Lawyer Discrimination Against Clients: Outright Rejection--No; Limitations on Issues and Arguments-Yes

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LAWYER DISCRIMINATION AGAINST CLIENTS: OUTRIGHT REJECTION—NO; LIMITATIONS ON ISSUES AND ARGUMENTS—YES

SAMUEL STONEFIELD*

I. INTRODUCTION: THE QUESTION AND A PROPOSED ANSWER

A. The Question

In a society that prohibits most public discrimination,¹ should a lawyer be able to discriminate in the selection or treatment of a client or prospective client?² To be more specific, should the conduct of the following six attorneys who specialize in family law and discriminate in the selection or treatment of clients be lawful or unlawful?

- Lawyer 1 is a white male lawyer who refuses to represent African-Americans in his family law practice because he strongly dislikes them and does not want to associate with any African-Americans. He states that his “strong personal feelings” would

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* Professor of Law, Western New England College School of Law. A.B., 1967, Dartmouth College; J.D., 1971, Harvard University; Commissioner, Massachusetts Commission Against Discrimination, 1977-1981. I would like to thank and to commend my colleagues and our law review for their commitment to producing this symposium and the Massachusetts Commission Against Discrimination for continuing to fight the good fight.

1. I use the adjective “public” with discrimination to refer to acts of discrimination both by public entities and by private entities (employers, landlords, banks, doctors, accountants and lawyers) acting in the “public sphere.” See generally MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). Our legal and social culture generally recognizes a sphere of private autonomy and permits discrimination within that private sphere, such as in the choice of one’s friends. While the line between the public and private spheres is socially constructed, contingent and not always clear, the conduct of lawyers in the practice of law is unquestionably in the public sphere.

2. The term “discriminate” in this article means “to treat differently” because of race, sex, national origin, religion, disability, sexual preference and any other characteristics deemed unlawful by the state’s civil rights laws. I am referring only to the disparate treatment theory of discrimination, “the most easily understood type of discrimination.” International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
compromise his ability to provide zealous representation of a black client;\(^3\)

- Lawyer 2 is a white male lawyer who similarly dislikes African-Americans and refuses them as clients. However, his discrimination is covert, not overt; he always gives a plausible, albeit pretextual, reason for his denial (too busy to accept a new case right now; might have a conflict; etc.);

- Lawyer 3 is a female attorney with what she calls a feminist family law practice. While most of her clients are women, she also represents men. However, in an initial interview prior to forming a client relationship, she tells any male prospective client that, with respect to certain issues and arguments involving financial obligations, she may treat him differently than she would a female client, because of her interpretation of the law, in the following manner.

A recurrent issue in family law practice is the determination of the payments to be made by the wage-earner spouse to the homemaker spouse, as a form of deferred compensation for unpaid domestic labor, childrearing and diverse other services provided to support the wage-earner and his or her career.\(^4\)

Most of the time, the wage-earner spouse is a man and the homemaker spouse is a woman, and most of the time Lawyer 3 represents the female homemaker. Sometimes, however, the roles are reversed and the homemaker is a male. In Lawyer 3’s opinion, while a male and female homemaker may often be alike in certain respects,\(^5\) social and economic forces also make

\(^3\) For a similar hypothetical, see Robert T. Begg, Revoking the Lawyers License to Discriminate in New York: The Demise of a Traditional Professional Prerogative, 7 Geo. J. Legal Ethics 275, 276 (1993), and Brenda Jones Quick, Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession’s Response to Discrimination on the Rise, 7 Notre Dame J.L. Ethics & Pub. Pol’y 5, 11 (1993). I strongly recommend Professor Begg’s article as a thorough and scholarly introduction to the many issues raised by lawyer discrimination.

\(^4\) The divorce of business executive Gary Wendt and homemaker Lorna Wendt provides a recent high-profile example of this type of dispute. The case went to trial when Ms. Wendt rejected her husband’s $8 million pre-trial offer of settlement. In a preliminary decision on December 3, 1997, the trial judge awarded Ms. Wendt an estimated $20 million. See Betsy Morris, It’s Her Job Too: Lorna Wendt’s $20 Million Divorce Case Is the Shot Heard ’Round the Water Cooler, Fortune, Feb. 2, 1998, at 64. For a good discussion of this issue, see Margaret F. Brinig, Property Distribution Physics: The Talisman of Time and Middle Class Law, 31 Fam. L.Q. 93 (1997).

\(^5\) The actual allocation of domestic work and responsibilities between the wage-earner and the homemaker will be specific to each marriage. Lawyer 3 does not assume that a male homemaker will have occupied the same domestic role and performed the same work as a female homemaker. She believes in the accuracy of studies reporting that, in households where both spouses are full-time wage-earners (and thus are “similarly situated” in this formal sense), the female spouse still does most of the domestic
them unlike in other ways. Factors as diverse as the sex role development in childrearing, allocation of roles and tasks in the family, opportunities and expectations in schools, and discrimination and opportunities in the workplace have made the world different for men and women. Lawyer 3 believes that it is essential that courts recognize these differences and grant female homemakers a "plus factor" not available to male homemakers. Lawyer 3 will not make a "plus factor" argument on behalf of men and will not oppose it if made on behalf of a woman (although she may contest its implications in the context of a specific case). Thus, if a househusband such as Mr. Stropnicky comes to her, Lawyer 3 tells him that the arguments that she will make for him as a male homemaker may be similar in some respects to, but also different in some respects from, the arguments that she would for a female homemaker. She thus offers Mr. Stropnicky what she calls "conditional representation," an offer to represent him conditional upon his understanding and acceptance of the particular terms of representation. If the male prospective client agrees to representation on this basis (and affirms that agreement in writing), Lawyer 3 will represent him.

- Lawyer 4 is a white male lawyer who is willing to represent, and has represented, both white and African-American clients in most family law transactions but not in the context of the drafting, review or litigation of a prenuptial agreement for a person of one race marrying a person of another race. While he will draft and review (and defend or enforce in court) a prenuptial agreement for a black person marrying a black person or for a white person marrying a white person, he feels strongly that inter-racial marriages are morally wrong and socially harmful and will not draft or review (or defend or enforce in court) a prenuptial agreement in these circumstances;

- Lawyer 5 is Judith Nathanson, the respondent in Stropnicky v.

work. See Arlie Russell Hochschild & Anne Machung, The Second Shift: Working Parents and the Revolution at Home (1989). Lawyer 3 interpolates from these studies that a male homemaker is likely to do less domestic and childrearing work than a female homemaker. Also, given the non-traditional nature of the male homemaker role, Lawyer 3 also believes that, in general, male homemakers move back and forth between homemaker and wage-earner roles more often than female homemakers do.

6. The lawyer also tells him that she will not assume that he, as a male homemaker, has occupied the same domestic role and performed the same work as has a female homemaker in the "traditional" family. See supra note 5 and the accompanying text. She will conduct a detailed intake interview to ascertain the facts in each particular case.
Nathanson. 7 Attorney Nathanson represents only women, and not men, in her family law practice. 8 Her reasons for wanting to represent women and not men involve a desire “to devote her expertise to eliminating gender bias in the court system,” 9 to specialize in “the issues that arise in representing wives in divorce proceedings,” 10 and “to feel a personal commitment to her client’s cause . . . that in family law she has only experienced . . . in representing women.” 11

• Lawyer 6 is a white male attorney who represents only men in family matters and has acquired particularized expertise in advance planning to remove assets from the reach of possible divorce court decrees. He believes that limiting his practice to men—and letting his clients and prospective clients know of this limitation—is essential in creating and maintaining his clients’ confidence in him and his work, and that having their total confidence is essential to his specialized asset-protection counseling. Further, as a matter of personal and political conviction, Lawyer 6 believes that those who work in the labor and capital markets to create income and wealth should be entitled to keep the fruits of their labor and that any problems concerning the economic status of women after divorce should be resolved either by prior contractual agreements of the parties, the individual efforts of the divorced female spouse or by social relief programs funded by all taxpayers, and not by family court orders, which he views as forced contributions from the former male spouse.

