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AFTERWORD: A THOUGHT ABOUT FEMINIST LITIGATION STRATEGIES

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As a feminist litigator, I continue to struggle with the decision of the Massachusetts Commission Against Discrimination ("MCAD") in *Stropnicky v. Nathanson*, which held that Judith Nathanson's decision to represent only women in divorce proceedings constitutes unlawful sex discrimination.[1] The contributors persuasively advance a number of reasons why Nathanson should be permitted to represent only women, at least under certain circumstances: that her action is a benign compensatory measure to remedy the effects of past discrimination; that her choice is an associational right protected by the First Amendment;[2] that she has the right to be protected from compelled speech;[3] and that as an attorney, she should have the right to decline to represent clients based upon her personal preferences.[4] As a lawyer who has litigated on behalf of women challenging gender discrimination, I now ask a different question. Even assuming that Nathanson has the legal right to refuse to represent Joseph Stropnicky solely because he is male, should a feminist lawyer make that choice?

I share Nathanson's desire to devote her energy and talents to the elimination of gender inequity. As a feminist lawyer, though, I am concerned about the means she has chosen to redress discrimination against women. Nathanson could have chosen to represent clients based not on their sex, but on the basis of their legal claim.

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1. 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997).

2. *See* Bruce K. Miller, *Lawyers' Identities, Client Selection and the Antidiscrimination Principle: Thoughts on the Sanctioning of Judith Nathanson*, 20 W. NEW ENG. L. REV. 93 (1998).

3. *See* Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49 (1998).

4. *See* Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. NEW ENG. L. REV. 9 (1998).

Instead, she chose to adopt a policy that automatically excludes men as clients, regardless of whether their legal claim offers the opportunity to advance gender equity in the law.

Those of us who litigate gender discrimination cases participate not only in the construction of legal doctrine, but in the construction of social norms and beliefs about gender.[5] As lawyers, the claims that we make about sex and gender on behalf of our clients simultaneously reveal and construct a vision of gender. In seeking to eradicate the inequitable and discriminatory treatment of women in family law, Nathanson relies upon and reinforces the same stereotypical beliefs about sex and gender that she purports to attack. Her justification rests on an essentialist vision of gender which assumes, and reinforces, the legitimacy of gender as a classificatory scheme.

Nathanson advances several related arguments to justify her female-only divorce practice. Nathanson claims that she seeks to devote her expertise to the elimination of gender bias in the court system. She also claims that the issues that arise in representing women differ from those that arise in representing men in divorce proceedings.[6] As an example, she argues that wives' attorneys emphasize the value of homemaker services, while husbands' attorneys do not.[7] Nathanson also argues that she needs to feel a personal commitment to her client which she has only experienced in family law by representing women. Moreover, she asserts that her female clients feel more comfortable because they view her decision to represent only wives as evidence of her commitment to their interests, and that she is more credible as an advocate because the judges know that she only represents women.[8]

Like Martha Minow, I believe that Nathanson's defense of her female-only policy rests on an essentialized notion of gender.[9] Nathanson's refusal to represent men, even if their cases offer the opportunity to advance gender equity, depends upon, and reinforces,

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5. In the Citadel litigation, for example, counsel for Faulkner and Mellette offered the courts a competing construction of men and women which challenged the blatantly essentialist vision of South Carolina that women, because of their temperament and character, inherently were not suited for stressful, military-style education. *See, e.g.*, Valorie K. Vojdik, *At War: Narrative Tactics in the Citadel and VMI Litigation*, 19 HARV. WOMEN'S L.J. 1 (1996).

6. *Stropnicky,* 19 M.D.L.R. at 40.

7. *See id.*

8. *See id.*

9. *See* Martha Minow, *Foreword: Of Legal Ethics, Taxis, and Doing the Right Thing*, 20 W. NEW ENG. L. REV. 5 (1998).

the traditional construction of gender and sex as essential and natural, rather than socially constructed and contingent. Her argument incorrectly assumes the truth of one of the most dangerous gender stereotypes: that all women are homemakers and all men are breadwinners. Her justification assumes that all men are systematically advantaged in marriage and all women systematically disadvantaged, in the same manner. Nathanson's claim that she can only feel a personal commitment to female clients in family law matters, and that her clients feel reassured because she only represents women, appears to assume a natural and inherent affinity between women solely on the basis of their sex, regardless of their socioeconomic status, race, religion, or age. While gender is a fundamental construction that helps create and limit women's identity in this culture, it does not follow that all women automatically share identical interests. There are vast differences among individual women in their socioeconomic status and race which intersect with their gender to shape their experiences and interests. Carolyn Wexler, the former wife of a wealthy General Electric executive whose divorce and property fight was featured on the front page of the Wall Street Journal, does not have the same problems and constraints as, for example, a middle aged African-American woman with no savings and limited job skills who is entering a job market replete with racism.[10] Indeed, the differences between these two women probably far exceed the similarities.

Litigation strategies rooted in essentialism mask the social and cultural use of gender as a classification scheme that makes distinctions between men and women appear natural. The myth of gender difference has been used throughout history to rationalize the exclusion of women from the public sphere and to deny them power, opportunity, and status.

Rather than reproduce essentialist notions of gender, we should embrace litigation strategies that challenge gender as essential and instead reveal it as socially constructed. Setting aside the question of his motivation for asking Nathanson to represent him, Joseph Stropnicky offered the opportunity to challenge the traditional construction of gender roles in marriage. As a husband, Stropnicky shunned the traditional role of breadwinner and instead

10. Carolyn Wexler is a Connecticut homemaker whose divorce from her wealthy husband, the former chief executive officer of General Electric Capital Corporation, made front page headlines in the Wall Street Journal when a court awarded her a substantial portion of their marital estate. *See* Paul Bennett, *"Corporate Wife" Gains in a Divorce Ruling*, WALL ST. J., Dec. 4, 1997, at B1.

took responsibility for homemaking and child care.[11] As a male, he transgresses the restrictive gender boundaries and norms of this culture. By breaking the association between his sex and gender, Stropnicky reveals gender as a social construction rather than a natural and essential category. It is within the space created by this disjuncture that we can begin to reconstruct sex, gender, and identity.

My criticism of Nathanson is not to suggest that feminist litigators must represent any man that walks in the door. There may be circumstances which could justify a refusal to represent men which do not depend on an essentialist rationale. For example, a feminist lawyer might decide to handle only litigation challenging the lack of access of women to athletic programs under Title IX. The attorney then could refuse to represent any client, either male or female, whose case did not involve increasing athletic opportunities for women. The crucial distinction is that the attorney would not reject a particular male client solely because of his sex, but because of the nature of his claim. While the result will likely be the same, the key difference is that the attorney's decision to not represent the male client does not rest on essentialist assumptions about men and women, nor stigmatize the prospective client on the basis of a personal characteristic. Presumably this policy would meet MCAD approval under *Stropnicky*, which distinguished Nathanson's refusal to represent Stropnicky because of his status as a man from a refusal by a lawyer to not represent a handicapped person because the lawyer does not handle handicap discrimination claims. There may be other situations in a gender-based legal practice where the exclusion of male clients does not stigmatize men by virtue of their sex, but is justified as a benign compensatory measure.

As feminist litigators, we are engaged in the necessary process of constructing gender, both inside and outside the courtroom. Our commitment to gender equity should guide our legal practice, as well as our legal arguments. If our goal is to promote inclusion in this society, we should not adopt litigation strategies that embrace exclusion without careful evaluation of their need and cost.

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11. *Stropnicky*, 19 M.D.L.R. at 39.