

# Politics and Plurality in a Lawyer's Choice of Clients: The Case of *Stropnick v. Nathanson*

STEVE BERENSON\*

## I. INTRODUCTION

In a controversial recent decision, a hearing commissioner with the Massachusetts anti-discrimination agency sanctioned a female domestic relations lawyer under state public accommodations law for declining to represent a male party in ongoing divorce proceedings. The purpose of this Article is to evaluate the competing claims of the lawyer to freedom of association in choosing clients, and the potential client to equal access to legal services without regard to his gender. Which claim ought to be preferred in this context? Following this Introduction, the second part of this Article takes a more detailed look at the facts and circumstances surrounding the dispute between Joseph Stropnick and Attorney Judith Nathanson, as well as the grounds for decision articulated by the hearing commissioner.<sup>1</sup>

The next part of the Article attempts to establish a framework for evaluating the competing claims in Stropnick and Nathanson's case.<sup>2</sup>

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\* B.A. Franklin and Marshall College 1985, J.D. Harvard Law School 1989, L.L.M. Harvard Law School 1998. The Author will be joining the faculty of Nova Southeastern University's Shepard Broad Law Center as an Assistant Professor in the fall 1998 term. Special thanks to Martha Minow, Todd Rakoff and Deanna Sampson for their helpful comments on earlier drafts of this Article.

1. See *infra* Part II.
2. See *infra* Part III.

It begins by reviewing the framework established by the Supreme Court for balancing claims of freedom of association against competing claims of equal access to some public good under public accommodation or other anti-discrimination legislation.<sup>3</sup> Pursuant to the Court's framework, particular associations are determined to fall within one of three categories. Associations falling within the first category, described as intimate or personal associations, or the second category, described as expressive associations, are granted heightened constitutional protection by the Court. Thus, claims of freedom of association by the members of such associations are likely to be preferred to competing claims of equal access raised by non-members. With regard to associations falling within the Court's third category, however, no such heightened constitutional protection is afforded, and claims to equal access by those excluded from such associations are likely to be preferred to competing claims of freedom of association.

The next part of this Article argues that the Supreme Court's framework is an inadequate evaluation of the competing claims presented by Stropnicki and Nathanson.<sup>4</sup> The Court's framework fails to provide sufficient recognition to the importance of political activity to our constitutional scheme. Yet it is precisely the political nature of Nathanson's gender-conscious client selection policy that provides what is compelling about her claim to freedom of association in this matter. In an effort to compensate for what is lacking in the Supreme Court's framework, Part III goes on to explore parallels between the Court's three categories of associations and the three spheres of human activity referred to in the writings of philosopher Hannah Arendt, the private, social, and public realms,<sup>5</sup> and discusses how Arendt might have resolved conflicts between the freedom of association and equality principles within each of her three spheres.<sup>6</sup> It then reviews critiques that have been made of Arendt's three spheres.<sup>7</sup> Finally, in light of the Supreme Court and Arendt's formulations and the aforementioned critiques of both, Part III proposes a reconstructed framework for evaluating competing claims of freedom of association and equal access, based on the modified categories of private, social/commercial, and political associations.<sup>8</sup> Within the first of these categories, the freedom of association principle will presumptively be preferred to the equality

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3. *See infra* Part III.A.

4. *See infra* Part III.B.

5. *See infra* Part III.C.

6. *See infra* Part III.D.

7. *See infra* Part III.E.

8. *See infra* Part III.F.

principle, whereas, in the second, the opposite will be the case. With regard to the category of political associations, a “hard look” type of review of the competing claims will be necessary.

Part IV of this Article focuses on the question of whether Nathanson’s law practice, in which only women are represented in divorce cases, should be considered to be a private, commercial, or political association for purposes of Part III’s reconstructed framework. After rejecting categorization of the law practice as a private association,<sup>9</sup> the essay considers the commercial nature of the practice of law.<sup>10</sup> While the economic considerations involved in the practice of law are obvious, the current dominant conception of lawyering, referred to here as the professional model, formally treats such financial considerations as being merely incidental to legal practice. This tenet of the professional model has been under attack in recent years, and its viability is questionable. Nonetheless, Nathanson’s refusal to represent Stropnick does not appear to have been motivated primarily by commercial considerations, and therefore, the association formed with the clients Nathanson has chosen to represent need not necessarily be categorized as a commercial association.

In considering whether Nathanson’s law practice ought to be categorized as a political association, Part IV.C. begins by looking at legal practice from the perspective of the professional model.<sup>11</sup> The essay concludes that neither the professional model’s strong primacy of client interests tenet,<sup>12</sup> nor its weaker “protect the public good” tenet,<sup>13</sup> provides for a conception of lawyering that would place Nathanson’s law practice within Part III’s category of political associations. Part IV, however, goes on to describe an alternative perspective to that of the professional model from which Nathanson’s law practice may be viewed, that of the public interest lawyering model.<sup>14</sup> While the traditional view of public interest lawyering does provide for a conception of legal practice that would place such a practice within Part III’s political association category,<sup>15</sup> attacks on the public interest lawyering model

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9. *See infra* Part IV.A.

10. *See infra* Part IV.B.

11. *See infra* Part IV.C.1.

12. *See infra* Part IV.C.1.a.

13. *See infra* Part IV.C.1.b.

14. *See infra* Part IV.C.2.

15. *See infra* Part IV.C.2.a.

from sources including congress and the courts, as well as a critique raised by poverty law scholars, call into question the model's continuing viability.<sup>16</sup> Nonetheless, Part IV concludes that, if modified, a viable conception of public interest lawyering survives,<sup>17</sup> and that Nathanson's law practice fits one prototype of what public interest lawyering needs to become in the future.<sup>18</sup> As such, her law practice warrants the heightened protection afforded to political associations in Part III's framework.

Finally, in light of Part IV's conclusion, Part V attempts to balance Stropnický's equality claim against Nathanson's freedom of association claim. The essay argues that to the extent that Stropnický's claim presents a familiar argument based on gender "neutrality," it ought to be rejected in favor of Nathanson's competing claim. However, to the extent that Stropnický's claim is based on a positional analysis of his subordinated status as a "homemaker," it is entitled to greater weight. Similarly, the essay argues that Nathanson's decision to refuse to represent Stropnický is entitled to less weight as an example of a traditional "benign discrimination" type preference for the members of a traditionally disadvantaged group, than as an exercise in judgment (in the Arendtian sense) that the cause of gender equality would be better served by such a decision. The essay concludes that a proper balance between the competing claims requires a particularized analysis of the facts and circumstances effecting gender issues in the courts today.

## II. THE CASE: *STROPNICKY V. NATHANSON*<sup>19</sup>

In the summer of 1991, Joseph Stropnický sought the assistance of a lawyer to review a draft divorce settlement agreement prepared in conjunction with the termination of Stropnický's eighteen-year marriage. Stropnický's position in relation to the divorce settlement was somewhat atypical, as he had been a "househusband" for much of the marriage's

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16. See *infra* Part IV.C.2.b.

17. See *infra* Part IV.C.2.c.

18. See *infra* Part IV.C.3.

19. The following account is drawn from the February 25, 1997, written decision of a single Commissioner (Charles A. Walker, Jr.) of the Massachusetts Commission Against Discrimination in the case of *Stropnický v. Nathanson*, which is published at 19 MASS. DISCRIM. L. REP. 39 (1997) [hereinafter "M.D.L.R."], and from two newspaper articles regarding the case which appeared in the legal newspaper *Massachusetts Lawyers' Weekly* [hereinafter "MASS. LAW. WKLY."]: Barbara Rabinowitz, *Client Selection*, MASS. LAW. WKLY., Apr. 19, 1993, at B29; Mark A. Cohen, *Refusal to Represent Husband is Gender Bias: MCAD Rules Against "Wives Only" Lawyer*, MASS. LAW. WKLY., Mar. 3, 1997, at A1.

duration.<sup>20</sup> For seven years following the birth of the couple's first child, Stropnickiy stayed at home and cared for the couple's children while his wife pursued a career as a doctor. After the couple's second child turned three, Stropnickiy obtained a certificate to teach biology. However, he worked only intermittently throughout the rest of the marriage due to tight education budgets during that period.<sup>21</sup> At the time of the divorce, Stropnickiy's annual earnings were approximately one tenth of those of his wife.

The divorce mediator who helped the couple prepare its draft settlement agreement suggested that each of the parties retain counsel to review the draft agreement.<sup>22</sup> To assist the parties in finding counsel, the mediator provided a list of recommended family law practitioners.

20. Figures from the United States Bureau of Labor Statistics for the year 1991, cited in an influential law review article, found that only 415,000 men stayed out of the work force that year to "keep house," whereas approximately 24 million women did so. See Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 69 n.3 (1993) (arguing that the plight of displaced homemakers would be eased by reconfiguring laws regarding marriage and divorce along the lines of contemporary partnership law). For a more recent article dealing with our legal system's under appreciation of the value of homework, see Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996). For a wide-ranging discussion of related issues including the valuation of homework and the position of parties following divorce, see *Symposium: Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2119 (1994).

21. In November 1980, Massachusetts voters approved a ballot initiative commonly referred to as Proposition 2½. Modeled on California's Proposition 13, the Massachusetts initiative limited the annual property assessments of most cities and towns to 2½ percent of the property's fair cash value. See generally Massachusetts Teachers Assoc. v. Secretary of the Commonwealth, 424 N.E.2d 469, 472 n.4 (1981) (upholding law resulting from ballot initiative against a variety of challenges). As a result of Proposition 2½'s enactment, municipalities faced a period of fiscal scarcity, with education budgets bearing the brunt of the necessary reductions. See, e.g., *The Impact of Proposition 2½ on the Public Schools: A REPORT OF THE MASSACHUSETTS ASSOCIATION OF SCHOOL COMMITTEES* (1982); *Proposition 2½: Its Impact on Massachusetts: A REPORT FROM THE IMPACT: 2½ PROJECT AT THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY* (Lawrence E. Suskind & Jane Fountain Serio eds., 1983).

22. Representation of both parties to divorce proceedings is generally considered to involve the lawyer in representing conflicting interests. See, e.g., D.E. Evins, Annotation, *What Constitutes Representation of Conflicting Interests Subjecting Attorney to Disciplinary Action*, 17 A.L.R. 3rd 835, § 7 (1968). For more recent analyses questioning, to some degree, this traditional view, see, e.g., Teresa S. Collett, *And the Two Shall Become as One . . . Until the Lawyers are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101 (1993); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994).

One of the lawyers on the list whom Stropnický sought assistance from was Judith Nathanson,<sup>23</sup> one of three partners in a small law firm in Lawrence, Massachusetts.<sup>24</sup> The mediator described Nathanson to Stropnický as a lawyer who deals aggressively with issues of concern to wives in divorce matters. In seeking Nathanson's assistance, Stropnický hoped to benefit from Nathanson's expertise in representing wives, given the similarity of his circumstances to many "housewives."

In addition to representing wives in divorce proceedings, Nathanson represents both women and men in a variety of probate-related and other types of proceedings. Nathanson's firm solicits clients through a variety of common means including listings in the yellow and white pages, advertisements in local newspapers, and a sign outside of its office. Attorney Nathanson is also listed with the referral services of a variety of advocacy groups including the Women's Resource Center of Greater Lawrence, the National Center for Women in Family Law, and Merrimack Valley Legal Services.

Nathanson "is committed to developing the domestic relations law . . . in ways that promote and advance the interests of wives."<sup>25</sup> She represents women exclusively in divorce proceedings so that she can devote her expertise to combating gender bias in the Massachusetts court system. Ms. Nathanson states that she needs to feel a personal commitment to her client in order to be an effective representative, and that she only feels such a commitment with regard to wives in divorce proceedings. Ms. Nathanson further believes that the exclusive nature of her divorce practice causes her clients to have greater trust in her and a greater willingness to share personal and confidential information with her than would otherwise be the case. She also believes that her exclusive practice has allowed her to maintain a consistency in her legal arguments that has enhanced her credibility with the judges she appears before in probate court.

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23. Stropnický also contacted other lawyers on the list in an effort to retain counsel. The other lawyers contacted declined to represent Stropnický for reasons that are not clear.

24. Lawrence, Massachusetts is a post-industrial city which lies approximately 26 miles north of Boston, and currently has the lowest per capita income of any of Massachusetts' 351 cities and towns. See MASSACHUSETTS DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT: COMMUNITY PROFILES (1997). Lawrence was one of the early centers of the textile industry in America and was the site of a good deal of labor organizational activity by the largely female textile workers, including the famous "Bread and Roses" strike of 1912. See generally ARDIS CAMERON, RADICALS OF THE WORST SORT: LABORING WOMEN IN LAWRENCE, MASSACHUSETTS, 1860-1912 (1993).

25. Rabinowitz, *supra* note 19, at B29 (quoting respondent's pleading before the Massachusetts Commission Against Discrimination).

When Stropnický contacted Nathanson's office seeking representation, the receptionist informed him that Nathanson does not represent men in divorce cases. However, Stropnický insisted on speaking with Nathanson personally. The next day, Nathanson returned Stropnický's call and reiterated her policy of representing women exclusively in divorce proceedings. She declined to make an exception in Stropnický's case despite his explanation that his circumstances were similar to those of many women in divorce proceedings and the fact that the arguments that would be advanced on his behalf would be similar to those advanced on behalf of many of Nathanson's female clients.

Shortly thereafter, Stropnický filed a complaint against Nathanson with the Massachusetts Commission Against Discrimination (M.C.A.D. or Commission) alleging illegal gender discrimination. Stropnický stated in his complaint that he felt angry, humiliated and defeated by Nathanson's refusal to represent him on grounds of his gender. He further stated that as a result of his negative experience dealing with Nathanson, he did not make additional efforts to secure the assistance of counsel with regard to his divorce settlement agreement and subsequently regretted going forward with his divorce proceedings without the assistance of counsel.

Following a hearing held on January 26, 1996, a single M.C.A.D. Commissioner<sup>26</sup> ruled in favor of Stropnický in a thoughtful, written decision,<sup>27</sup> issued on February 25, 1997.<sup>28</sup> The Commissioner found that Nathanson's refusal to represent Stropnický solely on grounds of his gender amounted to a denial of equal treatment in a place of public

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26. Pursuant to the relevant statutes and M.C.A.D. rules, a single Commissioner, acting as hearing officer, initially hears and adjudicates complaints filed with the Commission. MASS. GEN. LAWS ch. 151B, §§ 3(6), 5 (1994); MASS. REGS. CODE tit. 804, § 1.15(5) (1996). A subsequent appeal is provided to the full Commission. MASS. GEN. LAWS ch. 151B, §§ 3(6), 5; MASS. REGS. CODE tit. 804, § 1.16 (1996).

27. See 19 M.D.L.R. at 39.

28. Stropnický's complaint was originally filed on July 24, 1991. The matter was scheduled for a public hearing on September 16, 1992, following a finding of probable cause by the Investigating Commissioner the previous month (MASS. GEN. LAWS ch. 151B, §§ 3(6), 5; MASS. REGS. CODE tit. 804, § 1.08 (1996)). Delays similar to the nearly six years between filing and initial decision in Stropnický's case have plagued complainants before the Commission. See Lynn A. Girton, *Pursuing Claims at the M.C.A.D.*, 75 MASS. L. REV. 152, 164 (1990). In its 1996 annual report, the M.C.A.D. stated that more than 5,000 new complaints had been filed with it that year, while more than 8,000 complaints remained pending at the end of the year. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION—ANNUAL REPORT (1996).

accommodation based on prohibited grounds, in violation of the Massachusetts public accommodations law.<sup>29</sup> In finding Nathanson's law office to be a place of public accommodation, the Commissioner relied upon judicial decisions interpreting the statute's coverage broadly and inclusively,<sup>30</sup> as well as the Commission's own decisions applying the statute's coverage to the offices of other professionals such as doctors and dentists.<sup>31</sup> In addition, the Commissioner looked to the Americans with Disabilities Act (ADA), which expressly defines a law office to be a place of public accommodation,<sup>32</sup> and concluded that it would be inconsistent with the Massachusetts statute's broad remedial purposes for it to be construed more narrowly than the ADA.<sup>33</sup>

The Commissioner took pains to point out that he did not "intend to undermine those professional considerations attorneys traditionally rely upon in making business decisions."<sup>34</sup> In particular, he mentioned an attorney's ability to decline representation in areas where the attorney lacks sufficient expertise to handle the case adequately.<sup>35</sup> Thus, according to the Commissioner, while an attorney retains the right to decline representation on a variety of grounds, she may not do so solely on the basis of the potential client's membership in a protected class.<sup>36</sup> The Commissioner also pointed out that the scope of his authority was

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29. The Massachusetts public accommodations law, provides, in relevant part, that it is unlawful to make "any distinction, discrimination or restriction on account of . . . sex . . . relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement." MASS. GEN. LAWS ch. 272, § 98 (1994). The statute goes on to define a "place of public accommodation" as "any place . . . which is open to and accepts or solicits patronage of the general public[.]" and provides a non-exclusive list of examples of public accommodations, including a "retail store or establishment, including those dispensing personal services." MASS. GEN. LAWS ch. 272, § 92A (1994). With regard to the "venerable history" of the Massachusetts public accommodations law (which was the first of its kind passed following the Civil War), see *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). For a thorough review of the history of such public accommodation provisions, see Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283 (1996).