From a broad perspective, the decision to permit or prohibit lawyer discrimination is yet another example of interest balancing in the regulatory context. In general, our society has strongly embraced the antidiscrimination principle and its core idea that making decisions about other people on the basis of their race and sex is presumptively wrong. 12 However, other goals, such as autonomy, privacy or efficiency, sometimes trump the policy of nondiscrimina-

7. 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997). This essay assumes the reader’s basic familiarity with this decision.
8. She represents both men and women “in other legal proceedings, not involving controversies between men and women . . . .” Id. at 40.
9. Id.
10. Id.
11. Id.
tion and then, through exemptions, exceptions and affirmative defenses, statutes permit discrimination. A decision in the lawyer context will balance the importance of prohibiting lawyer discrimination against the importance of preserving the freedom to discriminate as an essential part of the practice of law. A decision-maker that engages the issue will have to assess the practical and symbolic consequences of the decision and then decide to permit, to prohibit or to permit some and to prohibit other lawyer discrimination.

As a matter of both law and policy, the legal status of lawyer discrimination is presently open for discussion as never before. The longstanding traditional view permits all lawyer discrimination as a necessary consequence of broad lawyer discretion to select or reject clients. This view somehow survived the civil rights and regulatory revolution of the 1960's and 1970's and has reigned largely unchallenged and virtually unnoticed. However, recent rules and rulings prohibiting lawyer discrimination—from sources as diverse as state bar regulation, federal legislation, and a new application of traditional state statutes—threaten the dominance of the traditional view. The State of California, with more lawyers than any other state in the nation, now prohibits lawyers from discriminating against clients. The 1990 Americans with Disability Act specifically prohibits unlawful discrimination in employment or in "accepting or terminating any client," id. Rule 2-400(B)(1)-(2), and states that unlawful discrimination "shall be determined by reference to applicable state or federal statutes or decisions making unlawful discrimination in ... offering goods and services to the public," id. Rule 2-400(A)(3). An enforcement provision states that "[n]o disciplinary investigation or proceeding may be initiated by the State Bar against a member under this rule unless and until a tribunal of competent jurisdiction, other than a disciplinary tribunal, shall have first adjudicated a complaint of alleged discrimination and found that unlawful conduct occurred." Id. Rule 2-400(C). There are as of yet no decisions, rulings or advisory opinions interpreting this Rule. Telephone interview with Lynn Cobb, Paralegal, State Bar of California (Feb. 24, 1998).
cally identifies the "office of . . . [a] lawyer" as a place where disabil-
ity discrimination is prohibited. And the Stropnicky decision that led to this symposium ruled that a state public accommodation law, enacted in 1865, prohibits all lawyer discrimination. The issue is ready for reconsideration.

B. A Proposed Answer: A Summary of the Argument

This essay offers an approach to lawyer discrimination that falls between the total permission of the traditional view and the total prohibition of the recent enactments and interpretations. Borrowing from the approach used in employment discrimination law, I propose the prohibition of lawyer discrimination, subject to two narrow affirmative defenses. The general prohibition represents society's strong opposition to discrimination and applies to lawyers the same rule that currently applies to doctors, psychiatrists, accountants and virtually all other professions and occupations—the rule of nondiscrimination. The two affirmative defenses recognize that exceptional circumstances may justify otherwise-unlawful discrimination. One such defense, analogous to the BFOQ defense in employment law, is based on professional standards and permits

In recent years, several jurisdictions have considered and enacted antidiscrimination rules governing employment practices and the treatment of witnesses, court personnel and attorneys. See Begg, supra note 3, at 303-18 (discussing proposed rules and rules in Colorado, the District of Columbia, Florida, Michigan, New Jersey, New York, Pennsylvania, Rhode Island and Washington). However, I have found no other jurisdiction whose code of professional responsibility explicitly prohibits lawyer discrimination against clients.


19. Section 98 of Chapter 272 of the Massachusetts General Laws was enacted on May 16, 1865, and amended on numerous occasions thereafter. Its text does not provide any affirmative defenses, and the Single Commissioner's decision in Stropnicky did not recognize any.

20. BFOQ is the acronym for "bona fide occupational qualification," a defense recognized in Title VII, ADEA, and the ADA. Title VII reads: Notwithstanding any other provision of this [title], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2(e) (1994); see also 29 U.S.C. § 623(f)(1) (1994) (BFOQ also serves as a defense in the ADEA when the use of age is "reasonably necessary to the normal operation of the particular business"); 42 U.S.C. § 12113(a) (1994) (it may be a defense to a charge of discrimination under the ADA that "an alleged application of qualifica-
discrimination if the attorney can prove that such discrimination is necessary to the practice of law. The other affirmative defense permits discrimination if the lawyer proves that the prohibition violates a constitutional right of either the lawyer or the client, such as the right of free speech, the right of association or the right to avoid being compelled to say what one does not want to say. Under my proposal, a lawyer wishing to discriminate must present a written request for the recognition of an affirmative defense, in advance of any discrimination, to the state entity that regulates lawyers and must obtain prior approval for any discrimination. 21

Section II sets forth my proposal and the reasons that support it, and Sections III and IV interpret the proposal and apply it to the conduct of the six attorneys in the introductory examples. In carefully applying the antidiscrimination principle to the practice of law and the interaction between lawyers and clients, these sections produce an interesting finding: not all lawyer discrimination is alike. As is common with employment, housing and other forms of discrimination, there are two distinct types of possible lawyer discrimination: outright client rejection on the one hand, and limits in the selection of particular issues and arguments, on the other. 22 The discrimination of Lawyers 1, 2, 4, 5 and 6 exemplifies outright client rejection. The discrimination of Lawyer 3 represents the discriminatory limitation of issues and arguments. 23 Distinguishing between these two types of lawyer discrimination is useful in thinking about the discrimination that might be justified and the discrimination that cannot.

21. The requirement for a prior written ruling will encourage reflection and discussion about the decision to discriminate, from which might come greater understanding of both the reasons for the prohibition and the reasons for the discrimination and, over time, better mechanisms to accommodate the tensions between the prohibition and the lawyer's practice. Written rulings will also provide guidance to other lawyers and will develop both the boundaries between permissible and impermissible discrimination and an understanding of the values that shape those boundaries.

22. These two types of discrimination are analogous to "failure to hire" and "terms and conditions" discrimination in employment discrimination cases, 42 U.S.C. § 2000e, and "failure to rent" and "terms and conditions" discrimination in housing discrimination cases, 42 U.S.C. § 3604(b) (1994).

23. It is classic disparate treatment because the lawyer treats a male client differently than she would treat a female client.
As developed more fully in Section III, I conclude that none of the many plausible conceptions of the practice of law, the lawyer's role and the client's rights can justify discrimination in the outright rejection of clients, and that prohibiting such discrimination does not violate a lawyer's (or client's) constitutional rights. On the other hand, I find that both affirmative defenses play an important role in justifying the second type of discrimination in certain cases. Both constitutional law and professional standards governing the practice of law support a lawyer's qualified right not to make particular arguments on behalf of a client of a particular race or sex that he or she would make on behalf of a client of another race or sex. In Section IV, I describe how these professional standards can justify the actions of Lawyer 3 but not the conduct of the other five lawyers.24

I want to make two final introductory points before proceeding with the substantive discussion. First, I want to acknowledge the difficulty of the issues and my own uncertainty with my proposed solution. The question of when, if ever, to permit lawyer discrimination is difficult and surprisingly slippery. It involves basic and deeply contested issues concerning the lawyer's role, the nature of the practice of law and the nature of a profession. It requires assessments of both lawyer-centered and client-centered views of legal practice and the implications and limitations of those views. I am far from certain that my proposals are correct as a matter of either law or policy; I have changed my views more than once in the preparation of this essay and will surely be forced to think hard about changing them again. It will take time and experience to build a shared vocabulary in this area and to develop some confidence in our individual and social judgments. Given this difficulty and uncertainty, we should favor approaches that foster dialogue and discussion and that encourage us to understand better and to accommodate more effectively the tensions between the prohibition against discrimination and evolving professional standards and constitutional rights.

