiting

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20. *Id.* at 90. With this viewpoint in mind, the client selection decision may trigger First Amendment issues. In her essay, Leora Harpaz analyzes the free speech implications of an attorney's representation of a client and discusses how Nathanson's advocacy of Stropnicky's cause qualifies as constitutionally protected free speech. *See, e.g.*, Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49 (1998).

21. *See* MODEL RULES Rule 1.2(b) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

22. *See infra* notes 32-38 and accompanying text.

discrimination in employment, housing, and education serve to eradicate invidious discrimination in areas central to a free, civil society, to protect individual liberties, to provide a remedy for victims of discrimination and to deter discrimination.[23] In the past three decades, Congress has added age[24] and disability[25] to the previously protected groups (i.e., race, sex, and national origin) as special classes subject to protection by antidiscrimination laws. Complementing federal legislation, several states have passed public accommodation laws and human rights laws which prohibit numerous forms of public acts of discrimination.[26]

Antidiscrimination legislation historically has targeted discrimination by public institutions and only recently has targeted private acts of discrimination.[27] More recently, legislation has been enacted with the goal of reaching a wider range of institutions and individuals, and protecting a larger group of people from being victimized by discrimination.[28] Traditionally, professional offices did not fall within the reach of public accommodation laws.[29] However, many state public accommodation laws have been applied to medical and dental offices. Prior to *Stropnicky*, state public accommodation laws did not enumerate and were not construed to include lawyers' offices in the definition of a place of public accommodation.[30]

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23. For examples of federal antidiscrimination provisions, see Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e-2000e17 (1994); Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1994); Equal Educational Opportunities Act, 20 U.S.C. §§ 1701-1710, 1712-1721, 1751-1758 (1994).

24. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1994).

25. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994).

26. *See generally* DONALD H. HERMANN & WILLIAM P. SCHURGIN, LEGAL ASPECTS OF AIDS app. 2A (1991) (providing a compilation of state statutes relating to public accommodation).

27. *See* Runyon v. McCrary, 427 U.S. 160 (1976) (holding that federal law which prohibits race discrimination in private contracting is applicable to a private, commercially operated, nonsectarian school); Katzenbach v. McClung, 379 U.S. 294 (1964) (reviewing the constitutionality of antidiscrimination laws).

28. Efforts by AIDS activists have resulted in the creation of state and local human rights commissions which enforce public accommodation laws, and broadened the definition of place of public accommodation to reach professional offices of doctors and dentists. *See supra* note 6.

29. *But cf.* 42 U.S.C. § 12181(7)(F) (including lawyers' offices within the definition of place of public accommodation; only federal civil rights legislation to enumerate lawyers' offices in definition of public accommodation). To date, this has not been applied to client selection decisions.

30. As lawyers' offices have never been likened to common carriers or public utilities, there has not been a duty on the part of lawyers to open their offices to everyone or to serve all. *See* Begg, *supra* note 6, at 300-01.

B. *Professions Regulating Themselves*

Concomitant with society's overarching concerns with both public and private discrimination, many professional organizations have enacted professional rules which prohibit discriminatory practices. In some instances, these rules reach the selection of clients. Engineers, dentists, social workers, and physicians, for example, have adopted ethical codes which unequivocally prohibit these professionals from refusing to provide services based on invidious discrimination.[31]

In contrast, the legal profession[32] largely has refrained from applying antidiscrimination principles to the client selection process. As set forth above, the professional responsibility rules governing lawyers afford wide discretion in the decision whether to accept a client or a cause. Refusal to represent a client may be based on an inability to pay a fee, a dislike of the person, or outright discrimination.[33] Such unfettered discretion permits invidious discrimination by the very persons who have taken an oath to uphold the Constitution[34] and eradicate such discrimination. Client selection decision motivated by discriminatory animus harms the individuals involved, the profession, and the institution of justice.

Some state bar associations have taken the initiative to adopt antidiscrimination rules relating to lawyers' conduct. These rules, however, may only pertain to employment discrimination[35] or conduct in connection with the practice of law.[36] Whether these rules

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31. *See id.* at 297-99 and accompanying notes.

32. California rules make discrimination in the selection and termination of clients a violation of the ethical rules. *See infra* note 38 and accompanying text.

33. *See* WOLFRAM, *supra* note 7, § 10.2, at 573.

34. The oath lawyers take upon admission to the practice of law includes a pledge to uphold the Constitution of the United States and to devote oneself to public service, and to the public good.

35. *See, e.g.*, DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 9.1 (1997) ("A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, . . . sex . . . ."); VERMONT CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(6) (1996-97) ("A lawyer shall not . . . [d]iscriminate against any individual . . . in hiring, promoting or otherwise determining the conditions of employment of that individual.").