30. 19 M.D.L.R. at 40 (citing *Concord Rod and Gun Club, Inc. v. Massachusetts Comm. Against Discrimination*, 524 N.E.2d 1364 (1988) (hunting and fishing club is a place of public accommodation) and *Local Fin. Co. of Rockland v. Massachusetts Comm. Against Discrimination*, 242 N.E.2d 536, 539 (1968) (the office of a finance company in the business of making loans is a place of public accommodation)).

31. 19 M.D.L.R. at 40.

32. 42 U.S.C. § 12181(7)(F) (1996).

33. 19 M.D.L.R. at 40.

34. *Id.* at 41.

35. *Id.* See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(1) (1983); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1996).

36. 19 M.D.L.R. at 41. The statute prohibits discrimination on grounds of "race, color, religious creed, national origin, sex, sexual orientation . . . deafness, blindness or any physical or mental disability or ancestry." MASS. GEN. LAWS ch. 272, § 98.



limited to analysis of Stropnick's claims under the public accommodations law and the M.C.A.D.'s procedural statutes.<sup>37</sup> Thus, he declined to address Nathanson's argument that application of the public accommodations law to her practice would violate her First Amendment rights, noting that consideration of such arguments would have to be left to any reviewing courts.<sup>38</sup>

As punishment for her statutory violation, the Commissioner ordered Nathanson to pay a \$5,000 fine.<sup>39</sup> Nathanson has appealed the decision to the full three-member Commission.<sup>40</sup> Following the full Commission's decision, either party (or both) may seek judicial review of the Commission's decision.<sup>41</sup> Such review is limited to the question of whether the Commission committed an error of law or otherwise abused its discretion.<sup>42</sup>

Not surprisingly, the Commissioner's decision has provoked a great deal of controversy among lawyers in Massachusetts. Letters to the editor of Massachusetts' leading legal newspaper, *Lawyers' Weekly*, have illustrated the range of views. Some lawyers have expressed outrage<sup>43</sup> at the Commission's intrusion into what has traditionally been considered a lawyer's unfettered discretion to choose who to accept as a client.<sup>44</sup> Other lawyers expressed dismay that Nathanson's efforts to combat well-documented examples of gender bias in Massachusetts' courts were not supported by the Commission.<sup>45</sup> A prominent Boston law professor characterized the decision as "legally correct," but expressed reservations that the decision might contribute to the current backlash against affirmative action (by treating a white male's claim of discrimination as equivalent to discrimination claims made by members of historically oppressed groups such as women and persons of color) and that the

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37. 19 M.D.L.R. at 42.

38. *Id.* See *infra* Part III.

39. 19 M.D.L.R. at 42.

40. MASS. GEN. LAWS ch. 151B, § 5.

41. MASS. GEN. LAWS ch. 151B, § 6.

42. *Id.* See also MASS. GEN. LAWS ch. 30A, § 14 (1994); *Wheelock College v. Massachusetts Comm. Against Discrimination*, 355 N.E.2d 309 (1976).

43. See Kevin J. Mahoney, *How Can MCAD Decision Comport With Cannon 7*, MASS. LAW. WKLY., March 17, 1997, at A10; Richard J. Cohen, *Ruling in Discrimination Case "Must Be Opposed,"* MASS. LAW, WKLY., Apr. 14, 1997, at A10.

44. See *infra* notes 263-65 and accompanying text.

45. James S. Weliky et al., *Discussion on MCAD Case "Misses the Point,"* MASS. LAW. WKLY., Mar. 27, 1997, at A10.

decision might dissuade attorneys such as Nathanson from gearing their practices toward representing historically disadvantaged groups.<sup>46</sup> It thus seems clear that the controversy surrounding *Stropnick v. Nathanson* is unlikely to die down anytime soon.

### III. TOWARD A FRAMEWORK FOR BALANCING FREEDOM OF ASSOCIATION AND EQUAL ACCESS CLAIMS

#### A. *The Supreme Court's Framework*

Assuming that the full M.C.A.D. will affirm the decision of its single Commissioner, and further assuming that any reviewing courts in Massachusetts will uphold the determination that Nathanson's refusal to accept Stropnick as a client amounted to a violation of the Massachusetts public accommodation law,<sup>47</sup> the Massachusetts' courts, and perhaps even the United States Supreme Court, will be faced with an instance of the by-now familiar clash between a person or persons' asserted right of freedom of association and another person or persons' claimed right of equal access to some public good, without regard to (in this case) gender.<sup>48</sup> This conflict is particularly vexing, because, in the words of Professor William Marshall, it implicates "the two virtual first principles of contemporary constitutional law: freedom and equality. The right to choose one's associates (freedom) is pitted against the right to equal treatment (equality), a most fundamental conflict."<sup>49</sup>

In a trilogy of cases from the 1980s presenting conflicts between claims of freedom of association and asserted rights of equal access to

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46. Robert V. Ward, Jr., "Painful" Discrimination Ruling is Legally Sound, MASS. LAW. WKLY., Mar. 17, 1997, at A10.

47. This seems like a fairly safe assumption in light of the Supreme Judicial Court's previous interpretations of the scope of the law's coverage. See *supra* note 30. See also *Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1297 (1994) (finding Boston's St. Patrick's Day-Evacuation Day Parade to be a place of public accommodation for purposes of MASS. GEN. LAWS ch. 272, §§ 92A, 98), *rev'd sub. nom. on other grounds*, *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (Supreme Judicial Court's interpretation of public accommodations law requiring parade organizers to allow respondent group to participate in parade had the effect of infringing upon organizers' First Amendment free speech right to control the expressive content of the parade).

48. See, e.g., Marie A. Failinger, *Equality Versus the Right to Choose Associates: A Critique of Hannah Arendt's View of the Supreme Court's Dilemma*, 49 U. PITT. L. REV. 143 (1987); Douglas O. Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 MICH. L. REV. 1878 (1984); William P. Marshall, *Discrimination and the Right of Association*, 81 NW. U. L. REV. 68 (1986).

49. Marshall, *supra* note 48, at 69.

public accommodations,<sup>50</sup> the United States Supreme Court established a relatively well-defined framework for analyzing such conflicts. The Court has divided the universe of possible associations into three categories, and has afforded heightened constitutional protection to associations falling within two of those categories. The first category granted heightened constitutional protection includes intimate and/or highly personal associations.<sup>51</sup> Intimate associations include relationships that “presuppose ‘deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one’s life.’”<sup>52</sup> In *Board of Directors of Rotary International v. Rotary Club of Duarte*, the Court gave examples of the types of associations that it had previously placed within this category, including marriages,<sup>53</sup> groups of relatives living together,<sup>54</sup> and relationships surrounding the bearing and begetting of children,<sup>55</sup> and the raising and educating of children.<sup>56</sup> However, it is quite clear that these kinds of intimate relationships are not at issue in *Stropnický*.

Nonetheless, the Court stated that it will not limit inclusion in its first category of protected associations to family relationships.<sup>57</sup> In the case of non-intimate associations, courts will determine whether a particular association is sufficiently personal to warrant heightened protection with reference to factors such as “relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.”<sup>58</sup> Thus,

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50. *New York State Club Ass’n v. City of New York*, 487 U.S. 1 (1988) (upholding application of New York City Human Rights Law to prohibit private clubs’ policy of denying membership to women); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (upholding application of California’s Unruh Civil Rights Act to prohibit Rotary Clubs’ policy against allowing women members); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) (upholding application of Minnesota’s public accommodations law to prohibit Jaycees’ policy against allowing women members).

51. *Rotary Club*, 481 U.S. at 544; *Roberts*, 468 U.S. at 617-18.

52. *Rotary Club*, 481 U.S. at 545 (quoting *Roberts*, 468 U.S. at 619-20).

53. *Id.* at 545 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978)).

54. *Id.* at 545 (citing *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977)).

55. *Id.* at 545 (citing *Carey v. Population Services Int’l*, 431 U.S. 678 (1977)).

56. *Id.* at 545 (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

57. *Rotary Club*, 481 U.S. at 546.

58. *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

with regard to the Jaycees, the Court found the group to be too large and unselective in its membership to constitute a protected “personal” association.<sup>59</sup> The Court reached similar conclusions with regard to the Rotary Clubs<sup>60</sup> and the dining club members of the New York State Club Association.<sup>61</sup>

The second category of associations to which the Court has granted heightened protection includes certain types of associations, where persons join together for purposes of engaging in activities protected by the First Amendment such as speech, assembly, petition for the redress of grievances, and the exercise of religion.<sup>62</sup> Examples that the Court has given of associations falling within this category include: an NAACP-organized consumer boycott;<sup>63</sup> certain religious organizations;<sup>64</sup> an ACLU-sponsored group effort toward meaningful access to the courts;<sup>65</sup> and unions engaged in collective bargaining activity.<sup>66</sup>

Accordingly, with regard to this second category of associations receiving heightened protection, the Court in *Roberts* found that a “not insubstantial part” of the Jaycees’ activities constituted “protected expression on political, economic, cultural, and social affairs.”<sup>67</sup> The Court noted that over the years, the organization had “taken public positions on a number of diverse issues,”<sup>68</sup> and that its members regularly engaged in “a variety of civic, charitable, lobbying, fundraising, and other activities worthy of protection under the First Amendment . . . .”<sup>69</sup> Thus, the Court concluded that the Jaycees were an “expressive” association entitled to heightened constitutional protection. By way of contrast, the Court in *Rotary Club* found that unlike the Jaycees,

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59. See *id.* at 621. Later in its opinion, the Court seemed to suggest that the Kiwanis Club, whose membership policies it regarded to be significantly more selective than those of the Jaycees, might fall into its category of protected personal associations. *Id.* at 630. However, the Court later backed off from such a suggestion in *Rotary Club*, 481 U.S. at 547 n.6.

60. In addition to their size, the Court noted the high turnover of members and the presence of strangers during most club activities as factors preventing the local Rotary clubs from falling within the first category of associations receiving heightened constitutional protection. *Rotary Club*, 481 U.S. at 546-47.

61. See *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 12 (1988).

62. See *Rotary Club*, 481 U.S. at 545; *Roberts*, 468 U.S. at 618.

63. *Roberts*, 468 U.S. at 622 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

64. *Id.* (citing *Larson v. Valente*, 456 U.S. 228 (1982)).

65. *Id.* (citing *In re Primus*, 436 U.S. 412 (1978)).

66. *Id.* (citing *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977)).

67. *Id.* at 626 (quoting Court of Appeals decision at 709 F.2d 1560, 1570 (8th Cir. 1983)).

68. *Id.* (citing 709 F.2d at 1569-70).

69. *Id.* at 627.

the Rotary Clubs do not engage in expressive activities.<sup>70</sup> In fact, the Court found that Rotary Club policy forbids the Clubs from taking “positions on ‘public questions’ including political or international issues.”<sup>71</sup> Similarly, in *New York State Club Association*, the Court found that the Association’s dining club members lacked the characteristics of protected expressive associations.<sup>72</sup>

Justice O’Connor wrote a separate opinion in *Roberts* concurring in part and concurring in the Court’s judgment upholding the application of Minnesota’s public accommodations law to the Jaycees.<sup>73</sup> Justice O’Connor did not join the Court’s finding that the Jaycees are an “expressive” association entitled to heightened constitutional protection.<sup>74</sup> In Justice O’Connor’s view, an organization must be “predominantly engaged in protected expression” in order to be entitled to the heightened constitutional protection afforded expressive associations.<sup>75</sup>

However, in Justice O’Connor’s opinion, the Jaycees’ commercial activities predominate over its expressive ones, thereby excluding it from the category of protected associations.<sup>76</sup>

The Court noted in its opinion in *Roberts* that its willingness to afford heightened protection to the two categories of associations described above derives from fundamental constitutional values. With regard to intimate/personal associations, the Court articulated its recognition that “to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.”<sup>77</sup> In the case of expressive associations, the Court stated that “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”<sup>78</sup>

70. *Board of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987).

71. *Id.*

72. *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 13 (1988).

73. *Roberts*, 468 U.S. at 631 (O’Connor, J., concurring in part and concurring in the judgment).

74. *Id.* at 632.

75. *Id.* at 635.

76. *Id.* at 640.

77. *Id.* at 618.

78. *Id.* at 622.

Despite the importance of the intimate/personal and expressive associations to fundamental constitutional values, the Court's framework does not absolutely protect such associations from any restrictions by legislative authorities whatsoever. Rather, the Court reviews such restrictions applying the type of "heightened scrutiny" that is familiar from a variety of types of cases including equal protection challenges to racial classifications,<sup>79</sup> and restrictions on speech that is protected by the First Amendment.<sup>80</sup> In such circumstances, legislative restrictions "may be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms."<sup>81</sup>

For example, in *Roberts*, despite its finding that the Jaycees were an expressive association deserving of heightened constitutional protection, the Court went on to find that the State of Minnesota had a compelling interest in enforcing its public accommodations law so as to eliminate discrimination and to assure "its citizens equal access to publicly available goods and services."<sup>82</sup> The Court ruled that this antidiscrimination interest outweighed the infringement of the Jaycee members' associational rights. The Court also concluded that the Minnesota statute abridged no more associational freedom than was necessary to accomplishing the State's goal of assuring women access to social, political and economic equality.<sup>83</sup>

The Court's establishment of two categories of associations that are entitled to heightened constitutional protection leaves behind a broad third category of "other" associations that are neither "personal" enough, nor "expressive" enough to fall into the two previously-discussed categories. Indeed, the Court's decisions can be seen as setting up a continuum, with the most "private" of associations at one end (intimate/personal associations), and the most "public" of associations

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79. See, e.g., *City of Cleburne, Texas v. Cleburne Living Ctr.*, 475 U.S. 432, 440-41 (1985); *Loving v. Virginia*, 388 U.S. 1 (1967); D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 73 n.25.

80. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 12-2 (1986); C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CINN. L. REV. 779, 780 & n.6 (1988).

81. *Roberts*, 468 U.S. at 623.

82. *Id.* at 624.

83. *Id.* at 628-29. For example, the Court concluded that the Jaycees' "ability to engage in [First Amendment] protected activities or to disseminate its preferred views" would not be hindered by a requirement to admit women as members. *Id.* at 627. The Court rejected the argument that the views of women on public issues were likely to differ from those of the Jaycees' male members, as "sexual stereotyping" of the worst sort. *Id.* at 628.

(expressive associations) at the other.<sup>84</sup> While associations falling at the ends of the continuum receive heightened constitutional protection, those falling within the middle do not. In such associations, “commercial,”<sup>85</sup> “social,”<sup>86</sup> or other such considerations predominate over personal and/or expressive ones.<sup>87</sup> Because such commercial and social considerations are not afforded as high value in our constitutional scheme as the intimate/personal or expressive considerations that predominate in associations that fall within the Court’s other two categories of associations, the Court applies its traditional low-level of scrutiny<sup>88</sup> to regulations that may infringe on freedom of association in such settings in the name of equal access. Thus, with regard to the Rotary Clubs and the private New York City dining clubs, both of which the Court found to fall within this third category of associations, the Court had little difficulty upholding the challenged applications of public accommodation laws.<sup>89</sup>

### B. *A Critique of the Supreme Court’s Framework*

A number of commentators have offered critiques of the framework established in *Roberts* and its progeny.<sup>90</sup> The most consistent thread running through these critiques seems to be taking off from De Toqueville’s celebration of America’s multitude of small-scale, informal

84. See Failinger, *supra* note 48, at 148-49.

85. *Roberts*, 468 U.S. at 635 (O’Connor, J., concurring in part and concurring in the judgment).

86. See, e.g., *Concord Rod & Gun Club v. Massachusetts Comm’n Against Discrimination*, 524 N.E.2d 1364, 1364 (1988).

87. Failinger, *supra* note 48, at 149.

88. See, e.g., *City of Cleburne, Texas v. Cleburne Living Ctr.*, 475 U.S. 432, 440-41 (1985); Robert W. Bennett, “*Mere*” *Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979); Welch, *supra* note 79, at 73.

89. *Board of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 537 (1987); *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 1 (1988).