24. I also explore how it may be possible to recast Judith Nathanson's claim and view her as similar to Lawyer 3. While not how she presented herself or her claim and thus not the basis on which the Single Commissioner adjudicated the case, Lawyer 3's claim seems to capture the core of Nathanson's concerns. In Section V, I suggest that the Full Commission of the MCAD should incorporate my two proposed affirmative defenses into the statute and then remand the case to the Single Commissioner to hold further hearings and to determine whether Ms. Nathanson satisfied the requirements of either or both of the affirmative defenses.
Secondly, I want to explain the format used in the following sections. The essay elaborates the approach summarized in this introduction by presenting a suggested legislative resolution and then interpreting and applying that legislation. To assist in the explanation, I use the device of a hypothetical legislature,\textsuperscript{25} one that heard about the Stropnicky case, studied the issue of lawyer discrimination and then enacted legislation prohibiting such discrimination, subject to the two affirmative defenses. For me at least, the legislative setting provides a policy-oriented perspective broader than the one available when responding to issues raised by a particular case or interpreting state or federal law or codes of professional responsibility. Further, locating the policy discussion and decision in a legislature highlights several institutional features of lawyer discrimination that are easily overlooked: that the legal profession and the judiciary are not the only sources of professional standards for the profession;\textsuperscript{26} that a legislature may very well act to impose standards if it determines that the legal profession’s own standards are distinctly out-of-touch with broad social norms; and that a legislature will be skeptical of arguments based on what I will call “lawyer exceptionalism,” claims that the practice of law is so “special” that the standards that apply to other occupations and professions should not apply to lawyers.

\textsuperscript{25} This legislature is of course the creation of the author, a fifty-two year old white male law professor who was, from 1977 to 1981, a Commissioner of the MCAD, the agency whose Stropnicky decision inspired this symposium. I project onto this hypothetical legislature my views on how a conscientious legislature ought to approach and to resolve these issues. I make no claim to descriptive accuracy; it is simply a heuristic device.

\textsuperscript{26} In this country, the judiciary is the primary regulator of lawyers, based both on historical practice and the separation of powers grounds that the regulation of the practice of law is part of the judicial function. This separation of powers perspective supports what is known as the “negative inherent powers” doctrine, a radical form of which holds that “any attempt by either the legislative or executive branch to entrench on that exclusively judicial power is an unconstitutional usurpation.” CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 27 (1986). The doctrine is susceptible to serious criticism and, even in jurisdictions that accept the doctrine, it is not absolute. See id. at 28-31. This essay assumes, without further discussion, that no state Supreme Court would apply the doctrine to invalidate a state statute that prohibits lawyer discrimination, especially not a statute that recognizes two affirmative defenses, one of which is tied to professional standards as determined by the committee that regulates lawyers. In any event, the legislative device in this essay is simply a method for presenting the discussion. My underlying approach would work as well as an amendment to the Disciplinary Rules promulgated by the highest court of any jurisdiction.
II. THE LEGISLATION

This section will describe the legislature’s deliberative process and will then present a statute that reflects the legislature’s resolution of the issues. Sections III and IV then interpret and apply the statute. As part of the legislative process, our hypothetical legislature received a briefing on the Stropnicky decision and held hearings on the issue of lawyer discrimination. It thus acquired a considerable amount of background information on matters such as the professional standards of the legal profession and other professions governing discrimination against clients, the existing federal laws governing such discrimination, and the social facts concerning nature and extent of such discrimination. The legislators were surprised to learn that, even though no other profession permits discrimination against clients and federal law likely prohibits at least some forms, the professional standards of the legal profession not only do not explicitly prohibit lawyers from discriminating against clients but actually permit such discrimination.27 The legislators learned that the legal profession is alone in its policy of permitting discrimination and that the professional standards governing doctors and psychiatrists (and most other professions and occupations) explicitly prohibit discrimination.28 The briefing also informed the

27. This freedom to discriminate is one small part of what Professor Wolfram calls the “Orthodoxy of Professional Freedom to Choose Clients.” Id. at 573. In exercising this general freedom, “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 lawyer’s race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral.” Id. Professor Chin further elaborates and defends this traditional view of the lawyer’s freedom to discriminate. See Gabriel J. Chin, Do You Really Want a Lawyer Who Doesn’t Want You?, 20 W. NEW ENG. L. REV. 9 (1998).

28. See, e.g., AMERICAN COLLEGE OF PHYSICIANS, ETHICS MANUAL, reprinted in CODES OF PROFESSIONAL RESPONSIBILITY 239, 241 (Rena A. Gorlin ed., 3d ed. 1994) (“Confidentiality respects the privacy of patients, . . . and prevents discrimination based on their medical condition.”); AMERICAN DENTAL ASSOCIATION, PRINCIPLES OF ETHICS AND CODE OF PROFESSIONAL CONDUCT, reprinted in CODES OF PROFESSIONAL RESPONSIBILITY, supra, at 219, 219 (“[D]entists shall not refuse to accept patients into their practice or deny dental service to patients because of the patient’s race, creed, color, sex, or national origin.”); AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS AND CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, reprinted in CODES OF PROFESSIONAL RESPONSIBILITY, supra, at 265, 327 (“[P]hysicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, or any other basis that would constitute invidious discrimination.”); AMERICAN PSYCHIATRIC ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY, reprinted in CODES OF PROFESSIONAL RESPONSIBILITY, supra, at 349, 354 (“A physician shall, in the provision of appropriate patient care, except in emergencies, be free to
legislators of two federal statutes—the 1990 Americans with Disability Act and a section of the Reconstruction Era Civil Rights Act, amended in 1991—that probably make disability or race discrimination by lawyers unlawful.

The legislators were even more surprised by the traditional rationale for permitting attorney discrimination. As reported to them, the legal profession permits such discrimination because of the risk that strong personal feelings might prevent the lawyer from complying with his or her duties of loyalty to and zealous representation of the client. This rationale astonished the legislators, who thought that a primary reason for professional standards, in any profession, was to guide and even to force otherwise unacceptable personal behavior into conformity with professional norms. They were startled to find the legal profession following the reverse policy and bending professional norms to accommodate unacceptable personal behavior. The legislature found the rationale for the traditional rule—even when burnished by Professor Chin’s spirited defense and elaboration—wholly unconvincing.

The legislative briefing contained two other features: a report on the extent and severity of the problem of discrimination by lawyers and a discussion of possible justifications for what might be

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With respect to racial discrimination, while I agree with Professor Chin that no cases have yet applied § 1981 to the attorney-client contractual relationship, I draw no interpretive message from that fact. It seems to me that a statute that gives "all persons within the jurisdiction of the United States ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens," 42 U.S.C. § 1981(a), would give a black prospective client the same right to make and enforce a lawyer-client contract as a white person, see Begg, supra note 3, at 329-35 (discussing application of § 1981 to lawyer-client contracts).

32. See Chin, supra note 27.
called "affirmative" forms of discrimination, as practiced by Judith Nathanson and other lawyers. Reviewing a number of recent studies on discrimination in the legal profession, the staff reported that the problem of lawyer discrimination against clients was not particularly widespread or severe. The studies discussed many types of discrimination and especially noted barriers to the entry of minorities and women into the professions and the treatment of minority and women once they have entered the profession. While documenting these problems and suggesting several solutions, it is noteworthy that these reports did not even mention, let alone discussed, the problem of discriminatory refusal to accept clients. The staff offered the informal, anecdotal opinion that most lawyers do not discriminate but instead offer their professional services to all paying clients and that money—not discrimination—is the barrier preventing some minorities, women or other protected classes from obtaining needed legal services.

On the other hand, the report also noted anecdotal and historical evidence of discrimination. Anecdotally, the staff had received reports of blatant discrimination, such as lawyers who will not represent African-Americans because of racial animus or homosexual men or women because of homophobia. It has read of the refusal of doctors, dentists and lawyers to serve people infected with the HIV virus and knows that Congress found disability discrimination by businesses and professionals (including lawyers and doctors)


in places of public accommodation prior to enacting the Americans with Disabilities Act\textsuperscript{35} in 1990. On the historical side, the legislature is also aware of past patterns of discrimination, including WASP law firms refusing to represent Jewish, Irish-American and Italo-American clients and of racial and religious discrimination in the legal and medical professions.