36. *See, e.g.*, COLORADO RULES OF PROFESSIONAL CONDUCT Rule 1.2(f) (1997) ("In representing a client, a lawyer shall not engage in conduct that exhibits or is intended to appeal to or engender bias against a person . . . whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process."); RULES REGULATING THE FLORIDA BAR Rule 4-8.4(d) ("A lawyer shall not engage . . . in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, ju-

cover the client selection decision is debatable.[37] Standing alone, the California Rules of Professional Conduct explicitly prohibit "unlawful discrimination . . . on the basis of race, national origin, sex, sexual orientation, religion, age or disability . . . in accepting or terminating representation of any client."[38] Professionalism looking outward challenges the legal profession to reconcile the fact that, unlike other professions, its members, though sworn to uphold the rule of law, are not required to apply antidiscrimination principles to the selection of clients.

IV. BALANCING COUNTERVAILING INTERESTS

A lawyer's rejection of a client based solely on gender is discrimination and should not be countenanced. In contrast, a lawyer's refusal to represent an anarchist based on the lawyer's patriotism is sanctioned by both the professional rules and society at large. Since the refusal is based on an ideological clash, no class-based discrimination is perceived. But what happens, when for example, this same ideology which drives the client selection decision is indelibly linked with that of a protected class? Should the policy underlying antidiscrimination legislation give way to the lawyer's right to autonomy in the client selection decision? Or should antidiscrimination considerations trump lawyer autonomy? This is the conundrum present in *Stropnicky*. Is it possible to simultaneously respect antidiscrimination principles and the lawyer's autonomy in the client selection process? A second look at *Stropnicky*, with an eye to both Ms. Nathanson's public role as a lawyer and her personal interest in lawyer autonomy, coupled with consideration of the factors motivating her decision, suggests that the answer is yes.

A. *Looking Outward: Gender Discrimination*

On the surface, Ms. Nathanson's decision to reject Mr. Stropnicky because he is a man disserves the public interest in open, free and fair access to the system of justice, and can serve to disparage the profession for condoning a lawyer's right to pick and

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rors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender . . . ."); NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(a)(6) ("A lawyer [or law firm] shall not . . . unlawfully discriminate in the practice of law, including in hiring, promoting, or otherwise determining conditions of employment, on the basis of age . . . .").

37. *See* Begg, *supra* note 6, at 318-23.

38. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 2-400(B)(2) (1997).

choose her client even if it runs afoul of antidiscrimination principles. Furthermore, discrimination undeniably affects the individual and, in this case, caused Mr. Stropnicky distress over being rejected based on an immutable characteristic.[39] It is to these interests that laws and rules which seek to curb attorney discretion are directed. Absent a countervailing concern justifying such conduct in the client selection process, Ms. Nathanson's decision would be improper and could constitute unlawful discrimination.[40]

B. *Looking Inward: Lawyer Autonomy*

The specter of unlawful discrimination is not apparent from the perspective of Ms. Nathanson who declined to represent Mr. Stropnicky not because he is a man, but because her professional *raison d'etre* is to support women in the family law courts and to remedy past and present discrimination of women in the family law arena.[41] Were Ms. Nathanson required to represent Mr. Stropnicky and thereby to advocate a position and present herself in a manner inconsistent with her own self-concept as a person and attorney, she could surely compromise her professional and personal integrity. In an environment such as the family law courts, where systemic gender biases have been officially recognized,[42] Ms. Nathanson's zealous representation of Mr. Stropnicky could well entail a reliance, and even a deliberate utilization of such biases. Coerced representation of Mr. Stropnicky would place Ms. Nathanson's personal beliefs in conflict with the requirements of zealous advocacy. In circumstances such as this, a lawyer should have the "ethical discretion" to refuse a client that is based not on "a personal privilege of arbitrary decision, but [based on] a professional duty of reflective judgment."[43]

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

40. The decision in *Stropnicky* did not consider the public accommodation law's potential constitutional deficiencies as applied. To the extent such legislation is found to be unconstitutional, a lawyer's rejection of a client, though unconscionable, may be lawful.

41. Professor Chin's essay in this volume notes the paradox *Stropnicky* arouses. The "ironic *general rule*," he elaborates, will undermine the ideals driving antidiscrimination legislation and penalize those most intent on furthering these ideals. Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9, 11 (1998).

42. *See Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 746-48 (1990).

43. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988).