90. See Failinger, *supra* note 48; Linder, *supra* note 48; Marshall, *supra* note 48; Deborah Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106 (1986); Aviam Soifer, *Toward a Generalized Notion of the Right to Form or Join Associations: An Essay for Tom Emerson*, 38 CASE W. RES. L. REV. 641 (1988); Kimberly S. McGovern, Note, *Board of Directors of Rotary Int’l v. Rotary Club of Duarte: Prying Open the Doors of the All-Male Club*, 11 HARV. WOMEN’S L.J. 117 (1988); Note, *State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations*, 104 HARV. L. REV. 1835 (1991) [hereinafter “*State Power*”].

associations,<sup>91</sup> that the Court's framework fails to protect adequately the contribution to pluralism and cultural diversity made by such associations by declining to extend heightened constitutional protection to a broad enough range of such associations.<sup>92</sup> However, few would argue that *all* such associations contribute equally to the advancement of fundamental constitutional values. Therefore, it seems to me, particularly in light of the genuine harm that such groups can cause by their exclusionary practices,<sup>93</sup> that the Court is on solid ground in trying to distinguish among such groups in terms of the degree to which they serve the fundamental constitutional values. In fact, my basic criticism of the Court's framework is that it does not go far enough in requiring a close fit between the associations to which it will grant heightened constitutional protection and the fundamental constitutional values that underlie its framework.

For example, it appears that the Court's framework is faulty in the extent to which it affords heightened protection to certain "personal," but not "intimate" associations.<sup>94</sup> Aside from the fact that granting such heightened protection in contexts beyond marriages, families, procreation, contraception, education and child rearing went beyond any existing precedents,<sup>95</sup> as pointed out by Professor Marshall, such small-scale groups, which may include anything from a bridge club to a country club, simply fail to advance the constitutional values that are implicated by intimate associations to a degree that is sufficient to outweigh the harm caused by exclusionary practices by such groups.<sup>96</sup> As I will argue more fully below,<sup>97</sup> genuinely intimate relationships are foundational to development of the kind individual identity that is indispensable to our scheme of self-government. By contrast, informal groups such as a bridge club simply fail to serve that end in a manner that is deserving of heightened constitutional protection. While such a criticism may seem to be beside the point in the present context, given that a law practice seems an unlikely candidate for categorization as a

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91. See Linder, *supra* note 48, at 1901; *State Power*, *supra* note 90, at 1838.

92. See Linder, *supra* note 48, at 1901-03; Marshall, *supra* note 48, at 104-05; *State Power*, *supra* note 90, at 1850-51.

93. See, e.g., Rhode, *supra* note 90; McGovern, *supra* note 90.

94. See *supra* notes 57-61 and accompanying text.

95. See Marshall, *supra* note 48, at 80.

96. *Id.* at 81. Marshall relies on Kenneth Karst's identification of society (the enjoyment of certain other people), care and commitment, intimacy (physical and emotional) and self-identification (seeing oneself through the eyes of those with whom one is intimate), as the fundamental values served by intimate associations. See Kenneth Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624, 629-39 (1980).

97. See *infra* notes 173-75 and accompanying text.



personal association for purposes of the Court's framework,<sup>98</sup> such a criticism is important to developing a comprehensive framework for addressing conflicts between claims of freedom of association and claims of equality.

The Supreme Court's framework also seems to be overinclusive at the "public" end of its continuum of associations. A framework that equates the Jaycees with groups such as the NAACP and the ACLU in terms of their importance to fundamental First Amendment values<sup>99</sup> seems to be in serious need of some fine tuning. As Justice O'Connor's opinion in *Roberts* makes clear, the Jaycees are an organization that "first and foremost . . . promotes and practices the art of solicitation and management."<sup>100</sup> In contrast, groups such as the NAACP and ACLU have been at the heart of political struggles for public justice in this country for decades. It is this latter type of political activity that ranks at the top of the hierarchy of First Amendment values, whereas the Jaycees' type of private-regarding activity in pursuit of financial self-interest ranks much farther down in terms of important constitutional values.<sup>101</sup> A framework that fails to distinguish between such groups seems unlikely to be able to provide for a proper balancing between the very significant costs of exclusion and truly central First Amendment values.

This overinclusiveness in the Court's "expressive" category seems particularly troublesome in the present context, given what seems to be so compelling about Nathanson's freedom of association claim;<sup>102</sup> that is the *political* nature of a legal practice that challenges the status quo around gender issues.<sup>103</sup> Justice O'Connor's variation on the Court's framework, which would afford heightened protection to groups that are predominately engaged in expression, would to some degree ameliorate the above-described defect in the Court's framework. However, Justice O'Connor's framework is also not fully adequate in at least two respects. First, Justice O'Connor's formulation would afford heightened protection

98. *But see infra* Part IV.A.

99. *See supra* notes 62-69 and accompanying text.

100. *Roberts v. United States Jaycees*, 468 U.S. 609, 639 (1984) (O'Connor, J., concurring).

101. *See Soifer, supra* note 90, at 657-59. *See also* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 37-38, 79-80 (1960).

102. *See supra* notes 45-46 and accompanying text.

103. I leave to Part V a discussion of what is compelling in Stropnick's competing claim to equality regardless of gender, although much of the strength of his position is likely to be readily apparent.

to “predominately expressive” organizations even when their discriminatory conduct is unrelated to their expressive purposes.<sup>104</sup> Thus, to use an example given by Professor Marshall, a “Save the Whales” organization would be protected under Justice O’Connor’s framework in its refusal to accept African-American members, even though such a policy would be wholly unrelated to its expressive purposes.<sup>105</sup> More importantly for present purposes, Justice O’Connor’s formulation also fails to account for the primary significance of political, as opposed to other forms of expression, in the hierarchy of First Amendment values.<sup>106</sup> Such a distinction would have to be made in order to capture fully what is at stake in the dispute between Stropnicki and Nathanson. In short, what is necessary therefore, is a framework that can take into account both the type of association involved and the type of expression it is engaged in when considering an association’s claim to freedom of association in the face of a competing equality claim.<sup>107</sup>

### C. *Hannah Arendt’s Spheres of Human Activity*

In an effort to correct for what is missing from the Supreme Court’s framework, I now turn to the writings of philosopher Hannah Arendt regarding what she described as the three spheres of human activity. At least two scholars have noted a congruity between Arendt’s categories and the categories of associations set forth in the Supreme Court’s above-described framework.<sup>108</sup> The directness of any link between Arendt’s writings and the Supreme Court’s framework should not be overstated. As will be clear from the following discussion, the intricacies of the constitutional doctrine that was the focus of the previous two sections were not a matter of consideration in Arendt’s writings, even when she directly addressed a decision of the Court’s. Nonetheless, Arendt’s writings seem to be a particularly promising source for providing the missing political element from the Court’s analysis, as no modern philosopher has placed a greater emphasis on the need to encourage genuine participation in politics and the importance of such participation to human development.<sup>109</sup>

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104. See Marshall, *supra* note 48, at 79.

105. *Id.*

106. See Soifer, *supra* note 90, at 657-59; MEIKLEJOHN, *supra* note 101, at 37-38, 79-80.

107. See Soifer, *supra* note 90, at 657-59.

108. See Failinger, *supra* note 48; James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1551 n.392 (1990).

109. See Hannah F. Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327 (1981).

Drawing upon the example of the ancient Greeks, Arendt saw life as divided into three spheres of activity, the private, social, and public realms.<sup>110</sup> In Greek society, the private realm was the domain of family and household.<sup>111</sup> The primary objective in the private realm was the satisfaction of material human wants and needs.<sup>112</sup> Thus, the issues to be addressed in the private realm included economic production, as well as the "more direct necessities of bodily function and species reproduction . . . ."<sup>113</sup> Because of the imperative character of such issues, necessity ruled in the private realm.<sup>114</sup> At least in Greek society, force and violence were justified in the private realm, according to Arendt, because they are "the only means to master necessity."<sup>115</sup> Arendt's apparent endorsement of this disturbing view has led her critics to accuse her of being unduly tolerant of practices such as slavery and gender domination that have historically characterized the private sphere.<sup>116</sup>

At the other extreme of Arendt's three-part division is the public realm. Arendt's historical model for the public realm was the Greek *polis*.<sup>117</sup> In the *polis*, individuals, liberated from the necessity that characterizes the private realm, came together to engage in speech and action, the highest forms of conduct in which humans can engage, in an effort to distinguish themselves from one another.<sup>118</sup> Because necessity was not present in the public realm, it was the realm of plurality and

110. See HANNAH ARENDT, *THE HUMAN CONDITION* 28 (1958). See also Liebman, *supra* note 108, at 1551 n.392; Pitkin, *supra* note 109, at 330-31. Hegel apparently offered a similar three-part division into the realms of family, civil society and politics. See Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 374 n.388 (1985), citing G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 110 (T.M. Knox trans., Encyclopedia Britannica 1952). See also SEYLA BENHABIB, *SITUATING THE SELF* 90 (1992).

111. ARENDT, *supra* note 110, at 29.

112. *Id.* at 30; Pitkin, *supra* note 109, at 331.

113. Pitkin, *supra* note 109, at 331 (citing ARENDT, *supra* note 110, at 30).

114. ARENDT, *supra* note 110, at 30.

115. *Id.* at 31. See also Richard J. Bernstein, *Rethinking the Social and the Political*, in *PHILOSOPHICAL PROFILES* 238, 242 (1986) [hereinafter Bernstein, *Rethinking*]; Pitkin, *supra* note 109, at 331.

116. See, e.g., Bernstein, *Rethinking*, *supra* note 115, at 242; RICHARD J. BERNSTEIN, *HANNAH ARENDT AND THE JEWISH QUESTION* 5 (1996). For more sympathetic readings of Arendt's views on matters of gender and equality, see *FEMINIST INTERPRETATIONS OF HANNAH ARENDT* (Bonnie Honig ed., 1995).

117. ARENDT, *supra* note 110, at 28; Bernstein, *Rethinking*, *supra* note 115, at 241.

118. ARENDT, *supra* note 110, at 25; Bernstein, *Rethinking*, *supra* note 115, at 241.

equality, where persons distinguished themselves through persuasion rather than through force and violence.<sup>119</sup> Such displays of speech and action in the public realm provided the opportunity for individuals to achieve something “more permanent than life itself,” a type of “immortality” toward which humans aspire.<sup>120</sup>

In between Arendt’s private and public realms lies the social realm.<sup>121</sup> According to Arendt, this realm did not exist throughout most of history, but rather is a relatively recent development.<sup>122</sup> The social realm is the area where “private interests assume public significance.”<sup>123</sup> Thus, formerly private interests such as economics and even matters of personal intimacy have become public concerns.<sup>124</sup> In the social realm, we “see the body of peoples and political communities in the image of the family whose everyday affairs have to be taken care of by a gigantic nation-wide administration of housekeeping.”<sup>125</sup> While economic markets are classic examples of the social realm, so too is the welfare state.<sup>126</sup> Indeed, Arendt characterized bureaucracy as the governmental form of the social realm.<sup>127</sup>

Arendt seemed to believe that modern growth of the social realm would continue to the point of “devouring” both the private and the public realms.<sup>128</sup> In this growth, Arendt saw the greatest threat of modern society. According to Arendt, the social realm is the realm of “behavior,” where various and innumerable rules (both formal and informal) tend to stunt spontaneous action and lead to the normalization and routinization of human conduct.<sup>129</sup> To Arendt, the replacement of action in the public realm with behavior in the social realm amounts to nothing short of the destruction of human freedom. In the replacement of action in the public realm with behavior in the social realm, Arendt

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119. ARENDT, *supra* note 110, at 26; Bernstein, *Rethinking*, *supra* note 115, at 241.

120. Pitkin, *supra* note 109, at 333 (quoting ARENDT, *supra* note 110, at 58, 17-21).

121. For a more detailed discussion of Arendt’s social realm, see Hannah F. Pitkin, *Conformism, Housekeeping, and the Attack of the Blob: The Origins Of Hannah Arendt’s Concept of the Social*, in FEMINIST INTERPRETATIONS, *supra* note 116, at 51 [hereinafter Pitkin, *Conformism*].

122. ARENDT, *supra* note 110, at 38. Pitkin, *supra* note 109, at 333.

123. ARENDT, *supra* note 110, at 35.

124. Pitkin, *Conformism*, *supra* note 121, at 54.

125. Bernstein, *Rethinking*, *supra* note 115, at 242 (quoting ARENDT, *supra* note 110, at 28).

126. Pitkin, *Conformism*, *supra* note 121, at 54; Bernstein, *Rethinking*, *supra* note 115, at 242.

127. Pitkin, *Conformism*, *supra* note 121, at 55-56; Bernstein, *Rethinking*, *supra* note 115, at 243.

128. Pitkin, *Conformism*, *supra* note 121, at 57.

129. Bernstein, *Rethinking*, *supra* note 115, at 242-43.

saw the seeds of totalitarianism and terror.<sup>130</sup> Therefore, Arendt viewed as a critical task, the preservation of a “public space of politics,” where human beings can act, rather than merely behave.<sup>131</sup> In order to preserve successfully such a space, social concerns such as economics must rigidly be kept separate from politics.<sup>132</sup>

Not only did Arendt believe that the behavior that characterized the social realm was incompatible with the speech and action that were necessary to the survival of the public realm, but Arendt also believed that the tools of reason and debate that were present in the public realm were incapable of resolving social questions.<sup>133</sup> According to Arendt, because they are private issues turned public, social questions are only amenable to resolution through force and violence, which are incompatible with the conditions necessary to the survival of the public sphere.<sup>134</sup> Therefore, the social question, along with the poor, dispossessed or compassionate persons who would advance it,<sup>135</sup> must be kept separate from politics for this reason as well.<sup>136</sup>

#### D. *Balancing Freedom of Association and Equality Claims in Arendt's Three Spheres*

Arendt's private, social, and public spheres correspond roughly to the three categories of associations established by the Supreme Court in its cases presenting conflicts between asserted claims of freedom of association and claimed rights of equal access to public accommodations.<sup>137</sup> However, differences in content and scope caused Arendt to reach some different (as well as some similar) conclusions from the Court as to whether the principle of freedom of association or the equality principle should be preferred when they come into conflict within a particular sphere. For example, as was pointed out above, Arendt's public realm is an arena where distinctions are made according

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130. Pitkin, *supra* note 109, at 334; Bernstein, *Rethinking*, *supra* note 115, at 244.

131. BENHABIB, *supra* note 110, at 90.

132. Pitkin, *supra* note 109, at 334-35.

133. Arendt would later identify the existence of poverty as *the* social question. See HANNAH ARENDT, *ON REVOLUTION* 86 (1965).

134. Pitkin, *supra* note 109, at 334-35; Bernstein, *Rethinking*, *supra* note 115, at 244.

135. See *infra* note 182 and accompanying text.

136. Pitkin, *supra* note 109, at 335; Bernstein, *Rethinking*, *supra* note 115, at 245.

137. See *supra* Part III.A.

to speech, debate, persuasion, and reason.<sup>138</sup> However, an atmosphere conducive to such a discourse can only exist where the participants enjoy a high degree of equality.<sup>139</sup>

Arendt acknowledges that the Greek notion of equality, which governed in her model public sphere, the *polis*,<sup>140</sup> had very little to do with modern notions of equality. The Greek notion of equality “meant to live among and to have to deal only with one’s peers, and it presupposed the existence of ‘unequals’ who [would be excluded from the political sphere] . . . [and] were always the majority of the population in a city-state.”<sup>141</sup> As pointed out above,<sup>142</sup> Arendt’s failure to attack this notion vigorously has led to much criticism of her views. Of course, absolute equality would also prevent the existence of a public sphere, as there would be no need under such circumstances to engage in debate or efforts to persuade others because everyone would already be in agreement, and there would be no capacity for persons to distinguish themselves from one another.<sup>143</sup> Therefore, what is necessary to political action is something of an equilibrium between similarity and difference, a condition that Arendt refers to as “plurality.” “Plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live.”<sup>144</sup>

The importance of equality in the public realm is one reason why Arendt argued that persons may only enter the public realm after they have been “liberated” from the necessity that governs the private realm, and have left behind its force and violence that are required to master necessity, but are incompatible with the discourse that yields public freedom.<sup>145</sup> Thus, Arendt would likely have argued that in the public realm, the equality principle should trump any conflicting freedom of association claims.<sup>146</sup> In contrast, as pointed out above,<sup>147</sup> by afford-

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138. See *supra* notes 117-20 and accompanying text. See also Bernstein, *Rethinking*, *supra* note 115, at 241.

139. See *supra* note 119 and accompanying text.

140. See *supra* note 117 and accompanying text.

141. ARENDT, *supra* note 110, at 32. See also Pitkin, *supra* note 109, at 331.

142. See *supra* note 116 and accompanying text.

143. ARENDT, *supra* note 110, at 8.

144. *Id.*

145. Bernstein, *Rethinking*, *supra* note 115, at 242.

146. See Liebman, *supra* note 108, at 1551 n.392. Of course, the freedom of association principle was not without value for Arendt in the public sphere. Indeed, the very existence of a public sphere is dependent on the presence of at least some associates with whom one can debate or make efforts to persuade and who can bear witness to one’s speech and action. See Failinger, *supra* note 48, at 162.