After discussing this report, the legislature agreed that any blatant discrimination that does occur is harmful and wrong and should be declared unlawful. In addition to the economic losses, such discrimination also inflicts a dignitary harm upon the victim and an assault on society's commitment to nondiscrimination. Even if lawyer discrimination is not widespread, a rule permitting discrimination in the legal profession sends precisely the wrong message about both the legal profession and society's views about discrimination. The legislature decided to replace the traditional rule with a rule explicitly prohibiting discrimination, if only for symbolic reasons. Laws against discrimination require everyone else—employers, landlords, bankers—to control their personal preferences when conducting a regulated business. It is not too much to require lawyers to obey these same laws.\textsuperscript{36}

On the other hand, the legislature also thought it appropriate to recognize certain narrow affirmative defenses. Just as an employer is permitted to discriminate if it can prove that such discrimination is a bona fide occupational qualification, the legislature believed that a lawyer (like any other professional) should be permitted to discriminate if he or she could prove that such discrimination is necessary to the practice of the profession, as determined by the professional standards of that profession. In this regard, the legislature noted that lawyers in practice often specialize in many different ways, including their choice of clients and issues. The legislature did not want to disturb these practices, as it understood


\textsuperscript{35} 42 U.S.C. §§ 12101-12213 (1994). The ADA explicitly defined professional offices as places of public accommodation subject to the statute's prohibition against discrimination. \textit{See id.} § 12181(7)(F).

\textsuperscript{36} The legislature also considered and rejected an argument that the prohibition would be unworkable, would undermine the lawyer-client relationship, and would lead to a flood of frivolous and vexatious claims. These potential problems beset all discrimination laws, indeed all forms of legal regulation. Employers, landlords and other subjects of such regulation have all made the same objections, which society has consistently rejected. It is both unpersuasive and unseemly for lawyers to insist that enforcement costs and consequences should exempt them, and no one else.
them. Some lawyers represent only plaintiffs and others only defendants in personal injury work; some exclusively management and others exclusively labor in employment law. Even more to the legislature's point, longstanding and important legal advocacy groups, such as the NAACP Legal Defense Fund, the ACLU, The ACLU Women's Rights Project and the NOW Legal Defense Fund specialize in representing the interests of certain groups and ideas. The legislature's understanding was that these lawyers do not discriminate on the basis of race, sex or any other prohibited characteristic when they decide which clients to accept and to reject. Instead, they base their client-representation decisions on facts and issues raised in particular cases and the congruence of those facts and issues with their practice, strategy and legal and ideological beliefs. The legislature also understood, however, that some of the legal defense organizations may at times consider the race or sex of a prospective client in determining the types of arguments they would be willing to advance on behalf of that client. The legislature did not intend its new law to change what it understood to be these current practices and expected the affirmative defenses to apply to any distinctions and discriminations that they might make in issue and argument selection.

The legislature also decided to recognize an affirmative defense based on constitutional law, permitting the discriminating attorney to avoid liability if he or she proves that prohibiting the discrimination would violate a constitutional right. The legislative report noted that the interpretation of the constitutional issues would be closely related to the interpretation of professional standards governing the practice of law. The legislature included the constitutional affirmative defense in the statute to assure that the administrative agency charged with the initial fact-finding and interpretation will engage the constitutional issues together with the issues concerning professional standards and the appropriate role of lawyers.

With respect to the affirmative defenses, the legislature created an explicit legislative history to document its legislative intent that the affirmative defenses were to be narrow and infrequent exceptions to the general rule prohibiting discrimination. The legislature intended to override the legal profession's traditional rule permit-

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37. I describe the nondiscriminatory practices of these groups as the legislature's background understanding (whether true or not). I believe the description to be true as a matter of social fact but do not presently have documentation for my belief.
ting discrimination and to replace it with a general rule prohibiting discrimination and did not intend to permit the legal profession's traditional rule to reemerge as an affirmative defense. The legislature intended that the affirmative defense would be used only for determining the legality of "affirmative" discrimination. The legislature found that discrimination like Attorney Nathanson's, motivated not by discriminatory animus but by specialized work on behalf of a historically-disadvantaged class, raised many difficult issues. The legislature's discussion of "affirmative" discrimination echoed the rhetoric of the affirmative action debates, with some legislators supporting a rule of sexblindness (and colorblindness) and others supporting a flexible, asymmetrical standard that would permit exceptions for some actions designed to assist members of historically subordinated groups.

The discussion was unsatisfyingly abstract and the legislature was unable to reach agreement. It decided that the issue would be more appropriately discussed and resolved in the context of actual cases and thus decided to permit the regulatory agency to determine the circumstances, if any, in which such discrimination could be justified. However, the legislature established a strict standard to control its delegation. It required the discriminating lawyer to persuade the regulatory agency that the discrimination was necessary to the practice of law and, as a way of underlining the standard of necessity, to prove that there was no less discriminatory means of achieving the same goal. Further, the legislature expressed its intention that the required necessity was to be measured not by the idiosyncratic practice of any individual lawyer but against the professional standards for the practice of law applicable to the entire profession. Finally, the legislature decided to require a lawyer wishing to discriminate to present a written request, in advance of any discrimination, to the state body that regulates lawyers. The prior written request will encourage the individual lawyer to think seriously about the reasons for the proposed discrimination and to discuss those reasons with a professional body.

After concluding its deliberations, the legislature prepared a statute incorporating its decisions. The substantive portions\(^{38}\) of that statute provide:

\(^{38}\) Any discrimination statute would also have procedural requirements, enforcement provisions and a remedies section. While important in any regulatory regime, they are beyond the scope of this essay.
Non-Discrimination in Licensed Occupations

1(A) It shall be an unlawful practice for the holder of any occupational or professional license issued by the State to practice or to perform any occupation or profession to discriminate in any way against an actual or potential customer, client or patient because of that person's race, color, national origin, religion, sex or disability;

(B) Notwithstanding § 1(A), it shall not be an unlawful practice if the holder of the license demonstrates that it qualifies for an affirmative defense, by persuading the agency that issued the license that:

1) the discrimination is a bona fide occupational or professional qualification necessary to the normal operation or practice of the occupation or profession and that there is no less discriminatory way to practice the occupation or profession; or

2) the prohibition of such discrimination would violate the constitutional rights of the holder of the license.

(C) The holder of a license wishing to establish an affirmative defense under § 1(B) must first apply to the agency that issued the license, setting forth with particularity the nature of the discrimination in which the holder wishes to engage, the affirmative defense(s) it wishes to establish and the reasons that support its claim for the affirmative defense(s).

III. interpreting the Statute and Its Affirmative Defenses

This section will interpret the statute and its affirmative defenses. The statute establishes a clear starting point and a directed method of analysis. Under the statute, treating a client or prospective client differently because of a proscribed characteristic is presumptively unlawful, subject to the affirmative defenses based on professional standards or constitutional rights. Each of the six attorneys has in fact treated a client or prospective client differently because of race or sex. Therefore, under the statute, the conduct of all six attorneys is unlawful unless protected by an affirmative defense.

39. Although the impetus for the statute was lawyer discrimination, the statute applies to all licensed occupations. By adopting a uniform rule, the legislature sought to reaffirm the strong social policy against discrimination and to treat any differences between the professions and occupations in the context of affirmative defenses to the general rule.
Before applying the affirmative defenses to the six individual cases in Section IV, this section will discuss the general considerations that inform those specific applications, first for the professional standards and then the constitutional affirmative defenses. In determining whether lawyer discrimination is necessary to the practice of law or required as a matter of constitutional right, I examine different perspectives on the practice of law, the role of lawyers and the rights of clients. I conclude that discrimination in the selection and rejection of clients cannot be justified but both professional standards and constitutional law support the freedom of the lawyer to use the race or sex of the client as a factor in interpreting the law and deciding which arguments to make on behalf of a client.