C. *Motivating Factors: Attorneys' Refusal to Represent*

In addition to the inner conflict a coerced representation may provoke,[44] forcing an attorney-client relationship in a situation which challenges the attorney's personal belief system not only jeopardizes the ethical requirement of zealous advocacy, it may ignore otherwise legitimate objectives. As much as Ms. Nathanson's rejection of Mr. Stropnicky as a client may resemble gender discrimination, it is motivated not by gender animus but by a deep commitment to a legitimate social cause.[45]

Ms. Nathanson purposely restricted her divorce practice to historical victims of discrimination with the goal of remedying gender discrimination against women in the area of family law and eradicating gender bias in the courts. Her commitment to remedying past discrimination serves a legitimate, lawful objective.[46] Favorable treatment to the victims of past discrimination is a form of corrective justice.[47]

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44. When lawyers are called upon to represent clients, or causes they disdain, the negative feelings about the representation unwittingly may be transferred to the clients. *See* Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship*, 27 CREIGHTON L. REV. 1 (1993). Dean Richard Matasar asks, "What to do when lawyering is at odds with one's sense of right and wrong?" Richard Matasar, *The Pain of Moral Lawyering*, 71 FLA. B.J. 75, 76 (1997). Dean Matasar suggests that lawyers "[d]o what the profession demands . . . . [T]his is the price of being a lawyer." *Id.* at 77. This approach requires the lawyer to subjugate her personal beliefs in order to zealously represent the client or to separate her professional and personal selves. *See id.* This latter approach might entail justifying representing clients' interests that are at odds with personal beliefs by simultaneously engaging in personally-satisfying pro bono work.

45. The relationship between such commitment and one's personal integrity is aptly noted by Professor Miller in his essay. *See* Bruce K. Miller, *Lawyers' Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW ENG. L. REV. 93, 95 (1998).

46. *See generally* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (Powell, J.) ("To eliminate every vestige of racial segregation and discrimination . . . [is a legitimate interest to which] race-conscious remedial action may be necessary."); Fullilove v. Klutznick, 448 U.S. 448 (1980); University of Cal. Regents v. Bakke, 438 U.S. 265 (1978); United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977).

47. *See* Margaret Jane Radin, *Affirmative Action Rhetoric*, 8 SOC. PHIL. & POL'Y 51 (1991).

> If individuals or groups hold entitlements that positive law has failed to recognize, then corrective justice requires that we change the law, and if individuals or groups hold entitlements that positive law has nominally recognized but not enforced, then corrective justice requires that we change our inaction and enforce them. This notion does not implicate the problems currently associated with affirmative action.

Id. Unlike affirmative action policies which disadvantage excluded persons, a lawyer's discretion to decline a client's case is unlikely to deprive the client of legal representation.

Legitimate interests such as eradicating bias against a historically discriminated group must be balanced against antidiscriminatory principles in evaluating the client selection decision. When lawyers retain ethical discretion in the client selection decision, justice is served by respecting the interests of both clients and lawyers as participants in our system of justice.

CONCLUSION

In a society governed by laws, lawyers play a unique role as the profession armed with the tools to assist those who wish to assert a legal claim along with those who are forced to enter the legal arena to defend an action. While in the days of the American colonies, lawyers "for hire" were not permitted to ply their trade, and legal causes were presented and resolved in a lay environment, the complexities of the developing society transformed this scenario into one where America now claims in excess of 70% of the world's lawyers.[48] As lawyers became a fixture upon the American scene, efforts to regulate and guide the profession developed.

The code of ethics or professional responsibility which all lawyers are sworn to obey does not insulate the lawyer from a host of conflicting duties and responsibilities affecting the service of clients, the administration of justice, and the moral obligations to oneself. The ethical rules admonish a lawyer not to decline representation because a client or cause is unpopular and require a lawyer to represent her client zealously and competently. In addition, a lawyer enters a fiduciary relationship with her client promising a duty of loyalty and confidentiality to the client.

Coexisting with professionalism considerations of lawyers as public servants, the rules recognize that lawyers as advocates must be accorded the discretion to reject causes or clients that are repugnant to their personal views. This feature of the rules recognizes that lawyers who must zealously represent causes that are repugnant to their personal views cannot always reconcile the outward-looking and inward-looking aspects of professionalism. In this respect, a lawyer's professional and private sides are at war; a state in which the client suffers, the lawyer and profession suffer, and the

48. The 70% figure was commonly quoted by the media after it "became a familiar factoid in the rhetoric of the 1992 [presidential] campaign." Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77-78 (1993) (contending that the 70% figure is overstated; that comparing numbers of lawyers in various countries is an "apples and oranges" problem).

administration of justice suffers. Such discretion in the client selection decision should not extend as far as permiting an attorney to engage in class-based discrimination notwithstanding personal animus toward the group to which a potential client belongs. Despite this, a lawyer must retain ethical discretion when selecting clients that allows a balancing of interests when discriminatory considerations are pitted against the lawyer's personal and professional integrity. Lawyers must have the freedom to follow their conscience when discriminatory concerns are offset by legitimate, lawful interests. Only then will a lawyer be ready to say to oneself and the public that "what we have become" are professionals serving the public good while adhering to the highest standards of professionalism, outwardly and inwardly.