147. See *supra* notes 79-81 and accompanying text.

ing heightened constitutional protection to expressive associations, the Supreme Court has indicated that it will generally privilege freedom of association claims over equality claims in the public sphere.<sup>148</sup>

On the other hand, as is also discussed above,<sup>149</sup> Arendt viewed the private sphere as the realm within which matters of necessity are addressed. Because such matters can only be addressed through force and violence, equality has no place in the private realm.<sup>150</sup> Arendt saw families historically as having a single interest, and a single opinion, that was determined “by the household head who ruled in accordance with it and prevented possible disunity among the family members.”<sup>151</sup> Therefore, Arendt would probably privilege claims of freedom of association over conflicting claims of equality within the private sphere.<sup>152</sup> Here, Arendt’s priorities are consistent with those of the Supreme Court, which also gives preference to claims of freedom of association over claims of equality in its intimate/personal category by providing heightened scrutiny to regulatory enactments infringing on such intimate or personal associations.<sup>153</sup> One should note, however, that the Supreme Court’s intimate/personal category is probably a good bit narrower than Arendt’s private sphere. While the Supreme Court limits its heightened protection to intimate associations concerning matters traditionally related to families and/or family life,<sup>154</sup> and to other, undefined but very small-scale personal relationships,<sup>155</sup> Arendt’s private realm includes a broader range of associations including those relating to economics, labor, and work.<sup>156</sup>

Based on the above, it unclear how Arendt would evaluate competing claims of freedom of association and claims to equality in her social

148. *But see* Roberts v. United States Jaycees, 468 U.S. 609 (1984) (upholding application of Minnesota’s public accommodations law to the Jaycees despite use of heightened scrutiny).

149. *See supra* notes 111-15.

150. ARENDT, *supra* note 110, at 32.

151. *Id.* at 39-40. With the rise of society, Arendt saw this singularity of interest and opinion as characterizing the entire nation, which acts as one enormous family. *Id.* at 39.

152. Arendt’s failure to condemn vigorously historical practices in the private sphere such as slavery and gender domination seems to support this view.

153. *See supra* notes 79-81 and accompanying text.

154. *See supra* notes 53-56 and accompanying text.

155. *See supra* notes 58-61 and accompanying text.

156. Bernstein, *Rethinking*, *supra* note 115, at 239-41. Note that Arendt distinguished between labor and work. *See* ARENDT, *supra* note 110, at 7.

realm. Indeed, much about Arendt's social realm is ambiguous.<sup>157</sup> However, to the extent that Arendt's social realm is merely the private realm gone public,<sup>158</sup> and society is "the facsimile of one superhuman family,"<sup>159</sup> then it seems that Arendt's view that the equality principle has no place in the private realm would also extend to the social realm. This is also consistent with Arendt's view that because social questions involve claims of necessity (and thus can only be resolved through force and violence), they must be kept out of the public realm, where equality must reign.<sup>160</sup> Thus, it seems that Arendt would privilege the freedom of association principle over the equality principle in her social realm. This, recall, contrasts with the low-level of scrutiny the Supreme Court gives to regulatory restrictions of freedom of association on grounds of equality where the association is neither intimate, personal, nor expressive, but rather falls into its "other" category,<sup>161</sup> that corresponds to Arendt's social realm.<sup>162</sup> Thus, the Court can be said to prefer equality claims in this sphere.

This reading of how Arendt would evaluate competing claims of freedom of association and equality in her social realm is consistent with the interpretation advanced by Professor Failinger in her article regarding Arendt's position on the school desegregation crisis of the 1950s.<sup>163</sup> In a controversial article that appeared in *Dissent* magazine,<sup>164</sup> Arendt criticized the government-enforced desegregation of the Little Rock, Arkansas public schools. In terms of the above-described typology, Arendt saw education as a matter that traditionally fell within the private realm, but presently had aspects that fell within the social realm as well.<sup>165</sup> Because of this, the white schoolchildren's parents' associational choices not to have their children associate with the city's African-American schoolchildren, were to be preferred over the African-American schoolchildren's parents' claim to equal access.<sup>166</sup> Failinger

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157. See Pitkin, *Conformism*, *supra* note 121, at 55-56.

158. See *supra* notes 123-25 and accompanying text.

159. ARENDT, *supra* note 110, at 29.

160. See *supra* notes 133-36 and accompanying text.

161. See *supra* notes 84-88 and accompanying text.

162. See Failinger, *supra* note 48, at 165-66; Liebman, *supra* note 108, at 1551 n.392.

163. See Failinger, *supra* note 48.

164. Hannah Arendt, *Reflections on Little Rock*, 6 *DISSENT* 45 (1959).

165. *Id.* at 55. See also Failinger, *supra* note 48, at 165.

166. Failinger, *supra* note 48, at 165. Arendt's views on the school desegregation crisis were in fact a good deal more elaborate than the above-discussion suggests. Among other things, Arendt deplored the fact that children were being asked to cross boundaries that their parents had not dared to challenge. Arendt, *supra* note 164, at 50. Arendt also feared the effect on the white schoolchildren of the mixed message that they received from the fact that their parents supported segregation while their government



criticizes both Arendt's characterization of education as falling within the private and social realms rather than the public realm,<sup>167</sup> as well as her view that freedom of association should trump the antidiscrimination principle within the social realm.<sup>168</sup> Thus, Failinger concludes that Arendt erred in her opposition to school desegregation in Little Rock.<sup>169</sup> Of course, Failinger's view as to the appropriate outcome is consistent with the Supreme Court's decisions on school desegregation.<sup>170</sup> In terms of the Court's own framework for evaluating conflicting claims of freedom of association and equality of access, its results in its school desegregation decisions can be described as involving a determination that educational associations fall within the intermediate category between intimate/personal associations and expressive associations, where regulatory efforts in support of equal access will generally survive the low-level of scrutiny employed in response to freedom of association claims.<sup>171</sup>

### *E. A Critique of Arendt's Framework*

Arendt's three-part division of the spheres of human activity is susceptible to a variety of further critiques. First, Arendt's private realm, in which force and violence are used to master the necessity of bodily and material imperatives, suggests tolerance of a degree of dominance and subordination that is simply unacceptable by contempo-

supported integration. The result, she thought, would be a vacuum of authority that the children would fill with "mob rule," a precursor to totalitarianism. *Id.* at 55-56. Indeed, the central image of Arendt's article is that of a jeering mob of white children chasing an African-American child away from the school house. *Id.* at 50, 56.

Failinger points out that Arendt never publicly retracted her opposition to the government-enforced integration of the Little Rock schools. *See* Failinger, *supra* note 48, at 158. However, Arendt's biographer Elisabeth Young-Bruehl cites later correspondence between Arendt and the novelist Ralph Ellison in which Arendt acknowledged that she had failed to consider the African-American "ideal of sacrifice" identified by Ellison and the extent to which school integration served as a rite of passage in the African-American child's internalization of that ideal. *See* YOUNG-BRUEHL, HANNAH ARENDT: FOR LOVE OF THE WORLD 316 (1982).

167. Failinger, *supra* note 48, at 164-69.

168. *Id.* at 182-85.

169. *Id.* at 187-88.

170. *See, e.g.,* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

171. *See* Liebman, *supra* note 108, at 1551 n.392; *accord* *Runyon v. McCrary*, 427 U.S. 160 (1976); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). However, it should be noted that these decisions pre-date the framework established in *Roberts*.

rary standards.<sup>172</sup> Moreover, Arendt's private realm fails to account adequately for those intimate relationships that are constitutive of personal identity and are critical to human development.<sup>173</sup> As Professor Bernstein points out, modern notions of privacy, what Arendt referred to as "intimacy," did not figure into the "classic private/household and public/political division" that formed the basis for Arendt's work.<sup>174</sup> As for love, which Arendt thought could only survive in the private sphere, professor Pitkin points out that Arendt did have some appreciation for its ability to lead to self-revelation.<sup>175</sup> However, Arendt does not appear to have sufficiently appreciated the capacity of intimate personal relationships to be foundational to the kind of identity development that is necessary to participation in the public realm. Nor does she appear to have paid much attention to the utility of such intimate associations as a bulwark against the encroaching mass society that Arendt so greatly feared.

Arendt's public realm is also susceptible to criticism on grounds that it is too narrow both in terms of who may participate in public deliberation and in terms of the substance of public deliberations. In order to participate in public deliberation, according to Arendt, a person must have been liberated from the bonds of necessity.<sup>176</sup> This is because claims of necessity may not be addressed by the persuasion and deliberation that must govern in the public sphere. Rather, such claims of necessity produce rage and must be satisfied through violence, which is destructive of the public sphere. Arendt offers the example of the failure of the French Revolution in support of this point. "When the poor, driven by the needs of their bodies, burst onto the scene of the French Revolution . . . necessity appeared with them, and the result was that the power of the old regime [became] impotent and the new republic was stillborn."<sup>177</sup>

Thus, according to Arendt, the poor must be kept shrouded in the private realm, where they can attend to their basic economic needs.<sup>178</sup> By similar reasoning, the women and slaves subjected to domination in

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172. See Failinger, *supra* note 48, at 178.

173. See, e.g., Karst, *supra* note 96; Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1533 (1987).

174. Bernstein, *Rethinking*, *supra* note 115, at 242.

175. Pitkin, *supra* note 109, at 332 (quoting ARENDT, *supra* note 110, at 51, 242).

176. This view is echoed in contemporary republican conceptions of property rights as constitutive of the independence necessary to participate in public deliberation. See, e.g., Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319, 1329 (1987); William H. Simon, *Social-Republican Property*, 38 *UCLA L. REV.* 1335, 1340 (1991).

177. Pitkin, *supra* note 109, at 335 (quoting ARENDT, *supra* note 133, at 108).

178. Pitkin, *supra* note 109, at 335.

the private realm in the name of mastering necessity would also be excluded from the public realm. Indeed, as Professor Bernstein points out, the two examples Arendt relies upon as the best historical examples of the kind of deliberative process she envisions, the Greek *polis* and the American Revolution, “occurred at a time when slavery was acceptable and justified, and when women (and many others) were not considered fit to be citizens.”<sup>179</sup>

Aside from the fact that exclusion of the poor and dispossessed from public deliberation is completely incompatible with contemporary notions of equality, personhood and human dignity, Arendt’s willingness to exclude certain persons from the *polis* deprives those left to participate from the benefit of the rich voices, perspectives, and experiences of those relegated to “outsider” status. As Frank Michelman states with regard to the change in dominant consciousness that accompanied the fall of *de jure* segregation in this country: “[D]oes anyone doubt the primary and crucial role in this instance of the emergent social presence and self-emancipatory activity of Black Americans? Does anyone doubt that their impact on the rest of us has reflected their own oppositional understandings of their situation . . . .”<sup>180</sup> A sacrifice of such voices is too great, if the content or outcome of deliberations in the public sphere is to have any independent worth.

According to Arendt, not only must the poor and dispossessed themselves be kept from participation in the public sphere,<sup>181</sup> but arguments advanced on their behalf by their “well-fed” proponents, to address poor people’s own claims of social and economic necessity, must also be excluded from the public realm. Such arguments are likely to be motivated by pity and compassion, emotions which like the poor’s

179. Bernstein, *Rethinking*, *supra* note 115, at 249. Bernstein further explains Arendt’s praise for the American Revolution (in contrast to her criticism of the French Revolution) as resulting from its character as “essentially a *political* revolution dedicated primarily to the founding and constitution of political freedom. It was not primarily concerned with *liberation* from biological necessity, or even with *liberation* from oppressive rulers.” *Id.* at 244 (emphasis in original). However, Bernstein later characterizes the American Revolution as a quest for social liberation. *Id.* at 255.

180. Michelman, *supra* note 173, at 1530 (citations omitted).

181. Pitkin offers a limited defense of Arendt against charges of hostility to the poor (Pitkin, *supra* note 109, at 341) and to women (*id.* at 341-42), while nonetheless arguing for a public sphere much broader in scope than that advocated by Arendt.

claims of necessity, cannot be addressed through debate and persuasion, but rather can only be addressed through force and violence.<sup>182</sup>

If all claims by and on behalf of those in economic or social need must be excluded from the public realm, the question must be asked, what is left to talk about there?<sup>183</sup> Bernstein quotes Mary McCarthy, a friend and supportive critic of Arendt's,<sup>184</sup> who put the question directly to Arendt at a 1972 conference on Arendt's work:

[I]f all questions of economics, human welfare, busing, anything that touches the social sphere, are to be excluded from the political scene, then I am mystified. I am left with war and speeches. But the speeches can't be just speeches. They have to be speeches about something.<sup>185</sup>

According to Bernstein, Arendt's response was "evasive and feeble."<sup>186</sup> Indeed, Arendt's view that the highest end of speech and action in the public sphere is for the individual to achieve immortal fame or permanent remembrance, conjures up images, as Pitkin states, of "posturing little boys clamoring for attention . . . wanting to be reassured that they are brave, valuable, even real."<sup>187</sup> As Pitkin further states, "[n]o account of politics or the public can be right that wholly empties them of substantive content, of what is at stake."<sup>188</sup> Yet in her effort to preserve a sphere of public freedom, in which action can flourish, Arendt left no room for addressing the many questions of social justice that *can* only be answered through politics.<sup>189</sup>

Despite this critique, there is much worth preserving in Arendt's conception of the public realm. Particularly appealing is Arendt's celebration of politics at a time when public perceptions of politics and the worthiness of participation therein are at an apparent low.<sup>190</sup> As Pitkin points out, Arendt draws upon Aristotle in her view that humans

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182. Pitkin, *supra* note 109, at 342; Bernstein, *Rethinking*, *supra* note 115, at 244-45.

183. Pitkin, *supra* note 109, at 337.

184. See HANNAH ARENDT & MARY MCCARTHY, *BETWEEN FRIENDS: THE CORRESPONDENCE OF HANNAH ARENDT AND MARY MCCARTHY, 1949-1975* (Carol Birmingham ed., 1995).

185. Bernstein, *Rethinking*, *supra* note 115, at 250.

186. *Id.* at 251.

187. Pitkin, *supra* note 109, at 338. Pitkin goes on to argue that Arendt could not have meant to celebrate the mere posturing that the above reading of her writings suggests. *Id.* at 341.

188. *Id.* at 342.

189. See Bernstein, *Rethinking*, *supra* note 115, at 252-53.

190. Pitkin, *supra* note 109, at 327. See also E.J. DIONNE, *WHY AMERICANS HATE POLITICS* (1991); WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY* (1992). Bernstein properly points out that Arendt's public sphere clearly implicates more than merely voting or traditional party politics. Bernstein, *Rethinking*, *supra* note 115, at 256.

will reach their highest potential in *polis* citizenship.<sup>191</sup> However, according to Pitkin, rather than celebrating the *polis* as a means for “the agonal striving to distinguish oneself before one’s peers and become immortal[,]”<sup>192</sup> Aristotle championed the *polis* as a means to achieve justice.<sup>193</sup> Invariably questions of justice involve issues of “economic privilege and social power.”<sup>194</sup> Therefore, according to Pitkin, the key to realizing Arendt’s ambition for public freedom is not to banish “the social question” from public life as Arendt suggests, but rather “to make it political in order to render it amenable to human action and direction.”<sup>195</sup>

### *F. The Supreme Court and Arendt: A Reconstruction*

By taking together the Supreme Court’s categories of associations, Arendt’s three spheres of human activity, and the critiques presented of each of these formulations, it is possible to reconstruct categories that provide a useful framework for evaluating Nathanson’s claim of freedom of association against Stropnick’s claim of equal access to counsel.

#### *1. Political Associations*

The Supreme Court’s category of expressive associations is overinclusive because it would provide heightened protection to associations, such as the Jaycees, that exist primarily to advance the personal social and economic aims of their members.<sup>196</sup> Arendt was surely correct in at least fearing the potentially corrupting effect on the public realm of claims of economic self-interest or other similar issues that she would have preferred be confined to the private realm. The recent congressional hearings into possible illegal campaign contributions

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191. Pitkin, *supra* note 109, at 338 (citing ARISTOTLE, *POLITICS* 5-6 (Sir Ernest Barker, trans., 1958)). For a critique of legal writers’ use (or misuse) of Aristotle’s conception of politics, see Miriam Galston, *Taking Aristotle Seriously*, 82 CAL. L. REV. 329 (1994).

192. Pitkin, *supra* note 109, at 338.

193. The primary thesis of Pitkin’s fabulous essay is that Arendt’s vision of politics needs to be infused with modern conceptions of justice.

194. Pitkin, *supra* note 109, at 339.

195. *Id.* at 346.

196. *See supra* Part III.B.

to the two major political parties<sup>197</sup> and the devastating effects of big money on participation in electoral politics<sup>198</sup> are clear illustrations of this problem. Pitkin is surely aware of this danger too when she states that private power may become sufficiently great such that “it may even outweigh and control the formally defined public realm, in effect making policy for the whole society in the private interest and under the control of the few.”<sup>199</sup>

However, Pitkin seems to believe that the public realm has something of a self-regulating mechanism that will prevent realization of Arendt’s worst fears. Though persons may

come to politics with [their] private interest firmly in hand, seeking by any means necessary to get as much as [they] can out of the system[,] . . . actual participation in political action, deliberation, and conflict may make us aware of our more remote and indirect connection with others, the long-range and large-scale significance of what we want and are doing.<sup>200</sup>

We may be drawn into politics “by personal need, fear, ambition or interest,” but once in the arena, “[w]e are forced, as Joseph Tussman has put it, to transform ‘I want’ into ‘I am entitled to,’ a claim that becomes negotiable by public standards.”<sup>201</sup>

I am much less sanguine than Pitkin about the capacity of the public sphere to transform the “claiming” behavior of certain private and self-regarding interests. The above-cited examples demonstrate that forays into politics by aggregations of self-regarding interests such as large corporations and political pressure groups have shown a much greater capacity to transform the political sphere into something far from the realm of public freedom that Arendt sought. Thus, Arendt was on the right track in trying to limit the entry of corrosive agents into the political realm and to preserve a space for public freedom.