A. Discrimination Justified by Professional Standards

To establish an affirmative defense based on professional standards, the lawyer must prove that discrimination based on race or sex is necessary to the practice of law. Given that the affirmative defenses will be “narrowly construed”\footnote{Dothard v. Rawlinson, 433 U.S. 321, 334 (1977); see also International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (“Our emphasis on the restrictive scope of the BFOQ defense is grounded on both the language and the legislative history of § 703.”).} and that the proponent has the burden of persuasion, this affirmative defense will be difficult—and, for outright client rejection, impossible—to establish. In the practice of law, lawyers provide legal services to resolve their client’s legal problems.\footnote{Lawyers also serve other functions and provide other services—publicists, lobbyists, friends and so on. However, these additional functions are subsidiary to and directed toward the core function of providing legal services as defined by the professional standards of the legal profession.} In doing so, lawyers use the particular knowledge, skills and values of the legal profession. The most complete recent inventory of the skills and values of the practicing attorney is the MacCrate Report.\footnote{See Task Force on Law Schools and the Profession, Legal Education and Professional Development: An Educational Continuum, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO BAR (chaired by Robert McCrate). The Report describes “the skills and values with which a well-trained generalist should be familiar before assuming ultimate responsibility for a client . . . [and which are required] to practice law competently and professionally.” Id. at 125. The ten skills are problem-solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and ADR procedures, organization and management of legal work, and recognizing and solving ethical dilemmas. See id. at 135. The four values are competent representation, promoting justice, fairness and morality, striving to improve the profession, and professional self-development. See id. at 136.} That report gives no support to the claim that discrimination in client selection in order to have cli-
ents of a particular race or sex is in any way necessary to the practice of law.

1. Outright Client Rejection

While rejecting the traditional interpretation, the legislature specifically left open the question of whether "affirmative" discrimination could be necessary to the practice of law. Attorneys such as Judith Nathanson and Lawyer 6 believe that a strong personal relationship—a bonding and a feeling of attachment and solidarity—between the lawyer and client is essential to their practice of law, and assert that the strong personal relationship is possible only with clients of a particular race or sex. They also devote (at least part of) their legal practice to a particular cause, such as achieving equal rights or economic justice for a particular group, and want to represent only clients who are members of that group.

The decision on whether "affirmative" discrimination is necessary to the practice of law of course depends on a conception of legal practice and the lawyer's role. None of several common views of the lawyer—as a "hired gun," as counselor, as fiduciary and as an officer of the court—support the claim that "affirmative" discrimination is necessary to the practice of law. As a hired gun (or agent for the principal, the client), the attorney is selling his or her legal expertise in the marketplace, similar to any other tradesperson, and the law regularly regulates tradespeople as they sell their services. As counselor, the attorney discusses matters with the client and gives both legal and non-legal advice. However, the fact that other professionals (including psychiatrists and social workers) engage in counseling while prohibited from discriminating against clients undermines the claim that such discrimination is necessary. As fiduciary, the lawyer has a special obligation to respect and to protect the trust and confidences of the client. While that obligation surely supports some lawyer discretion in selecting the clients to whom he or she will owe that obligation, it does not establish racial or sexual discrimination as a necessary element of that discretion. Finally, as officer of the court, a thick system of external rules gov-

43. That interpretation permitted discrimination by lawyers due to the risk that strong personal feelings might compromise the duties of loyalty to and zealous representation of the client. The rejection reflects the view that, in the course of their professional work, professionals must control their personal feelings and conform their professional conduct to proscribed external standards, including nondiscrimination.

44. See generally WOLFRAM, supra note 26, at 687-770.
erns the lawyer's conduct and speech, and adding a rule prohibiting discrimination is not inconsistent with that role.

Two other perspectives might justify the claim that discrimination is necessary to the practice of law: the need to respect the autonomy of the individual lawyer, and the need to respect the decisions of the client. There are two versions of the lawyer autonomy argument, one based on the lawyer's desire for bonding in the lawyer-client relationship and the other based on the lawyer's freedom to advance social causes. The first version of the lawyer autonomy argument derives from the individual lawyer's belief that a close attachment with a client is necessary for the effective practice of law. If the lawyer further believes that he or she can only achieve that close attachment with clients of a certain race or sex, then the legal profession should respect that belief and permit the discrimination in order to permit the effective practice of law. This argument has some resonance, trading as it does on the attractiveness and value of positive lawyer-client relationships. Such relationships are indeed wonderful and deeply satisfying and, often, the most instrumentally effective. We instinctively understand both their power and their fragility and want to foster and protect those relationships. Maximizing lawyer freedom—including the freedom to discriminate—is one way to foster (and avoid jeopardizing) those relationships.

While I too value strong lawyer-client relationships, discrimination is hardly necessary to the achievement of strong bonds, and it is unwise to permit discrimination as a means for achieving them. Lawyers can and do have satisfying and successful relationships across gender, racial, religious and other lines and should be encouraged—indeed, required—to develop the skills and commitment necessary to do so. The contrary belief—that discrimination is necessary for successful client relationships and that prohibiting discrimination would make such relationships impossible—is another example of what I earlier called "lawyer exceptionalism," the belief that lawyers are special and require different rules. If psychotherapists, bartenders and many others can establish effective professional relationships under a regime of nondiscrimination, lawyers can too. This "discrimination for bonding" rationale is too similar to the "negative personal feelings" rationale for the traditionally permitted discrimination. Both rationales are unacceptable for the same basic reason: in the practice of a profession, professional standards (including nondiscrimination) should control contrary conduct motivated by personal feelings.
A second version of the lawyer autonomy argument is that, in the practice of law, lawyers must have the freedom to work on behalf of particular causes and that their work on behalf of this or that cause justifies client discrimination. This argument confuses ends and means and eliminates a necessary distinction between personal and professional roles. A lawyer of course has the right, both as an individual and as a licensed professional, to work on behalf of any cause he or she wishes to support, including the advancement of women or further economic and social progress for African-Americans. But the means that the lawyer uses to pursue those ends must be lawful. The lawyer as an individual has wide latitude in deciding how to achieve those ends and can choose with whom and for whom to work on those activities, using whatever criteria he or she wishes to use. In the practice of law and the representation of clients, however, the lawyer's role is constrained by a number of legal requirements and professional standards, and the prohibition against client discrimination is another such requirement. In my opinion, using the serve-the-cause rationale to permit discrimination would be a serious mistake. It would authorize and justify virtually every kind of discrimination, for and against any type of racial, ethnic, religious or sexual group. It would be unwise and inconsistent with the policy choice reflected in the legislation. As shown by the examples of the NAACP and NOW Legal Defense Funds and others, it is also unnecessary.

The other possible justification for lawyer discrimination is client-based, grounded in the needs and rights of the client, not the autonomy of the lawyer. The client-based argument asserts that lawyers must discriminate against some people in order to meet the needs of those who want to be represented by an attorney with whom the client can "really" identify because he or she represents "only people like me." Client choice is an important value, but using it to justify attorney discrimination simply takes it too far.

As a general matter, clients as private individuals can lawfully discriminate. As individuals, they can use any reason to select or to reject an attorney (or electrician or doctor), including race or sex. Female clients can, and often do, select a woman lawyer (or electrician or doctor), and the same can be said for males, whites, blacks and people of all religious persuasions. No law regulates

45. While not perfectly clear as a matter of positive law, it is unlikely that a business client has a similar right to discriminate, at least on the basis of disability or race. See 42 U.S.C. §§ 12101-12213 (1994); 42 U.S.C. § 1981 (1994).
such individual client choice, and any such law would be undesirable, unworkable and probably unconstitutional as an infringement on personal autonomy.

The principle of personal autonomy which supports this client choice and freedom to discriminate does not, however, support the stronger right to select, and to have available for selection, a "pure" attorney, one who represents only clients of one race or sex. This broader justification for a lawyer's right to discriminate clashes too sharply with the principle of nondiscrimination. A recycled version of the "customer preference" defense that has been soundly rejected in most employment discrimination cases, this argument sweeps too broadly and depends too strongly on entrenched and established patterns of racial and social interaction that the laws against discrimination were designed to eliminate.

The discussion of professional standards thus far has focused on claims that lawyer freedom to select clients of a particular race or sex is necessary to the practice of law. After examining arguments based on the lawyer's role and on a client's rights, it has concluded that the legislative standard for justifying a discriminatory

46. See, e.g., Gerdom v. Continental Airlines, Inc., 692 F.2d 602, 609 (9th Cir. 1982) (the airline passengers' preference for female flight attendants cannot establish a BFOQ); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (the fact that the employer's South American clients would refuse to deal with women officers is not a basis for establishing a BFOQ); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (the "pleasant environment" and "cosmetic effect" provided by female flight attendants was tangential to the airline's primary function); Vigars v. Valley Christian Cent., 805 F. Supp. 802, 808 n.4 (N.D. Cal. 1992) (the preference of parents whose children attended school did not establish a BFOQ for the school prohibiting unwed pregnant employees); Bollenbach v. Board of Educ., 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) (Hasidic clientele's preference for male bus drivers does not establish a BFOQ); Wilson v. Southwest Airlines Co., 517 F. Supp. 292, 393 (N.D. Tex. 1981) (the airline passengers' preference for female flight attendants cannot establish a BFOQ; the duties of attracting and entertaining male passengers and fulfilling customer expectations for female service are tangential to the essence of a flight attendant job).