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197. See, e.g., Andrew Ferguson, *My Hearings Right or Huang*, WKLY STANDARD, July 28, 1997, at 24; Andrew Ferguson, *What If They Held a Hearing and Nobody Came?*, WKLY STANDARD, Aug. 4, 1997, at 23; *Following the Money*, NEW REPUBLIC, July 28, 1997, at 9; *Inside the Belly of the Beast*, ECONOMIST, July 26, 1997; David Shribman, *O Democracy!/Politics*, FORTUNE, Aug. 4, 1997, at 34.

198. See, e.g., Marty Jetzer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 467 (1994); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994). But see David J. Weidman, *The Real Truth About Federal Campaign Finance: Rejecting the Hysterical Call for Publicly Financed Congressional Campaigns*, 63 TENN. L. REV. 775 (1996).

199. Pitkin, *supra* note 109, at 344.

200. *Id.* at 347.

201. *Id.* (quoting JOSEPH TUSSMAN, OBLIGATION AND THE BODY POLITIC 78-81, 108, 116-117 (1960)).

However, Arendt's public realm is underinclusive in terms of who and what will be admitted into the realm of politics. I absolutely reject, along with Pitkin, Bernstein and Arendt's other critics, the notion that entry into the public realm ought to be limited on grounds of wealth, gender, status in society, or a desire to address questions of poverty and inequality. Nonetheless, it is possible to envision a middle ground between the Supreme Court and Arendt's formulations, with the limiting principle being the presence of a genuine willingness to embrace the Aristotelian "spirit" of the *polis* that Pitkin refers to.<sup>202</sup> That spirit is a willingness to engage in a collective search for the public good,<sup>203</sup> as opposed to the desire to get as much out of the system for oneself as is possible.<sup>204</sup> Such a conception of a political sphere is certainly broad enough to address the claims of Pitkin's "alienated and apathetic oppressed, who do not approach politics with their self-interest firmly in hand, . . . [but whose] personal trouble comes to be seen as an actionable public issue, a matter of justice."<sup>205</sup> However, it would not include the above-cited<sup>206</sup> example of Pitkin's reconstructed *homo faber*.<sup>207</sup>

Such a framework, which would provide heightened protection to associations desiring to engage in collective deliberations regarding the common good, what I will refer to as political associations, also has the advantage of providing for the primacy of political activity in the hierarchy of First Amendment values, and thus is capable of evaluating what is laudatory about Nathanson's practice in a way that the Supreme Court's unreconstructed framework is not.<sup>208</sup> Obviously, making determinations as to which associations will be entitled to heightened protection on the above-described grounds will be a difficult task. Those entering the public realm for self-seeking purposes will always be able to hire skillful lawyers to dress up their claims of private interest in terms of the public good. However, at least in the context of constitu-

202. *Id.* at 338, 346.

203. *Id.* at 339.

204. See MEIKLEJOHN, *supra* note 101, at 37.

205. Pitkin, *supra* note 109, at 347-48; accord MEIKLEJOHN, *supra* note 101, at 38.

206. See *supra* note 200 and accompanying text.

207. According to Pitkin, Arendt's *homo faber* is the technical thinker who is constantly searching for the best possible means to achieve his or her own private ends. Pitkin, *supra* note 109, at 340. It is *homo faber* who enters public life seeking to claim as much from the system for him or herself as is possible.

208. See *supra* notes 101 and 102 and accompanying text.

tional adjudication, it is possible to distinguish associations that have formed to assert claims of public justice, such as the NAACP-led boycott in *Claiborne Hardware*<sup>209</sup> and the ACLU-led effort to force accountability for the government-coerced sterilization of Medicaid applicants in *In re Primus*,<sup>210</sup> from associations formed to promote the personal economic and social interests of their members, often through exclusionary practices that are no longer considered acceptable.<sup>211</sup> While the Court may have erred in its effort to draw such a line in *Roberts*, the reconstructed framework provides an opportunity for promoting the type of vibrant public realm that Arendt envisioned, while preserving that realm against some of the destructive forces that Arendt so feared.

The above reasoning appears to support the balance struck by the Supreme Court in favoring claims of freedom of association over claims of equality (by applying strict scrutiny to legislative restrictions on freedom of association) with regard to political associations.<sup>212</sup> However, Arendt is surely right that even in an expanded public realm, a high degree of equality must be present in order for the type of speech, debate, and persuasion necessary for public freedom to occur.<sup>213</sup> Thus, perhaps what is necessary with regard to legislative restrictions on the freedom of political associations is a form of “hard-look” review,<sup>214</sup> that engages in a genuine consideration of competing claims, rather than the mechanistic, “strict in theory, fatal in fact”<sup>215</sup> application of strict scrutiny, or the “wink and a nod” application of low-level scrutiny that has characterized previous Court decisions. Perhaps the Court in *Roberts* engaged in just that sort of review when it upheld application of Minnesota’s public accommodations law to the Jaycees despite nominally applying strict scrutiny.<sup>216</sup> In any event, Part V of this Article will be devoted to such an evaluation of the competing claims advanced by Stropnick and Nathanson.

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209. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 886 (1982).

210. *In re Primus*, 436 U.S. 412, 412 (1978).

211. *See, e.g.*, *Board of Directors of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 537 (1987); *New York State Club Ass’n v. City of New York*, 487 U.S. 1, 1 (1988).

212. *See supra* notes 79-81 and accompanying text.

213. *See supra* notes 138-39 and accompanying text.

214. *See* Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69 (1985).

215. *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring).

216. *See supra* notes 82-83 and accompanying text.



## 2. *Private Associations*

The provision of heightened constitutional protection to certain intimate associations within the Court's framework<sup>217</sup> seems to present the opportunity to compensate for Arendt's failure to appreciate fully the importance of such associations within her conception of the private realm.<sup>218</sup> Unfortunately, the Court has not always protected adequately those intimate associations that are constitutive of the sense of personal identity that is necessary to participation in the public realm.<sup>219</sup> Nonetheless, the Court has in fact expressed sensitivity to the need for heightened protection of the private realm. The Court's observation that "to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State[.]"<sup>220</sup> can provide a useful basis for a workable conception of a private realm worthy of heightened protection.<sup>221</sup>

On the other hand, the Court's willingness to extend such heightened protection to other, non-intimate, small-scale personal groups,<sup>222</sup> fails to advance either the value of certain intimate relationships as foundational to the type of identity that is necessary in the public realm, or other values important to the public realm (except to the extent that such groups are engaged in political activity, in which case they will fall within the previous category of political associations anyway). While persons do develop some sense of identity from belonging to such groups, Arendt pointed out in *Reflections* that this is not the type of personal identity that is constitutive of genuine politics.<sup>223</sup> Thus, the proper scope of a private realm entitled to heightened constitutional protection should be restricted to intimate relationships, and the small-

217. See *supra* notes 52-56 and accompanying text.

218. See *supra* notes 173-74 and accompanying text.

219. See Michelman, *supra* note 173, at 1532 (criticizing the Court's failure in *Bowers v. Hardwick*, 478 U.S. 186 (1986), to protect intimate homosexual relationships as constitutive of identity and citizenship).

220. *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984).

221. Note that here, the Court and Arendt's preference for the freedom of association principle over the equality principle in the private realm are consistent. See *supra* notes 152-53 and accompanying text.

222. See *supra* note 60 and accompanying text.

223. See Arendt, *supra* note 164, at 51.

scale groups that the Court discusses should be relegated to the following category.

### 3. *Social/Commercial Associations*

Finally, the Supreme Court's willingness to allow the community as a whole (through its elected representatives) significant leeway in its efforts to regulate associations that do not fall within either of the Court's categories of expressive or intimate/personal associations, provides a possible means to control the sprawl of Arendt's social realm that she so greatly feared. As Pitkin puts it:

Most aspects of social life are left to evolve through drift and private power. Many activities probably can be successfully conducted only in that way. But the distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly shaping its policy, its way of life. . . . [C]itizenship enables us jointly to take charge of and take responsibility for the social forces that otherwise dominate our lives and limit our options, even though we produce them.<sup>224</sup>

In its above-described framework, the Supreme Court's privileging of public efforts, in the form of anti-discrimination legislation, to control the spread of social forces such as racial and gender bias, is worthy of support, representing a policy that's preferable to Arendt's willingness to let freedom of association trump equality in the social/commercial realm.

As "reconstructed" above, the three-part division into private, social/commercial, and political associations, and the corresponding balance between freedom of association claims and equality claims within each category may provide one mechanism for preserving a thriving public realm—an idea that is central to Arendt's thinking as well as to First Amendment jurisprudence. The reconstructed framework may also provide a means for protecting those foundational intimate relationships that are also necessary to the existence of such a public realm. For this reason, it is worth inquiring which category within this framework Nathanson's law practice falls within, recalling that she represents only women in divorce cases.<sup>225</sup>

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224. Pitkin, *supra* note 109, at 344.

225. Of course, Nathanson's decision to associate only with women divorce clients, is merely the flip-side of her decision not to associate with Stropnicki for purposes of his divorce case. See *Roberts*, 468 U.S. at 609; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234-35 (1977).

## IV. WHAT TYPE OF ASSOCIATION IS NATHANSON'S LAW PRACTICE?

The next step of the analysis is to determine which category of association within the reconstructed framework we should place Nathanson's legal practice.

A. *Is Nathanson's Law Practice a Private Association?*

Nathanson's law practice seems an unlikely candidate for categorization as a private association within our reconstructed framework. Lawyer-client relationships intuitively seem to be much less personal than the familial and related types of relationships that the Court has previously considered to fall within its intimate category.<sup>226</sup> This category roughly corresponds to the reconstructed framework's private association category.<sup>227</sup> Charles Fried has analogized the relationship between lawyer and client to one between friends.<sup>228</sup> However, it does not seem that friendships, beyond perhaps the closest personal kind, ought to fall within the private association category in our reconstructed framework. As Professor Marshall points out, most friendships implicate "the values of intimate association . . . to a much lesser degree than in family-type relationships because the depth of involvement and the emotional stake of the participants are not as great."<sup>229</sup> Fried does not go so far as to depict lawyer/client relationships as analogous to *very* close personal friendships. Instead, Fried categorizes the lawyer along with certain "special purpose friends," whose care and concern are limited in scope in a way that is not the case with family members and loved ones.<sup>230</sup> Thus, it seems clear that the attorney/client relationships created by Nathanson's law practice ought not be considered private associations for purposes of our reconstructed framework.

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226. See *supra* notes 53-56 and accompanying text.

227. See *supra* Part III.F.2.

228. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

229. Marshall, *supra* note 48, at 82 n.91. Professor Karst seems to take a more expansive view in terms of inclusion of close friendships within a category of constitutionally protected intimate associations, but he too acknowledges that the case for inclusion of friendships is weaker than the one for inclusion of family-type relationships. See Karst, *supra* note 96, at 629 & n.26.

230. Fried, *supra* note 228, at 1071.

B. *Is Nathanson's Law Practice a Commercial Association?*<sup>231</sup>

Nathanson earns her living through her practice. Therefore, it is tempting simply to characterize Nathanson's law practice as a commercial association, as she provides for her basic material needs such as food and shelter by offering legal services in exchange for money.<sup>232</sup> However, it is certainly the case that many persons involved in what would likely be considered political associations, such as unions, political campaigns, and advocacy groups, receive some sort of compensation for their work. Thus, the mere fact that Nathanson receives compensation for her work ought not be dispositive as to deciding the category of association into which her practice falls.

Moreover, according to the current dominant view of legal practice, described as the "professional model,"<sup>233</sup> remuneration is considered to be merely incidental to legal practice. According to Professor Russell Pearce, the essence of the professional model

is a bargain between the profession and society: The profession agree[s] to use its skills<sup>234</sup> for the good of its clients and the public. In exchange for this promise, society cede[s] authority to the profession, including the exclusive right to practice law and autonomy from government and to some extent, market regulation.<sup>235</sup>

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231. I do not think it necessary to address separately the question of whether Nathanson's law practice should be considered to be a "social" association, which would also cause it to be located within the reconstructed framework's intermediate category. Suffice to say that Nathanson's law practice does not seem remotely analogous to the many types of associations, ranging from groups such as country clubs to soccer teams, that people join to develop friendships or other types of social relationships, that are not sufficiently intimate to place such groups within the private association category, but nonetheless may contribute greatly to one's personal sense of welfare. See Marshall, *supra* note 48, at 82.

232. See, e.g., *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773, 787-88 (1975) ("exchange of [legal services] for money is 'commerce' in the most common usage of that word").

233. See, e.g., Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 1, 144 (Robert L. Nelson et. al. eds., 1992); William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 *STAN. L. REV.* 565 (1985).

234. The professional model assumes that the skills offered for sale by lawyers are beyond those possessed by laypersons, and that the "esoteric knowledge" possessed by lawyers is needed by laypersons at certain times. Russell Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 *N.Y.U. L. REV.* 1229, 1239 (1995).

235. *Id.* at 1238. Pearce describes the professional model as a "paradigm," as that term is used by Thomas S. Kuhn in his landmark book. See THOMAS H. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). According to Pearce, the "Professionalism Paradigm" emerged at the end of the nineteenth century, following the

While it is understood within the professional model that lawyers will be compensated, perhaps even handsomely, for their willingness to share their expertise, it is believed that “[i]n contrast to businesspersons, who maximize financial self-interest, altruistic lawyers place the interests of the common good and of their clients above their own financial and other self-interests.”<sup>236</sup>

Three central elements of the professional model can be identified from the above description: (1) the primacy of client interests; (2) protection of the public good; and (3) the incidental nature of the lawyer’s financial interests. Of these, the third seems most significant to the question of whether Nathanson’s law practice should be considered to be a commercial association. A discussion of this element follows. The other two central tenets of the professional model will be discussed in the next section considering whether Nathanson’s law practice ought to be categorized as a political association.

It seems highly likely that the average layperson would vigorously dispute the professional model’s assertion that financial self-interest is merely incidental to the practice of law. This view is not without basis, as there is ample evidence to suggest that large numbers of lawyers have come increasingly to view their work as a means towards maximizing their financial position,<sup>237</sup> thus rendering them more and more like Arendt’s *homo faber*. An increasing number of legal academics, including, among others, Pearce and Anthony Kronman,<sup>238</sup> have

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then-dominant “Republican Paradigm’s” inability to resolve what he calls the “Business-Profession dichotomy” (the distinction between a business and a profession) in the practice of law. Pearce, *supra* note 234, at 1241. The Republican Paradigm, which held “that individual professionals . . . were above the self-interest of the market [and] served as guardians of the public good,” was undermined by what was perceived to be a period of increasing economic selfishness on the part of lawyers. *Id.* The thesis of Pearce’s provocative article is that the Professionalism Paradigm has similarly failed to resolve the Business-Profession dichotomy, and is in the process of being replaced, in the Kuhnian sense, by a “Business Paradigm,” pursuant to which the practice of law will be conceived of more strictly as a business, as opposed to a profession. *Id.* at 1232.

236. *Id.* at 1239.

237. *Id.* at 1250-53; Simon, *supra* note 233, at 579. Pearce denominates the bar’s method of enforcing the subordination of attorney financial interests tenet of the professional model as the “Profit Maximizer” taboo. Pearce, *supra* note, 234, at 1242-43. He describes recent examples of “rent-seeking” behavior on the part of lawyers in terms of widespread violations of the “Profit Maximizer” taboo.

238. See, e.g., ANTHONY KRONMAN, *THE LOST LAWYER: THE FALLING IDEALS OF THE LEGAL PROFESSION* 294-95 (1993).

concluded that the subordination of lawyer financial self-interest that was critical to maintenance of the professional model is quickly becoming a thing of the past, if it ever existed at all.

Pearce locates the beginnings of the ascendancy of lawyer financial self-interest in the United States Supreme Court's decision in *Bates v. State Bar of Arizona*.<sup>239</sup> In *Bates*, the Court struck down bans on lawyer advertising as violative of First Amendment protections of commercial speech.<sup>240</sup> Pearce identifies such bans as having been of central importance to the professional model's subordination of attorney financial self-interest tenet.<sup>241</sup> However, in *Bates*, the Court embraced the notion of the lawyer as a self-interested business person.<sup>242</sup> The Court has subsequently extended *Bates*' reasoning to strike down a variety of limitations on lawyers' commercial activities.<sup>243</sup> Nathanson advertises for clients and engages in a variety of business-like practices in an effort to promote her firm.<sup>244</sup>

Another example of the Supreme Court's view of lawyering as primarily remunerative activity can be seen in its decision in *Hishon v. King and Spaulding*,<sup>245</sup> where the Court upheld the application of Title VII of the Civil Rights Act of 1964 to a law firm's decision regarding whether to make a particular female lawyer a partner. The Court clearly considered a law firm partnership to constitute a commercial association in terms of its previously-described framework. From this conclusion, the Court applied only low-level scrutiny to Title VII's limitation on the partners' asserted right of freedom of association, upholding the statute's

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239. 433 U.S. 350 (1977).

240. *Id.*

241. Pearce, *supra* note 234, at 1243 & n.62.

242. "In this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind." 433 U.S. at 371.

243. See, e.g., *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990) (permitting advertising of certification as a specialist); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (overturning ban on direct mailings); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (prohibiting ban on offering legal information regarding nature of potential claims and on use of illustrations to catch reader's attention); *In re R.M.J.*, 455 U.S. 191 (1982) (prohibiting, among other things, ban on lawyer's advertising admission to practice before Supreme Court). But see *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (upholding Florida Rules creating a 30-day period following an accident during which lawyers may not target solicitations at accident victims or their families); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding ban on in-person solicitation for profit). Pearce suggests that *Florida Bar* may be a step towards the full Court heeding the request of Justices O'Connor, Scalia and Chief Justice Rehnquist in their dissent in *Shapiro* for a reconsideration of the ruling in *Bates*. Pearce, *supra* note 234, at 1250 n.108. Nonetheless, he is confident that such a ruling would do little to resolve the crisis of the professional model. *Id.*

244. See *supra* Part II.

245. 467 U.S. 69 (1984).

application.<sup>246</sup> *Hishon*, of course, is not directly on point because it focused on the association created by attorneys' choice of partners rather than their choice of clients. However, it is further evidence of the erosion of the incidental nature of attorney financial self-interest tenet of the professional model.

In sum, it seems like there is not enough left of the subordination of attorney financial self-interest tenet for it, in itself, to prevent characterization of Nathanson's law practice as a commercial association for purposes of our reconstructed framework. On the other hand, there is no evidence that Nathanson's rejection of Stropnický as a client was in fact motivated by commercial concerns. Although we don't have enough information in the sketch that I've provided to know this for certain, it seems likely that Nathanson's rejection of Stropnický as a client worked against her short term financial interests, by costing her a potential pay check. Thus, while there are certainly elements leading one to characterize Nathanson's law practice as a commercial association, these elements are not so strong as to necessarily outweigh political elements in her practice, the subject of the next section.

### *C. Is Nathanson's Law Practice A Political Association?*

Nathanson's law practice can be viewed from a couple of possible perspectives for purposes of determining whether it ought to be categorized as a political association within our reconstructed framework. The first is that of the professional model. The first two subsections within this section will focus on whether Nathanson's practice should be considered to be a political association in light of the professional model's two remaining identified tenets: the primacy of client interests and protection of the public good. An alternative perspective from which one can view Nathanson's law practice is that of the public interest lawyering model.

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246. *Id.* at 78.

## 1. *The Professional Model Perspective*

### a. *The Primacy of Client Interests*

As it has matured, the professional model presents the view that “a lawyer [shall] act as a partisan advocate on behalf of her client.”<sup>247</sup> “[A] lawyer is expected to devote energy, intelligence, skill, and personal commitment to the single goal of furthering the client’s interests as those are ultimately defined by the client.”<sup>248</sup> As set forth in one of the two closest approximations to an authoritative codification of the tenets of the professional model,<sup>249</sup> the ABA Model Code of Professional Responsibility requires that a lawyer represent a client “zealously,”<sup>250</sup> and may not “fail to seek the lawful objectives of a client.”<sup>251</sup> Rules protecting attorney-client communications as confidential,<sup>252</sup> and broadly prohibiting lawyers from representing conflicting interests,<sup>253</sup> also narrow the scope of the lawyer’s focus to the client’s immediate interests. While professional responsibility rules grant lawyers a good deal of discretion with regard to strategy and tactics, i.e., the means by which a client’s objectives will be pursued,<sup>254</sup> defining the substance, purpose, and message of the legal representation are responsibilities that rest firmly with the client.<sup>255</sup>

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247. Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L.J. 2475, 2495 (1993).

248. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.3, at 578 (1986).

249. The other one being the ABA Model Rules of Professional Conduct.

250. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, DR 7-101 (1980) [hereinafter MODEL CODE]. It was this set of provisions that governed Nathanson’s law practice at the time the matter arose. However, effective January 1, 1998, the Massachusetts Supreme Judicial Court adopted a new set of professional responsibility standards for Massachusetts attorneys based on the Model Rules. See SUPREME JUDICIAL COURT RULE 3:07 (1998).

251. MODEL CODE, *supra* note 250, at DR 7-101(A). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1980) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation . . .”) [hereinafter MODEL RULES].

252. MODEL CODE, *supra* note 250, at DR 4-101; MODEL RULES, *supra* note 251, at Rule 1.6. Exceptions are provided, however, where the lawyer’s fee is in dispute or where the attorney is charged with misconduct. See MODEL CODE, *supra* note 250, at DR 4-101(c)(4); MODEL RULES, *supra* note 251, at Rule 1.6(b)(2).

253. MODEL CODE, *supra* note 250, at DR 5-101; MODEL RULES, *supra* note 251, at Rule 1.7.

254. Cahn, *supra* note 247, at 2498-99. See also MODEL RULES, *supra* note 251, at Rule 1.2 cmt. 1 (“In questions of means, the lawyer should assume responsibility for technical and legal tactical issues . . .”).

255. Cahn, *supra* note 247, at 2498-99. See also MODEL RULES, *supra* note 251, at Rule 1.2 cmt. 1 (“The client has ultimate authority to determine the purposes to be served by the legal representation . . .”) The well-known “client-centered” approach to lawyering, see DAVID BINDER ET AL., LAWYERS AS COUNSELORS—A CLIENT-



Given the radical subordination of substantive attorney goals to those of clients within the professional model, it is hard to see how a lawyer's choice of clients could be characterized as an act of political expression on the part of the lawyer warranting the heightened protection offered to the category of political associations. Perhaps if the client is engaged in conduct that would clearly fall within the political realm, the attorney's decision to represent that person could be considered to be an act of political association.<sup>256</sup> However, the professional model rejects even that degree of identification of the lawyer with client objectives. According to the Model Rules of Professional Conduct, "[a] lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>257</sup>

Moreover, the notion of a political association based on the objectives of the client will not suffice to place Nathanson's law practice into the category of political associations. This is the case because it seems unlikely that many of Nathanson's divorce clients view themselves as activists.<sup>258</sup> Such persons most likely seek out Nathanson's expertise in order to emerge from their divorce proceedings in the best position possible, both economically and with regard to family issues such as child custody and visitation rights. Such persons might even be compared to Arendt's *homo faber*,<sup>259</sup> whose associations fall within the social/commercial category of my reconstructed framework.

It is worth noting that the ethical foundations for the view of the professional model that the attorney must subordinate his or her own interests and represent vigorously all lawful client interests lie in notions

CENTERED APPROACH (1991), suggests techniques to help lawyers better to assist their clients in identifying the goals and objectives of representation, without challenging the fundamentally subordinate role of lawyers articulated by the professional model.

256. With regard to the representation of clients engaged in political activity, see Symposium, *Breaking the Law: Lawyers and Clients in Struggles for Social Change*, 52 U. PITT. L. REV. 723 (1991). See also Nancy D. Polikoff, *Am I My Client?: The Role Confusion of a Lawyer Activist*, 31 HARV. C.R.-C.L. L. REV. 443 (1996).

257. MODEL RULES, *supra* note 251, at Rule 1.2(b).

258. Professor Martha Minow questions this assertion, suggesting that many women become politicized and committed to gender equality during the divorce process, particularly those who are leaving abusive relationships and/or are facing dramatic reductions in their standard of living following divorce. My contrary view is based on my own experiences in other political lawyering contexts in which clients have either failed to share or have affirmatively rejected their lawyers' broader political aims.

259. See *supra* notes 200-01, 206 and accompanying text.

of individual “dignity, privacy and autonomy.”<sup>260</sup> The argument along these lines in favor of the subordination of attorney interests to client interests has perhaps best been articulated by Professor Stephen Pepper,<sup>261</sup> following up on Charles Fried’s *The Lawyer as Friend*.<sup>262</sup> According to Pepper, individual autonomy is the primary value to be served by our legal system.<sup>263</sup> Achievement of such autonomy requires mastery of legal rules and institutions, which in turn requires access to lawyers.<sup>264</sup> However, true first-class citizenship (maximum autonomy) requires that clients’ mastery of law be unfettered by an attorney’s views regarding morality or the political propriety of the client’s objectives.<sup>265</sup>

For similar reasons, proponents of this view also believe that notions of individual autonomy require that lawyers themselves have absolute discretion to determine who they will represent as clients.<sup>266</sup> Indeed, many see this as the flip-side of the requirement of a lawyer’s unwavering loyalty to client objectives once the attorney has decided to represent a particular client.<sup>267</sup> Thus, the view of the professional model has long been:

[A] lawyer may refuse to represent a client for any reason at all—because the client cannot pay the lawyer’s demanded fee; because the client is not of the

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260. Cahn, *supra* note 247, at 2497 n.98 (quoting Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985)).

261. See, e.g., Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545 (1995); Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613 (1986).

262. See Fried, *supra* note 228.

263. Pepper, *supra* note 261, at 616-17.

264. *Id.* at 617.

265. *Id.* at 618. For a critique of Pepper’s argument, see David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 4 AM. B. FOUND. RES. J. 637 (1986).

266. Fried, *supra* note 228, at 1078; Pepper, *supra* note 261, at 634.

267. It is somewhat surprising that writers across the spectrum of those who write on matters of lawyering and professional responsibility seem to take for granted the lawyer’s unlimited discretion to choose clients (with the possible exception of the well-known “last lawyer in town” hypothetical), despite likely disagreement with the underlying notion advanced by Fried and Pepper of autonomy as the paramount value to be served by our legal system. Compare Robert Gordon, *Independence of Lawyers*, 68 B.U. L. REV. 1, 9 (1988), with William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1128 (1988), and David Wilkins, *Race, Ethics and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan*, 63 GEO. WASH. L. REV. 1030, 1036 (1993). Wilkins does suggest, however, that a state might permissibly disbar a white lawyer for refusing to represent African-Americans. *Id.* at 1039 n.51.

lawyers' race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.<sup>268</sup>

This view is so firmly entrenched in mainstream legal consciousness that a court reviewing Stropnick's claim against Nathanson might simply reject Stropnick's claim on grounds of Nathanson's absolute right to choose her clients, without even considering the Supreme Court's framework for balancing freedom of association and equal access claims. However, as David Luban points out, the notion that autonomy in itself, regardless of the ends to which it is employed, ought to be the fundamental value to be served by our legal system, is highly questionable.<sup>269</sup> In fact, encouragement of engagement in politics and the equality principle that are the paramount values in the reconstructed framework set forth in Part III, may be more important values to be served by our legal system than abstract notions of autonomy (and may actually serve individual autonomy in many cases). Thus, the professional model's embrace of *absolute* lawyer discretion in selecting clients ought to be rejected. Of course, such a position still leaves open the question of whether Nathanson's decision to refuse to represent Stropnick was an appropriate exercise of lawyer discretion in this particular case.

#### b. *Protecting The Public Good*

While certainly lesser in force and number than the provisions discussed in the previous section asserting the primacy of client interests, there are a number of provisions in the professional model's authoritative texts that at least nominally require lawyers to abide the model's protect the public good tenet as well as its primacy of client interests tenet. For example, while lawyers are required by the *Model Code* to represent their clients "zealously,"<sup>270</sup> they must do so "within the bounds of the law."<sup>271</sup> "The law," as set forth in this provision, may be seen as the authoritative pronouncement of some conception of the public good.<sup>272</sup>

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268. Wolfram, *supra* note 248, § 10.2, at 53, *quoted in* Robert T. Begg, *Revoking the Lawyer's Right to Discriminate*, 7 GEO. J. LEGAL ETHICS 275, 278 (1993).

269. Luban, *supra* note 265, at 639.

270. *See supra* note 250.

271. MODEL CODE, *supra* note 250, at Canon 7, DR 7-102.

272. It is certainly questionable how much of a constraint this requirement to obey the law places on attorney conduct. *See* David B. Wilkins, *Legal Realism for Lawyers*,

Lawyers are similarly required to “avoid the infliction of needless harm [on third parties] . . . .”<sup>273</sup> There are, of course, also rules prohibiting lawyers from offering false evidence,<sup>274</sup> influencing the testimony of non-party witnesses,<sup>275</sup> and rules requiring lawyers to treat persons involved in the legal process with courtesy and concern.

The professional model’s protect the public good tenet seems particularly promising as an element in characterizing the practice of law as a political association. This is because the reconstructed framework’s political association category is largely defined in terms of collective efforts at determining the public good. However, despite the existence of the above-quoted provisions, critics of the professional model have long argued that it unduly subordinates its protect the public good tenet to its primacy of client interests tenet.<sup>276</sup> Recent examples of lawyers radically placing their clients’ interests ahead of competing interests of the legal system and third parties both support the views of such critics and highlight the impotence of the professional model’s existing restraints on such conduct.<sup>277</sup>

One often cited such example involves the role played by lawyers in the savings and loan scandals of the 1980s. A number of prominent law firms eventually agreed to the payment of millions of dollars to settle claims against them arising out of their conduct on behalf of savings and loan clients.<sup>278</sup> Critics have raised questions as to how lawyers, at

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104 HARV. L. REV. 468, 472-74 (1990). For an argument that attorneys ought not be bound by such a constraint under all circumstances, see William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996).

273. Cahn, *supra* note 247, at 2497 (quoting DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 6).

274. MODEL CODE, *supra* note 250, at DR 7-102; MODEL RULES, *supra* note 251, at Rule 3.3.

275. MODEL CODE, *supra* note 250, at DR 7-109; MODEL RULES, *supra* note 251, at Rule 3.4.

276. See, e.g., Peter Margulies, *Who Are You to Tell Me That?: Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Non-Clients*, 68 N.C. L. REV. 213 (1990) (arguing that traditional professional responsibility guidelines fail to account adequately for the interests of third parties).

277. It is beyond the scope of this Article to try to determine whether such examples of lawyers radically elevating their clients’ interests over those of others are driven solely by lawyers’ own financial self-interests (in that lawyers may profit most by maximizing client outcomes) as discussed in Part IV.B., or whether there are independent causes for lawyers’ willingness to engage in such behavior. Pearce describes the informal control mechanisms in support of the professional model’s protect the public good tenet as the “Business Servant Taboo” —the notion that lawyers will not maximize the well being of their business clients at the expense of others or the public good. Pearce, *supra* note 234, at 1243. Pearce treats the Business Servant Taboo as a subset of his “Profit Maximizer Taboo.” See *supra* note 237.

278. Pearce, *supra* note 234, at 1254. See also *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers’ Ethics*,

least formally charged with protecting the public good, could have participated in, failed to disclose, or actively covered up conduct that they knew to be illegal and harmful to identifiable third parties.<sup>279</sup> The answer, many believe, lies in a gross skewing between the professional model's requirement that lawyers place their clients' interests first and its protect the public good tenet. In light of such examples, it is hard to see how the professional model's protect the public good tenet, as it currently stands, is adequate in itself to turn traditional attorney-client relationships into political associations for purposes of Part III's framework.

A number of critics of the professional model's failure to account adequately for the public interest have proposed alternative conceptions of lawyering and professional responsibility. The two most prominent critics have been David Luban<sup>280</sup> and William Simon.<sup>281</sup> In a recent article, Professor Paul Tremblay refers to the approach taken by Luban and Simon as the "moral activist" model.<sup>282</sup> Pursuant to this alternative model, the lawyer must appeal to standards beyond those particular to the role of the attorney in our legal system and those embodied in officially promulgated codes of professional responsibility in order to justify his or her professional conduct. Professor Tremblay distinguishes Luban's view, in which the attorney should be guided by "common morality" in making professional decisions,<sup>283</sup> from Simon's view, in

and the Rule of Law, 66 S. CAL. L. REV. 977 (1993).

279. See, e.g., *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F.Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.) ("Where were [the lawyers] when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions?").

280. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424 (1990); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman*, 90 COLUM. L. REV. 1004 (1990) [hereinafter Luban, *Partisanship*].

281. See, e.g., William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29; Simon, *supra* note 267.

282. Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9 (1995). Professor Cahn refers to the work of Luban and Simon as the "moral lawyering" critique of the professional model. Cahn, *supra* note 247, at 2500-02.