47. As an example of laws relying on customer preferences to justify sex discrimination, several states, including Massachusetts, have recently amended their public accommodation statutes to permit health and fitness clubs to discriminate on the basis of sex, thus legalizing all-female and all-male health clubs. See 1998 Mass. Legis. Serv. ch. 19 (West); ILL. COMP. STAT. ANN. 5/5-103 (West 1993) ("Nothing in this Article shall apply to . . . [a]ny facility, as to discrimination based on sex, which is distinctly private in nature such as . . . health clubs . . ."); see also Livingwell (North) Inc. v. Pennsylvania Human Relations Comm'n, 606 A.2d 1287, 1294 (Pa. Commw. Ct. 1992) (sex is a bona fide public accommodation qualification for members of a women's health club). Legislatures approving these amendments believed that, in the context of health clubs, protecting the privacy interests of customers was more important than enforcing the prohibition against discrimination. The sharp focus and narrow tailoring of this exemption has given it an appeal unlikely to exist for clients of legal services.
refusal to represent a client has not been met. When the decision-maker (in this essay, the legislature) rejects the traditional "strong personal feelings" as a rationale and requires that discrimination be necessary to the practice of law, the remaining arguments in support of such discrimination also collapse.

2. Reasonable Limitations on Issues and Arguments

However, while providing no defense to outright discrimination, professional standards do justify the lawyer's use of the race or sex of a client in deciding the issues and arguments the lawyer is willing to raise on behalf of that client. To step outside of the family law area, take the example of a lawyer who specializes in representing plaintiffs in employment discrimination cases. Assuming an appropriate factual basis, professional standards will require the lawyer representing a black or female plaintiff in a Title VII employment discrimination case to make a claim of disparate impact discrimination48 (and would find the lawyer professionally negligent if he or she did not make that claim). However, in discussing the possible representation of a white or male plaintiff in an employment case with otherwise-identical facts, that same lawyer should be allowed, if he or she desires, to inform the potential client that he or she will not make a disparate impact argument on behalf of the white or male client. The basis for the refusal to make the argument is the attorney's reasonable legal opinion that, because the disparate impact theory of discrimination is designed to remedy past discrimination against historically-subordinated groups, only members of such groups can properly assert disparate impact claims. This view of the disparate impact claim is a reasonable and probably even the correct view, but it is by no means the only reasonable interpretation and is not authoritatively established.49 A


49. Although the Supreme Court has never directly addressed the issue, language in two cases suggests that the disparate impact theory is limited to members of certain groups. Even while deciding that one of the purposes of Title VII was to protect the employment opportunities of individuals (and thus rejecting the employer's group-oriented bottom-line defense), the Court nevertheless said that the disparate impact the-
different lawyer could reasonably assert a disparate impact claim on behalf of a male or white client. Presenting the claim would certainly not violate Rule 11, and the claim might even win. The plaintiff-oriented attorney's legal interpretation is reasonable and legally justified but by no means legally compelled.

Nevertheless, if there is full disclosure to the client, a lawyer has the right and professional obligation to exercise reasonable personal judgment in the interpretation of the law and in the use of that interpretation. The right to exercise reasonable personal judgment in the interpretation of the law is necessary to the practice of law and thus justified by the affirmative defense.\(^50\)

On the other hand, this right is limited, with the limits set by the prevailing professional standard for determining the reasonableness of arguments and claims. For example, it would be unreasonable for the plaintiff's attorney in our example to tell that white prospective client that the law does not support a disparate treatment (as opposed to a disparate impact) claim on behalf of a white employee. The Supreme Court case of *McDonald v. Santa Fe Trail Transportation Co.*\(^51\) authoritatively established that Title VII prohibits employers from such disparate treatment discrimination against both white and black employees. The attorney's refusal to present such a claim on such a basis would be unreasonable and not permitted. On the other hand, the employer might claim that its admittedly disparate treatment of the white employee was justified

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50. This right is a defense to the discrimination charge. If the client retains an attorney after the disclosure, the right also provides a defense to a malpractice claim.

by a lawful affirmative action plan. Given the uncertainty and difficulty of the law in this area, the attorney might reasonably decide not to challenge the employer’s affirmative action, on at least two possible grounds. The attorney might believe that the employer’s plan is legal (although another attorney might assess the same law and the same facts and come to a different conclusion). Or the attorney might decide that litigation involving a challenge to an affirmative action plan is a specialized area of practice, one that the attorney is not prepared to engage. The attorney would then extend the white prospective client an offer of conditional representation, agreeing to represent him but not to present a disparate impact claim or to challenge the employer’s affirmative action plan. The prospective client would then decide to accept or to reject the offer.

3. The Offer of Conditional Representation

The affirmative defense based on professional standards thus yields the following result: outright rejection—no; reasonable limitations on issues and arguments—yes. The prohibition against discrimination forbids the plaintiff-oriented civil rights attorney from rejecting the white or male client because of his race. The attorney cannot have a “black-only” or “women-only” criterion for selecting clients. However, the lawyer can make an offer of “conditional representation,” in which representation is conditional upon the client accepting the fact that the lawyer will not make certain arguments or raise certain claims or defenses.

This concept of “conditional representation” is a necessary consequence of a regime that prohibits outright client rejection but permits discrimination in issues and arguments. As a concept born of compromise, it is an initially unattractive technique, and its defects need to be considered in any evaluation of my suggested approach. “Conditional representation” is sharply at odds with the traditional view of the unconditional, hold-nothing-back commitment entailed in client representation. It sends a mixed message to the client: “I’ll represent you, but I won’t do everything that I lawfully can to accomplish your goals. I will hold back, because my

personal principles are more important than your case." This is ad-
mittedly not an attractive view of the attorney-client relationship.

The response to this criticism is confession and avoidance rather than denial. Despite its admitted flaws, we should still sup-
port conditional representation because, as Churchill said of de-
mocracy, it is better than the alternatives. One can avoid the problem of conditional representation only by adopting an uncondi-
tional rule, one that either permits all or prohibits all discrimina-
tion. Under the traditional rule, permitting all discrimination, the attorney’s message to the prospective client is clear— “I won’t re-
present you because you are black”—but the clarity is purchased at a high price. The clear message inflicts harm on an innocent individ-
ual and undermines both support for the principle of nondiscrimi-
nation and respect for the legal profession. On the other hand, the California rule or the MCAD interpretation prohibiting all discrimi-
nation sends a clear but unacceptable message to attorneys: “Your thoughts and interpretations don’t matter. You are automatons whose only job is to advance all plausible claims, regardless of what you think about them.” This view is equally unacceptable. It em-
body an objectionably narrow view of the lawyer’s role and would invalidate well-established legal practices, traditionally used by or-
ganizations like the NAACP Legal Defense Fund and the NOW Legal Defense and Education Fund.

Conditional representation is a necessary consequence of a middle view that seeks to accommodate both the prohibition against discrimination and a lawyer’s legitimate professional auton-
omy. Further, it is unlikely to present a major problem in practice, because there will be relatively few offers of conditional representa-
tion and even fewer acceptances. If (as may very well have been the case with Mr. Stropnicki) the client seeks the attorney precisely for the attorney’s value in presenting a particular argument or issue, and the attorney legitimately refuses to present that argument or issue, that client will then likely reject the offer of conditional rep-
resentation. However, it makes sense to keep the power of rejec-

53. "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." Winston Churchill, House of Commons (Nov. 11, 1947), in Oxford Dictionary of Quotations 150 (3d ed. 1979).

54. Once the groundrules become established, it seems likely that few attorneys will request, and fewer yet will receive, approval to limit the presentation of issues or arguments, and the types of issues and arguments will soon become standardized. Further, as discussed in the text, many clients will reject the offer of such representation.
tion in the hands of the client, and not the lawyer, because the client has the initial information on his or her legal needs and is better situated to decide whether this or that attorney can best meet those needs.

B. Discrimination as a Constitutional Right

The second statutory affirmative defense applies a defense if the enforcement of the prohibition against discrimination violates a constitutional right. Three related constitutional rights are arguably at issue: the right of free expression, the right of association, and the right not to be compelled to say what you do not want to say. My discussion of these issues will be brief and conclusory, as the essay has already grown well beyond its intended scope. I conclude that the constitutional arguments do not justify outright rejection of a client but can help to support and to explain the right of a lawyer to exercise reasonable professional judgment in deciding what arguments to make (or not to make) on behalf of a client.

The first constitutional defense is a straightforward argument that the statute impermissibly regulates speech. The statute subjects a lawyer’s speech to financial penalty and injunction, based on the content of her speech. As an example, Judith Nathanson wants to say to Mr. Stropnicky, “I will not represent you because you are a man and I specialize in representing women,” and to her female clientele, “I represent only women.” The statute’s prohibition makes both statements untrue, and general commercial law prohibits the making of untrue statements. Thus, in combination with general commercial law, the statute does in fact abridge her freedom of free speech, making it unlawful for Judith Nathanson to say what she wants to say. However, this type of abridgement is a standard feature of most regulatory statutes and does not violate the Constitution.

The second possible constitutional right to discriminate is based on the right of association, an aspect of personal autonomy and choice which protects the right to chose one’s friends, house guests and marriage partners, free of most state-imposed constraints or requirements. Given the intense and personal nature of the lawyer-client relationship, an attorney might claim an analogous right to choose the clients with whom to associate, free of statutory requirements. However, the attorney-client relationship is more

55. If the statute applies, she cannot refuse to represent Mr. Stropnicky because he is a man, and cannot represent only women.
professional than personal, and the attorney's right to choose (both to select and to reject) clients is already subject to government regulation and restraint that would be impossible to impose on purely private relationships. Although rarely exercised, courts have the right to force an attorney to represent (that is, to associate with) a client, even over the attorney's objection. Further, ethical rules governing conflicts and prior representation can prevent an attorney from representing (and thus associating with) a client that she affirmatively wants to represent. These longstanding limits on the lawyer's freedom of association are consistent with the Supreme Court's treatment of associational rights in *Roberts v. United States Jaycees*,56 a case where Justice O'Connor wrote in her concurrence that "[a] shopkeeper has no constitutional right to deal only with persons of one sex."57 An attorney has a constitutional right freely to choose her friends, but no constitutional right to choose her clients (or her law associates or even her law partners).58

The final constitutional argument is that the operation of the statute unconstitutionally compels an attorney to say things that he or she does not wish to say, in violation of the attorney's right to control his or her own speech (and silence). Skillfully developed by Professor Harpaz,59 this argument reinforces the right of lawyers to consider race and sex in deciding which arguments to make on behalf of a client. However, in my view, where the legal profession itself has determined that such discrimination violates its professional standards, it does not support a constitutional right to reject clients.

Rather than review the cases and arguments carefully explicated in Professor Harpaz's essay, I will simply identify what I see as the main point of weakness. The argument depends on an analogy, and the analogy is simply not convincing. The differences between the activity of a parade director in organizing and presenting his parade and the work of an attorney in representing a client are profound, and the law should wisely recognize these differences. In case law shorthand, for speech purposes, Judith Nathanson is more like Ollie McClung, the owner of Ollie's Barbeque,60 than "Wacko"
Hurley, a member of the South Boston Allied War Veterans Council that organized the parade.\textsuperscript{61}

First Amendment analysis looks carefully at the context in which the regulated speech occurs, both to classify the level of protection for the speech and to determine the nature and weight of the government's interest. A parade is an example of strongly protected speech, and the First Amendment prevents the government from forcing a parade director (the holder of the speech right) to include (or exclude) this or that group.\textsuperscript{62} While he is "performing" his parade, the government cannot prevent him from saying what he wants to say, cannot tell him what to say and cannot compel him to share his parade or speech with others.

The speech of Ollie the restaurateur and Judith Nathanson the lawyer occurs in a different context. In ways that would be impossible with the parade director, the government can, in certain circumstances and for certain purposes, prevent them from saying certain things and can also tell them what to say. For example, the government can prevent Ollie from telling African-Americans that they are not wanted in his restaurant and from using racial slurs when taking their orders or serving their food. The government can compel Ollie to speak to black customers, to tell them the "specials" not on the menu and to ask them what they would like to order.\textsuperscript{63} If proven that Ollie said to every white patron, "Lovely to have you; y'all come back now," and said nothing to blacks, and did so inten-

\textsuperscript{suit that concluded in the Supreme Court case of \textit{Katzenbach v. McClung}, 379 U.S. 294 (1964). In 1964, they brought an action in the federal district court to enjoin the Attorney General from enforcing, as against their family-owned business, the newly enacted Title II of the 1964 Civil Rights Act, 42 U.S.C. § 2000-b (1994) (current codified version). In a per curiam decision, a three-judge court granted the injunction. See \textit{McClung v. Katzenbach}, 233 F. Supp. 815 (N.D. Ala. 1964). That court noted as "undisputed facts," \textit{id.} at 817, that Ollie's Barbeque served meals in a "wholesome atmosphere," \textit{id.} at 825 n.3, to "white collar business people and family groups," \textit{id.}, and primarily to "regular customers who are for the most part known to the plaintiffs." \textit{Id.} The McClungs "would not voluntarily serve meals to Negros." \textit{Id.}

\textsuperscript{61} "Wacko" Hurley is John J. Hurley, the only individual plaintiff identified in the Supreme Court opinion in \textit{Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston}, 515 U.S. 557 (1995).

\textsuperscript{62} The unanimous Supreme Court opinion goes out of its way to emphasize the classic speech context of the case. The opinion begins by describing the issue as "whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey." \textit{Id.} at 559. The court then takes two pages to describe the 20,000 marchers that often participate in, and the 1 million viewers that often watch, the parade. \textit{See id.} at 560-62.

\textsuperscript{63} Prohibiting and imposing monetary penalties on this form of disparate treatment would constitute government compulsion.
tionally to discriminate against blacks, the government could compel Ollie to say “Lovely to have you . . .” to black patrons as well.

For purposes of analyzing the constitutional basis of a claimed right to discriminate against clients, attorney speech in the context of representing a client in the practice of law is closer to Ollie’s speech than to the parade director’s. While a lawyer is obviously different than a restaurateur or shopkeeper, the professional conduct and speech of a lawyer can be and is extensively regulated, in a way that the parade director’s speech can not be and is not. As the press conference and solicitation cases and long-established limitations on attorney vouching demonstrate, the government can directly prevent the attorney from saying some things that she wants to say. Further, the government can sometimes force an attorney to say things that she does not want to say and to represent clients that she does not want to represent.

The right to protection from compelled speech depends on a strong right—like the parade director’s—to control one’s speech. An attorney has that right in her role as a citizen, organizing a parade or giving a speech, but not in the practice of law governed by the reasonable professional standards of the legal profession.

66. Notwithstanding the desire of the attorney and her client, an attorney is prohibited from “vouching” her belief in her client’s position. See Model Rules of Professional Conduct Rule 3.4(e) (1994); Model Code of Professional Responsibility DR 7-106(C)(3) (1994); see also Wolfram, supra note 26, at 624. Thus, the government can prevent the attorney from saying, “I believe from the bottom of my heart that my client is telling the truth and that she is innocent.”
67. See, e.g., Zuaderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (upholding requirement that attorneys advertising that they accepted cases on contingency disclose that clients might still be liable for substantial costs).
68. A court can require an attorney to represent a client, over the attorney’s objection. Also, in litigation, an attorney must receive the court’s permission in order to withdraw from representation. If that permission is denied, the court can require the attorney to continue representing a client and, in that context, speak on behalf of the client.
69. I do not develop the implications of the continuum of speech that ranges from speech in the lawyer’s office to speech in the courtroom or speech on behalf of a client in other public contexts. These distinctions strike me as considerably less important than the distinction between the roles and activities of the lawyer and the parade director.
IV. APPLYING THE STATUTE

This section will apply the statute to the conduct of the six attorneys and conclude that the conduct of Lawyer 3 is lawful and that the statute bars the conduct of Lawyers 1, 2, 4, 5 and 6. The results for all but Lawyer 4 follow from the straightforward application of the general principles of interpretation developed in Section III. The case of Lawyer 4 raises the additional issue of how to treat conduct based on deeply held views, where such views cannot be justified as reasonable professional judgments but are permissible personal opinions based on religious or moral beliefs.