283. Tremblay, *supra* note 282, at 20 & nn.53-54.

which the attorney turns to conceptions of legal merit and justice as a guide to conduct.<sup>284</sup>

While both versions of the moral activist model serve to emphasize consideration of the public good to a much greater degree than the professional model, neither does so in a way that would transform conventional attorney-client relationships into political associations for purposes of Part III's framework. Under both Luban and Simon's models, the attorney's appeal to the public good occurs largely in opposition to, rather than in association with, the client. While lawyers may engage in a "moral dialogue" with their clients regarding the relationship of proposed courses of conduct to the public interest,<sup>285</sup> definition of the substantive objectives, purposes, and message of the attorney/client association remain firmly the province of the client. Should the client decline to follow the attorney's moral instructions, the attorney is left as a solitary defender of her or his conception of the public good. In such circumstances, the relationship simply cannot be categorized as a political association for purposes of Part III's framework, despite the attorney's appeal to the public good.

## 2. *The Public Interest Lawyering Model Perspective*

Regardless of whether one believes that the professional model remains a viable conception of lawyering practice, or whether one agrees with Pearce that it is being replaced by an emerging business model,<sup>286</sup> there has long been an alternative conception of lawyering in existence, under which the balance between attorney, client, and public interests is much more ambiguous than under the professional model, and under which a lawyer's financial interests are plainly a secondary concern. Within this alternative conception, the political and social change objectives of an attorney-client association are paramount. None other than Justice O'Connor embraced this conception in her concurring opinion in *Roberts*.<sup>287</sup> Citing *In Re Primus*<sup>288</sup> and *NAACP v. But-*

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284. *Id.* at 14, 20 n.59. Tremblay offers both a narrow reading of Simon (what he refers to as Simon's "purposivist" perspective), in which the lawyer is guided by determinations of legal merit in a narrow sense ("lawyers would choose those actions which are best calculated to achieve the goals and intended purposes of the substantive law established in generally applicable legal authority"), and a broad reading (which he refers to as Simon's "justice-based" perspective), pursuant to which the lawyer acts based on fundamental legal values and ideals. *Id.* at 26-27.

285. *See, e.g.,* Pepper, *supra* note 261, at 630; Luban, *supra* note 265, at 642; Margulies, *supra* note 276.

286. *See supra* note 235.

287. *Roberts v. United States Jaycees*, 468 U.S. 609, 631 (1984).

ton,<sup>289</sup> Justice O'Connor noted that certain types of lawyering activities fall within the scope of the First Amendment's heightened protection for political associations.<sup>290</sup> In contrast, Justice O'Connor cited *Ohralik v. Ohio State Bar Association*<sup>291</sup> and *Hishon*,<sup>292</sup> and stated that "ordinary law practice for commercial ends has never been given special First Amendment protection."<sup>293</sup>

### a. *Public Interest Lawyering's Past*

The NAACP Legal Defense Fund's (LDF) campaign to eliminate segregation in public schools, which was in issue in *Button*,<sup>294</sup> is the quintessential example of public interest lawyering to achieve social change in this country's history.<sup>295</sup> The NAACP lawyers engaged in a long-term, carefully crafted attack on legalized segregation through the vehicle of lawsuits in the courts.<sup>296</sup> After first struggling to force compliance with *Plessy v. Ferguson's*<sup>297</sup> mandate for equivalent quality in separate educational facilities, the LDF lawyers mounted the direct attack on *Plessy* that led to its reversal in *Brown v. Board of Education*.<sup>298</sup> Other examples of efforts to achieve broad political and social

288. 436 U.S. 412, 412 (1978). In *Primus*, the Court struck down the action of the state of South Carolina in disciplining an ACLU-affiliated attorney for writing a letter to a potential litigant expressing the ACLU's willingness to represent her in a lawsuit regarding the government coerced sterilization of female Medicaid recipients in Aiken, South Carolina in the 1970s.

289. 371 U.S. 415 (1963). In *Button*, the Court ruled that the NAACP Legal Defense Fund's practice of soliciting potential litigants to challenge segregation in public schools amounted to protected First Amendment activity.

290. *Roberts*, 468 U.S. at 637.

291. *See supra* note 243.

292. *See supra* notes 245-46 and accompanying text.

293. *Roberts*, 468 U.S. at 637.

294. *See supra* note 289.

295. For a recent reflection on the LDF's campaign against segregation, see Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1995) (arguing that a civic humanist account of tradition, as articulated in the writings of Hannah Arendt, comes closer to the version of tradition embodied in the American Civil Rights movement than the versions of tradition articulated by a "prudentialist" vision, as exemplified in ANTHONY KRONMAN, *THE LOST LAWYER* (1993), or a "redemptive" vision, as exemplified in MILNER BALL, *THE WORD AND THE LAW* (1993)).

296. *Id.* at 1174-75. *See also* JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994); RICHARD KLUGAR, *SIMPLE JUSTICE* (1977); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION* (1987).

297. 163 U.S. 537 (1896).

298. 347 U.S. 483 (1954).

change objectives that involved lawyering activity include the welfare rights movement,<sup>299</sup> the abortion rights campaign that led to the decision in *Roe v. Wade*,<sup>300</sup> and the creation of the Office of Economic Opportunity Legal Services Program and its successor, Legal Services Corporation.<sup>301</sup>

*b. Public Interest Lawyering in the Present*

Despite their apparent successes, many of the achievements of these legal campaigns have proven illusory or have been reversed in recent decades. Even given *Brown's* landmark status, many urban school systems remain highly segregated,<sup>302</sup> and Courts are increasingly unwilling to require the extensive reforms that would be necessary to achieve fully the promise of *Brown*.<sup>303</sup> Such judicial reticence has similarly stymied other gains made by reformist political lawyers in the 1960s and 1970s in areas such as correctional<sup>304</sup> and other institutional reform litigation. The welfare rights movement was relatively short-lived,<sup>305</sup> and its legal advocates fell well short of their objective of obtaining recognition of a constitutional right to a minimum level of subsistence.<sup>306</sup> Recent years have witnessed a severe backlash against

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299. See Ruth M. Buchanan, *Context, Continuity and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1016-20 (1994). See also MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993).

300. 410 U.S. 113 (1973).

301. See Buchanan, *supra* note 299, at 1014-16. For additional history regarding the birth of the legal services program see Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995); Gary Bellow and Jeanne Charn, *Paths Not Yet Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633 (1995).

302. See, e.g., Jerome M. Culp, Jr., *Black People in White Face: Assimilation, Culture, and the Brown Case*, 36 WM. & MARY L. REV. 665 (1995); Richard Delgado and Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995); Davison M. Douglas, *The Promise of Brown Forty Years Later: Introduction*, 36 WM. & MARY L. REV. 337, 341 (1995).

303. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995) (refusing to endorse a variety of remedial measures taken by school district on grounds that such measures went beyond scope of original desegregation decree).

304. Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993); Stephen Winter, *Cursing the Darkness*, 48 U. MIAMI L. REV. 1115, 1118 (1994).

305. Buchanan, *supra* note 299, at 1019.

306. *Id.* See generally Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899 (1990); Frank I. Michelman, *The Supreme Court 1968 Term Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles A. Reich, *The New Property*, 73 YALE L.J. 771 (1964).



welfare rights and welfare recipients.<sup>307</sup> The Legal Services Corporation has barely survived elimination,<sup>308</sup> suffering deep funding reductions<sup>309</sup> and draconian restrictions on the scope of its activities.<sup>310</sup>

Aside from these “external”<sup>311</sup> assaults on the possibilities for and efficacy of public interest lawyering for social change, in the past decade the work of lawyers advocating social change on behalf of poor people has been subjected to searing criticism from the academic left. While these developments suggest a critique of public interest lawyering on a macro level, the academic left critique focuses more closely on particular attorney-client relationships in the poverty lawyering setting.<sup>312</sup> Among other charges, writers of the “new poverty law scholarship” contend that lawyers for poor people have traditionally suppressed the oppositional narratives of their poor and oppressed clients in an effort to fit their clients’ stories to pre-existing narratives defined by the legal system.<sup>313</sup> This failure to provide room for clients to speak results in the lawyer becoming a further instrument of the client’s oppression, rather than a means for the client to fight such oppression. The critical writers further suggest that public interest lawyers have failed to appreciate the strengths, talents, and experiences of their poor clients, and have failed to take advantage of the ways those attributes can further the goals of legal representation.<sup>314</sup> The critique continues by contend-

307. See, e.g., JOEL F. HANDLER, *THE POVERTY OF WELFARE REFORM* (1995); Larry Cata Backer, *Welfare Reform at the Limit: “Ending Welfare as We Know It,”* 30 HARV. C.R.-C.L. L. REV. 339 (1995).

308. Buchanan, *supra* note 299, at 1030.

309. Louise G. Trubek, *Embedded Practices: Lawyers, Clients and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415, 418 n.12 (1996).

310. See Act of Apr. 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321.

311. This term is borrowed from Trubek, *supra* note 309, at 415, though it is used differently here.

312. See William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099 (1994).

313. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 217 (1991); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants’ Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

314. Gerald Lopez is a particularly strong proponent of this view. See Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LEGAL PRACTICE* (1992); Gerald P. Lopez, *An*

ing that public interest lawyers have failed to demonstrate sensitivity to and strategies to combat racial, ethnic, gender, and class bias.<sup>315</sup> Finally, the critique contends that political lawyers have made inadequate efforts to collectivize client experiences, i.e., to connect subordinated persons together to share experiences, multiply strengths, and to provide each other with support in facing similar challenges.<sup>316</sup>

Interestingly, when viewed broadly, at least one strand of this critique seems to present an extreme version of the professional model's primacy of client interests tenet<sup>317</sup> located in the poverty law setting. Professor Ruth Buchanan, in her excellent discussion of the new poverty law scholarship, identifies strong and weak versions of this strand as the "lawyer-as-translator" and the "lawyer-as-shadow" models.<sup>318</sup> Both versions share a deep ambivalence toward lawyers' efforts to speak on behalf of their poor clients as "necessarily reenact[ing] the subordination that their clients experience in the world, for the purpose of overcoming it."<sup>319</sup> Moreover, both see the life experiences of poor clients and their lawyers as so radically different that there is a "communication gap" that makes it extremely difficult for lawyers to represent (or re-present) accurately their poor clients' stories.<sup>320</sup>

Nonetheless, proponents of the lawyer-as-translator<sup>321</sup> model suggest that "[t]hrough empathy, ethnography, and experience, the poverty lawyer-as-translator is able to act as a reasonably effective go-between on behalf of his clients."<sup>322</sup> On the other hand, proponents of the lawyer-as-shadow model are much less sanguine about the capacity of lawyers to represent poor clients without performing "interpretive

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*Aversion to Clients: Loving Humanity and Hating Human Beings*, 31 HARV. C.R.-C.L. L. REV. 315 (1996).

315. See, e.g., White, *supra* note 313; Lopez, *supra* note 314, at 1629.

316. See Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 GEO. J. LEGAL ETHICS 619, 622 (1991); Lucie E. White, *Mobilization on the Margins of a Lawsuit*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 546 (1988).

317. See *supra* Part IV.C.1.a.

318. Buchanan, *supra* note 299, at 1038.

319. *Id.* (citing Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990)).

320. *Id.* at 1039.

321. The lawyer-as-translator model is most closely identified with the writings of Clark Cunningham. See, e.g., Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992). See also Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992). Buchanan also relies on the work of Gerald Lopez to suggest the viability of the lawyer-as-translator model. Buchanan, *supra* note 299, at 1039-40 (citing Lopez, *supra* note 314).

322. Buchanan, *supra* note 299, at 1038.

violence” regarding the meaning of the clients’ experiences.<sup>323</sup> According to Buchanan, proponents of this view believe the gap between lawyer and client to be unbridgeable, and that only clients can formulate and represent their own interests.<sup>324</sup> What follows is a view of the appropriate lawyer role “as a shadow figure, ensuring from the sidelines that the client’s voice is heard.”<sup>325</sup> What seems clear is that even more than was the case under the professional model’s primacy of client interests tenet, under both the lawyer-as-translator and the lawyer-as-shadow models, the lawyer’s role is far too restricted for the lawyer’s choice to associate with particular clients to be considered to be an act of political association for purposes of Part III’s framework.

Of course, the critique presented by the new poverty law scholars has not gone without reply. Some have argued that at its most extreme, the academic left critique romanticizes the capacity of poor people to transform their social worlds, while at the same time ignoring the potential of lawyers to contribute to achieving an alternative vision of society.<sup>326</sup> The reply suggests that the new poverty law scholars’ critique “essentializes” poor clients to be representatives of subordinated groups.<sup>327</sup> Furthermore, the critique denies both the fact that the short-term interests of such clients may conflict with the long-term interests of the groups to which they belong<sup>328</sup> and the valuable role that lawyers can play in helping to evaluate and resolve such conflicts.<sup>329</sup> The new poverty law scholars’ critique has further been challenged for lacking a normative vision that can lead to social transformation to a more democratic and egalitarian society.<sup>330</sup>

323. *Id.* at 1039, citing Alfieri, *supra* note 313.

324. *Id.* at 1041.

325. *Id.* at 1038.

326. See, e.g., Simon, *supra* note 312; Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992).

327. See *infra* note 357 and accompanying text.

328. Tremblay, *supra* note 326.

329. William Simon refers to the fact that performance in such a role is inevitably influenced by the lawyer’s own values as the “Dark Secret” of progressive lawyering. See Simon, *supra* note 312, at 1102.

330. Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC’Y REV. 697 (1992).

c. *Public Interest Lawyering's Future?*

Despite the eloquence of the response to the new poverty law scholars' critique, many of the charges raised by the critique seem indisputable. That fact, combined with the previously-described external assault on public interest lawyering, raises the question of whether there is anything left of the somewhat romanticized notion of public interest lawyering presented by Justice O'Connor in her concurrence in *Roberts*.<sup>331</sup> Certainly, a pessimistic view of public interest lawyering's future could lead to withdrawal and despair.<sup>332</sup> However, to the optimist, what emerges from the internal and external challenges described above are possibilities for a successful, albeit modified, version of public interest lawyering for the future. While the potential for successful, long-term, broadly-conceived impact litigation campaigns such as the NAACP's attack on legalized segregation seems remote,<sup>333</sup> more targeted and strategic "test cases" or lawsuits aimed at structural reform retain the potential to be an important part of an overall social reform strategy.<sup>334</sup> Moreover, when the constructive aspects of the critique of poverty lawyering<sup>335</sup> are taken together with the recognition of certain enduring strengths of the "old-style" of public interest lawyering that is presented by the response to the new poverty law scholars' critique,<sup>336</sup> what emerges is a new understanding of public interest lawyering: lawyers form "alliances" with clients,<sup>337</sup> based "in forms of respect and mutual-

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331. See *supra* notes 287-90 and accompanying text.

332. See Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 306 (1996).

333. Ironically, perhaps the closest approximation to the LDF model in existence today may be the campaign currently being waged in the courts by conservative public interest law groups to end affirmative action. See Adam Cohen, *The Next Great Battle Over Affirmative Action: A Lawsuit Against the University of Michigan Could End Racial Preferences in College Admissions*, TIME, Nov. 10, 1997, at 52.

334. See Buchanan, *supra* note 299, at 1022; Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287, 291 (1996).

335. Buchanan and Trubek have distilled five "constructive" principles from the new poverty law scholarship that might form the basis for a newly conceived form of public interest lawyering. These are: (1) to *humanize* poor clients; (2) to *politicize* legal practice; (3) to *collaborate* with clients; (4) to *strategize* with clients as to proper approaches to achieving objectives; and (5) to *organize* among persons with similar issues. See Ruth Buchanan & Louise Trubek, *Resistance and Possibilities: A Critical and Practical Look at Public Interest Lawyering*, 19 N.Y.U. REV. L. & SOC. CHANGE 687, 691 (1991).

336. See *supra* notes 326-30 and accompanying text.

337. The term "alliances" is taken from Gary Bellow, *supra* note 332, at 303, and corresponds roughly to Gerald Lopez's vision of "Rebellious Lawyering." See Lopez, *supra* note 314. See also Richard B. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for Facilitative Lawyering?*, 1 CLINICAL

ity,"<sup>338</sup> that take advantage of the strengths, weaknesses, and particular capacities of lawyers, clients, and lay advocates in order to achieve political ends. The prospect of large numbers of such small-scale alliances directed toward positive social change, ideally coordinated and collectivized in some coherent (but flexible) fashion, holds out perhaps the best hope for a model of public interest lawyering for the future.

### 3. *Nathanson's Law Practice as a Political Association*

Though perhaps not self-consciously, Nathanson's practice of representing women only in divorce proceedings for purposes of combating gender bias in the court system and in society at large, fits the above-described prototype of what public interest lawyering must become if it is to thrive in the future.<sup>339</sup> While the professional model's primacy of client interests tenet and the new poverty law scholar's focus on client autonomy may suggest that the attorney's role in an individual case is too narrow to create a political association,<sup>340</sup> Nathanson's overall practice of aggregating such cases in a manner that challenges the courts and society to live up to their rhetoric of fairness without regard to gender amounts to precisely the type of appeal to the public good that defined Part III's political realm. Therefore, Nathanson's decision only to represent women in divorce proceedings ought to be considered an act of political association for present purposes, and ought to be accorded the heightened deference provided to political associations within the above-described framework.

## V. BALANCING STROPNICKY'S EQUALITY CLAIM AGAINST NATHANSON'S FREEDOM OF ASSOCIATION CLAIM

The task remains to balance Stropnick's equality claim against Nathanson's freedom of association claim in light of the forgoing

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L. REV. 639 (1995).

338. Bellow, *supra* note 332, at 303.

339. See Trubek, *supra* note 309, at 428 (describing private "social justice law firm" engaged in family law practice as an emerging form of successful political law practice).

340. William Simon points out that the critical literature on poverty lawyering has had relatively little to say about the question of client selection. See Simon, *supra* note 312, at 1104. *But see* Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993) (arguing that poverty lawyers cannot coherently answer the question of whether to accept a particular case until they establish an overall "theoretic of practice.")

conclusion that Nathanson's law practice amounts to a political association entitled heightened protection within Part III's framework. The Supreme Court's framework<sup>341</sup> would subject the Massachusetts public accommodation law to heightened scrutiny for its prima facie infringement upon Nathanson's freedom of association right.<sup>342</sup> Given the history of the Supreme Court's applications of such heightened scrutiny,<sup>343</sup> one may assume that the Court would strike down the M.C.A.D.'s application of the Massachusetts law. However, recall that in *Roberts*, despite finding the Jaycees to be an expressive association entitled to heightened constitutional protection, the Court nonetheless upheld the application of Minnesota's public accommodations law to the Jaycees.<sup>344</sup> Finding the State's interest in fostering equality to be compelling, Justice Brennan, writing for the majority stated:

By prohibiting gender discrimination in places of public accommodation, the Minnesota Act protects the State's citizenry from a number of serious social and personal harms . . . . [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of the sexes forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic and cultural life.<sup>345</sup>

Thus, the Court went on to favor the excluded women's quest for equal access over the Jaycee members' asserted associational rights. One might conclude, therefore, that Supreme Court might actually favor Stropnick's claim to equal access over Nathanson's claim of freedom of association despite the application of heightened scrutiny.

The likelihood of such a result is strengthened by the fact that the current Supreme Court's doctrine regarding equality claims embraces the "neutral" or "color-blind" approach taken by Stropnick. Pursuant to such an approach, the equality-based claims of white males such as Stropnick are treated as being equivalent to such claims as advanced by women and members of minority groups. This is the case despite the

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341. See *supra* Part III.A.

342. For reasons discussed above, it is far from certain that a reviewing court would even reach this point in the analysis. First, such a court might simply rely on the traditional view that a lawyer has absolute discretion to chose his or her clients, and rule in favor of Nathanson without even applying the Supreme Court's framework. See *supra* notes 267-69 and accompanying text. Alternatively, even if it applied the Supreme Court's framework for balancing freedom of association and equal access claims, a reviewing court might be unwilling to embrace a conception of political lawyering that goes beyond the traditional public interest lawyering model articulated in Justice O'Connor's concurrence in *Roberts*. See *supra* notes 287-90 and accompanying text.

343. See *supra* note 214.

344. See *supra* notes 84-85 and accompanying text.

345. *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (citations omitted).

fact that as a group, white males have been thoroughly dominant throughout American history, and persons such as Stropnický have presumed to enjoy the advantages that correspond to that status throughout their lives. By contrast, women and members of minority groups have been subordinated throughout American history, and have not generally enjoyed such advantages.<sup>346</sup>

For example, the Court has applied strict scrutiny in cases brought by white plaintiffs claiming that efforts to assist members of historically disadvantaged groups through contracting preferences<sup>347</sup> and electoral districting<sup>348</sup> amount to “reverse discrimination.” Though the Court has traditionally distinguished racial from gender classifications,<sup>349</sup> it has shown a willingness to equate the gender discrimination claims raised by men with those raised by women in a manner that is similar to its willingness to accord equivalent treatment to racial discrimination claims raised by both Caucasians and African-Americans.<sup>350</sup> These trends, combined with the Court’s holding in *Roberts*, suggest that if Stropnický’s claim were ever to reach the Supreme Court, the Court might well conclude that Stropnický’s equality claim should outweigh Nathanson’s freedom of association claim, despite Stropnický’s lack of membership in a historically disadvantaged group. Thus, the Court might indeed uphold the M.C.A.D.’s decision to sanction Nathanson.

However, in “reconstructing” the Supreme Court’s framework, it is not necessary to include the same conception of equality as has been embraced by the Court. I join the many commentators who have rejected the Court’s so-called “neutral” approach to evaluating equality-based claims similarly regardless of whether raised by members of

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346. See, e.g., *Ward*, *supra* note 46 (rejecting the commensurability of Stropnický’s claims of equal access with similar claims advanced by African-Americans and women).

347. See, e.g., *Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to federal highway program providing contracting preferences to members of historically disadvantaged groups); *Croson v. City of Richmond*, 488 U.S. 469 (1989) (applying strict scrutiny to Richmond’s contracting set-aside program).

348. See, e.g., *Bush v. Vera*, 116 S.Ct. 1941 (1996) (applying strict scrutiny to legislative redistricting plan that provided for three “majority minority” districts); *Miller v. Johnson*, 515 U.S. 900 (1995) (same).

349. See, e.g., *United States v. Virginia*, 116 S.Ct. 2264, 2276 (1996).

350. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (accepting challenge by male to nursing school’s policy of admitting only women); *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (holding that use of preemptory strikes to exclude males from a jury violates the equal protection clause).

historically advantaged or disadvantaged groups.<sup>351</sup> The Court's approach fails because it does not account for the lingering effects of historic discrimination that continue to manifest themselves today and which will not be eradicated without further actions being taken. Such an inattention to context and to the practical effects of legal rules is a form of blindness that causes the Court's doctrine to yield unacceptable results.<sup>352</sup> From this perspective, Stropnick's equality claim should be viewed as being extremely weak, and likely inadequate within our reconstructed framework to trump Nathanson's freedom of political association claim, as articulated in the previous Part of this Article.

It is worth noting that Nathanson's practice of representing women only in divorce cases may be seen as an example of what has traditionally been considered to be the primary alternative to the "neutral" approach to equality claims employed by the Supreme Court. This alternative may be referred to as the "affirmative-action" or "benign discrimination" approach, and is also exemplified by the "set-aside" program rejected by the Court in *Adarand v. Peña*.<sup>353</sup> Under the "benign discrimination" approach, classifications that favor members of groups that have historically been discriminated against are permissible, whereas classifications based on race or gender that further disadvantage members of such groups are not.<sup>354</sup> From such a perspective, an application of Massachusetts' public accommodation law that would permit Nathanson to restrict the provision of her services to members of a historically disadvantaged group, women, would not be viewed as inappropriate. Alternatively, Stropnick's claim of "reverse discrimination" based on his membership in a historically advantaged group would not be credited. It should be reiterated, however, that this approach has not been accepted by the current Supreme Court.

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351. See, e.g., T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Garrett Epps, *Of Constitutional Seances and Color-Blind Ghosts*, 72 N.C. L. REV. 401 (1994); Bryan K. Fair, *The Acontextual Illusion of a Color-Blind Constitution*, 28 U.S.F. L. REV. 343 (1994) (reviewing Andrew Kull, *The Color-Blind Constitution*); Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Kenneth Karst, *Private Discrimination and Public Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1; PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 98-130 (1991).

352. See Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 851 (1990) (advocating attention to context).

353. See *supra* note 347.

354. Examples of cases upholding the affirmative-action approach include *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (upholding certain preferences afforded to minority-owned firms in applying for broadcast licenses), *overruled by Adarand Constr., Inc. v. Peña*, 515 U.S. 200 (1995), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding set-aside program for contracts on local public works projects).



Not surprisingly, the “benign discrimination” approach has received much criticism from the proponents of so-called “color-blindness” or “neutrality.”<sup>355</sup> However, such classification schemes have also recently been subjected to criticisms from many who remain convinced of the lingering existence and effects of racial, gender, and other invidious forms of discrimination, and the critical importance of eradicating the vestiges of such discrimination. For example, in a recent article,<sup>356</sup> Professor Martha Minow presents criticisms of “identity politics,”<sup>357</sup> which may apply to the “benign” classificatory schemes described above as well as to Nathanson’s practice of restricting her representation to women in divorce cases.<sup>358</sup> Professor Minow points out that among other troubling aspects, identity politics “essentializes” individuals by “reducing a complex person to one trait—the trait drawing that person into membership in a particular group—and then equating that trait with a particular viewpoint and stereotype.”<sup>359</sup> Perhaps Nathanson has been guilty of “essentializing” both Stropnick and the women that she represents.

If this is the case, then Nathanson can be said to have demonstrated a lack of *judgment* in her refusal to represent Stropnick, in the sense that Hannah Arendt might have used the term. To Arendt, to exercise judgment meant for one to think in the place of others, to take their perspectives into consideration.<sup>360</sup> The exercise of judgment in this

355. See, e.g., *Adarand Constr., Inc. v. Peña*, 515 U.S. 200, 226-27 (1995) (rejecting the application of lower level scrutiny to “benign” racial classifications).

356. Martha Minow, *Not Only For Myself: Identity, Politics and Law*, 75 OR. L. REV. 647 (1996). For a more detailed version of Professor Minow’s article, see MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY POLITICS AND THE LAW* (1997).

357. Professor Minow defines identity politics as “the mobilization around gender, racial, and similar group-based categories in order to shape or alter the exercise of power to benefit group members.” Minow, *supra* note 356, at 648.

358. Indeed, in her Foreword to the Western New England Law Review’s Symposium on *Stropnick v. Nathanson*, Professor Minow criticizes Nathanson’s refusal to represent Stropnick. See Martha Minow, *Foreword: Of Legal Ethics, Taxis, and Doing the Right Thing*, 20 W. New Eng. L. Rev. (forthcoming 1998).

359. Minow, *supra* note 356, at 653. Minow further criticizes identity politics for failing to account for “intersectionality” between group identities, for example, the fact that a person may be both an African-American and a woman at the same time. *Id.* at 655. Additionally, Minow points out that the definitions of group membership themselves, which form the basis for identity politics, are unstable and incoherent. *Id.* at 657.

360. HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 221 (1961).

sense was the quintessential political activity for Arendt.<sup>361</sup> Considering the diverse perspectives of others is both a prelude to, and indeed an instance of, the kind of debate and persuasion that characterize Arendt's public sphere.<sup>362</sup> Of course, the need to "woo the consent" of others in this way is a function of the plurality that characterizes Arendt's public realm.<sup>363</sup>

For Arendt, judgment is a "mode of thinking particulars which does not subsume particulars under general rules but ascends 'from the particular to the universal.'"<sup>364</sup> Perhaps if Nathanson had looked at Stropnický's situation in all of its particularity, she would have viewed his request for representation in terms of his position,<sup>365</sup> that of a "displaced homemaker,"<sup>366</sup> rather than in terms of the general category of "male," within which she seems to have placed his situation. Indeed, Nathanson herself may have been guilty of the kind of stereotyped reliance on existing gender roles that Justice Brennan criticized in his opinion in *Roberts*.<sup>367</sup> Thus, a failure of judgment may have caused Nathanson to select an incorrect means (representing only women) to her laudable end of eradicating gender inequality. Perhaps a positional analysis, focusing on Stropnický's situation as a subordinated homemaker, would have caused Nathanson to choose a different means (representing Stropnický) to achieve her desired end.

Then again, perhaps not. Arendt's concept of judgment does not require one to accept the point of view of the other, but only to consider it genuinely.<sup>368</sup> Nathanson did have an opportunity to speak with Stropnický before she declined to take on his case, and he did inform her at that time of the particularities of his situation.<sup>369</sup> Thus, Nathanson may well have considered Stropnický's situation in all of its particularity, and may nonetheless have rejected the notion that his request for representation presented a positional, rather than a gender

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361. See Richard J. Bernstein, *Judging—the Actor and the Spectator*, in PHILOSOPHICAL PROFILES 221, 229 (1986) [hereinafter "*Judging*"]; Seyla Benhabib, *Judgment and the Moral Foundations of Politics in Hannah Arendt's Thought*, in SITUATING THE SELF 121, 141 (1992).

362. Bernstein, *Judging*, *supra* note 361, at 230.

363. *Id.* at 230-31; Benhabib, *supra* note 361, at 137.

364. Bernstein, *Judging*, *supra* note 361, at 229. Arendt's derivation of this conception of political judgment from Kant's treatment of aesthetic judgments, "which are normally believed to be furthest removed from politics," is highly controversial. *Id.* at 228-29.

365. Bartlett, *supra* note 352, at 880.

366. See *supra* note 20.

367. See *supra* note 345 and accompanying text.

368. Benhabib, *supra* note 361, at 137; accord Bartlett, *supra* note 352, at 883.

369. See *supra* Part II.

issue.<sup>370</sup> Perhaps Nathanson's experience in the Massachusetts courts suggested to her that even Stropnick's displaced homemaker argument was likely to be more favorably received because he is a man than the same argument would be if made on behalf of a woman. Indeed, there is ample evidence to support the notion that gender, in itself, remains a prevalent ground of invidious discrimination within the Massachusetts courts.<sup>371</sup> Alternatively, Nathanson may simply have determined that the cause of gender equality would be better served by allocating the scarce resource that her practice represents to those who are most directly impacted by gender bias.

If the "true facts" support these latter two scenarios, then Nathanson's refusal to represent Stropnick ought not be viewed as an ill-advised example of identity politics. In offering a series of "social strategies" to address the "historic and continuing practices of group exclusions and oppressions" that identity politics attempts to respond to, while remaining cognizant of the potential harms that may result from identity politics, Martha Minow includes the need for "intensive and aggressive enforcement" with regard to the anti-discrimination principle.<sup>372</sup> This is despite the potentially divisive nature of such actions. As Minow puts it, "challenges to the hypocrisy—the gap between our ideals of equality and freedom and the reality—offer the best hope for pulling this country

370. Indeed, Stropnick's own rhetoric in his MCAD complaint is more suggestive of a reverse discrimination type argument than a positional argument. See *supra* Part II.

371. See, e.g., REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT (1989).

372. Minow, *supra* note 356, at 676. The other strategies offered by Minow are: (1) to facilitate public compensation and reparations for past and continuing group-based harms; (2) to frame a variety of settings for eliciting facts and narratives of past and continuing group-based harms; (3) to devise governmental policies that permit individuals to affiliate or identify themselves with groups temporarily and for specific purposes rather than rely on governmental assignment to fixed groups; (4) for prospective governmental action rather than efforts to remedy or comprehend past group harms, to try achieving governmental purposes without deploying group-based categories while remaining committed to overturning the effects of categorical exclusions in social and political realms; and (5) public support for art and artistic opportunities to address topics of past and present identities and affiliations, oppressions and resistances, and individual freedom. *Id.* at 679-96. Minow deliberately adopts strategies that are to some degree in conflict with one another so as to facilitate the process of jointly dealing with issues of historic discrimination and the rigidity of group assignments. *Id.* at 676.

together.”<sup>373</sup> Perhaps Nathanson’s practice of representing women only in divorce cases presents just such a challenge.

## VI. CONCLUSION

This Article attempts to evaluate the competing claims of freedom of association and equality presented in the case of *Stropnick v. Nathanson*, in terms of a modified version of the Supreme Court’s doctrinal framework for addressing such competing claims. The Supreme Court’s framework has been modified in accordance with philosopher Hannah Arendt’s conception of the three spheres of human activity, and the critique that has been made of Arendt’s writings in this regard. The modified framework attempts to capture Arendt’s celebration of politics because of the centrality of political activity to fundamental constitutional values, as well as the intrinsic value of political activity to human development and the fact that politics is the only means to achieving public justice.

As such, the modified framework recognizes and supports the political nature of the challenge to the status quo around gender issues presented by attorney Nathanson’s law practice. More particularly, the framework treats Nathanson’s modified version of public interest lawyering as a form of political association entitled to heightened constitutional protection. Despite this fact, given the similar importance of the antidiscrimination principle in American law, the modified framework requires that serious consideration be given to Stropnick’s equality claim as well.

To the extent that Stropnick’s equality claim presents an argument in favor of so-called “neutral” application of antidiscrimination law, it is rejected within the modified framework. However, to the extent that representation of Stropnick’s position would in fact be serving of the kind of plurality that Arendt argued was necessary to a thriving public realm, then perhaps Stropnick’s claim should be viewed as outweighing Nathanson’s. Unfortunately, the factual context within which the dispute between Stropnick and Nathanson arises remains sufficiently ambiguous so as to prevent a definitive conclusion as to whose position would better advance the cause of plurality. While such a conclusion may seem unsatisfying, it suggests that at a minimum, in the absence of factual evidence to the contrary, it would be wrong to uphold the sanctioning of Nathanson for what was at worst an error of judgment in her otherwise laudable entry into politics in pursuit of plurality.

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373. *Id.* at 679.