Lawyer 1 and Lawyer 2 are both white lawyers who refuse to represent African-Americans because of a personal dislike of, and desire not to associate with, black people. Both claim that "strong personal feelings" of dislike of African-Americans would prevent him from proving the zealous representation required by the professional standards. The only difference is their method of operation: Lawyer 1 is honest and overt about his discrimination; Lawyer 2 is covert.

Lawyer 1 will comply with § 1(C) of the statute and seek an affirmative defense and the agency will deny his request. While strong racist "personal feelings" were grounds for refusing to represent a client under the prior law, they no longer suffice, as rejecting the traditional view was the major point of the legislation. Lawyer 1 has no valid constitutional claims. He still has the right to speak and freely to choose his dinner guests and golf partners.70

Lawyer 2 is unlikely to request permission to discrimination from the Board of Bar Overseers. Rejected clients will not know that the reason for the rejection was racial or sexual and are unlikely to file a discrimination complaint. Even if they do, the complaint will be investigated and adjudicated under the difficult Burdine standard71 and, as in employment cases, the clients will often lose. The example of Lawyer 2 reflects two unhappy facts of life that the statute is powerless to change: 1) that covert discrimination is difficult to detect and eliminate; and 2) that people (even lawyers) who lie sometimes get away with it.

While this example exposes a limitation on the statute's likely effectiveness and enforceability, it is not, in my view, a reason for

70. Although, after Hishon v. King & Spalding, 467 U.S. 69 (1984), he may not choose his law partners as freely, at least in most circumstances.

rejecting the statute. Even if it did not change any behavior but instead drove all existing discrimination underground, the statute would still perform the worthwhile function of sending one important message and retracting another. It sends the important social message that discrimination is unlawful. It retracts the prior message that lawyers can discriminate, even though virtually no one else can. That message was harmful to the moral authority and image of the legal profession and undermined the societal commitment to eradicating discrimination; it is important to reject that message.

Lawyer 3 extends to male prospective clients an offer of conditional representation. While she will represent them, she will inquire carefully into the facts of a male homemaker's role and work (and will not simply assume that an actual—as opposed to formal—equivalence with the role and work of a female homemaker). Further, she will not make the “plus factor” argument on behalf of a male client. Lawyer 3 satisfies both affirmative defenses and will be granted a conditional right to discriminate, not in representation but in argumentation. As a matter of professional standards, a lawyer must have a reasonable amount of professional freedom to interpret the law and form opinions about which arguments to use in particular cases. Given the Supreme Court decision in Kahn v. Shevin, recognizing the legality of treating men and women differently in some contexts on the basis of social conditions, Lawyer 3's interpretation is a reasonable and defensible one, although by no means necessary or inevitable. It would be perfectly legitimate for a lawyer down the street to reject this interpretation and to argue that a “plus-factor” for females is illegal and that male and female homemakers should (as a matter of policy) and must (as a matter of law) be treated alike. The law is presently somewhat open-ended in this area and a lawyer should have the freedom to interpret the law either way and to reject an interpretation with which she disagrees.

However, this freedom is not limitless, and the standards of reasonable legal interpretation set the limits. The reasonableness of Lawyer 3's interpretation of the “plus factor” argument is contin-

73. Kahn upheld a statute permitting a property tax exemption for widows but not widowers. See id. at 351; see also Califano v. Webster, 430 U.S. 313 (1977) (per curiam) (upholding Social Security benefit formula that treated women more favorably than men); Schlesinger v. Ballard, 419 U.S. 498 (1975) (5-4 decision) (upholding different treatment of men and women in military discharge policy).
gent on the state of "the law" at the time of the interpretation. If the Supreme Court should reverse Kahn or similar cases using suitably broad language, Lawyer 3's argument might very well become an unreasonable legal interpretation, more like Lawyer 4's view on inter-racial marriage. The boundaries of permissible lawyer discrimination are established by the professional standards governing the lawyer's role.

Lawyer 4 presents an interesting variation. Because he objects to inter-racial marriages, as a matter of personal principle (notwithstanding the fact that such marriages are legal and constitutionally protected), he will not represent a client, whether black or white, who seeks legal representation concerning a prenuptial agreement for an inter-racial marriage, although he will represent a white or black person concerning a prenuptial agreement for a same-race marriage. Under conventional discrimination analysis, his refusal to represent a black or white client in these circumstances constitutes racial discrimination.

Unlike Lawyer 3, Lawyer 4 cannot justify his conduct as an exercise of his professional responsibility to interpret the law and decide which legal arguments to make. His position that prenuptial agreements attached to inter-racial marriages are invalid is completely wrong as a matter of law. If presented in court, it would be rejected and would be grounds for a Rule 11 sanction. Therefore, while Lawyer 4 is certainly free as a citizen to criticize inter-racial marriages, he can hardly claim that such arguments are necessary to or even permissible in the practice of law. Once again, we see that there is limit to professionally-supported lawyer freedom to interpret the law, that the standards of reasonable legal interpretation establish that limit, and that Lawyer 4 has exceeded it.

74. Such a reversal is not an idle possibility. The Kahn decision itself was 5-4. Three years later, Justice Stevens indicated that he might vote to overrule Kahn, which was decided before he joined the court. See Califano v. Goldfarb, 430 U.S. 199, 224 (1977) (Stevens, J., concurring). In Goldfarb, the Court, on a 5-4 vote, invalidated a Social Security provision that treated widows and widowers differently in terms of setting eligibility for survivor benefits.


76. Lawyer 4 may argue that his refusal to represent a client in such circumstances is not racial discrimination, because it is based not on the race of the potential client but on the race of the person that his potential client plans to marry. However, under the reasoning of the Supreme Court in an analogous situation (discrimination based not on the sex of the employee but on the sex of the employee's spouse), the Supreme Court ruled that such one-step-removed discrimination was still unlawful discrimination. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).
On the other hand, the hypothetical asks us to assume that Lawyer 4 feels deeply about this issue and objects to any personal involvement in such marriages on moral grounds. Let us further assume that his objection is as strongly felt as that of the doctor who objects to performing an abortion on moral or religious grounds. For this doctor, not as an interpretation of professional standards but through specific statutes, Congress and state legislatures have authorized the refusal to follow professional standards in certain circumstances.\(^\text{77}\) As a matter of professional standards alone, the doctor would be required to provide an abortion, if medically indicated after consultation with the patient. However, notwithstanding these professional standards and the patient's (\textit{Roe}-based but \textit{McRae}-limited) constitutional right, society has provided a special exemption for the doctor who objects on moral or religious grounds to a procedure that is required as a matter of professional standards. If the doctor is allowed to act on the basis of his strongly felt objections, will Lawyer 4 and, for that matter, Ollie, who also objects strongly on moral grounds to having African-Americans in his restaurant, be offered similar protection? The answer is: maybe, if the legislature offers it. The doctor's protection was a matter of legislative grace, not professional standards, and Lawyer 4 and Ollie will get relief only if the legislature provides it.

The legislature has already refused to grant Ollie relief, and for good reason. The legislature assigned Ollie's objection a very low value and further concluded that protecting Ollie's interest would seriously hinder the enforcement of discrimination law. It would authorize a "racist's veto" that would empower and validate resistance. I would expect that Lawyer 4's request would also be rejected.

Lawyer 5 is Judith Nathanson. As I have indicated earlier, it is unlikely that she can establish an affirmative defense for client rejection. An examination of her stated reasons reveals their inade-

\(^{77}\) See, \textit{e.g.}, 42 U.S.C. § 3000a-7(a) (1994) (no individual is required to perform or participate in abortion if contrary to her religious beliefs or moral convictions); \textit{Mass. Gen. Laws} ch. 112, § 121 (1997) (statutory authorization to refuse to perform abortions if an objection on religious or moral grounds is stated in writing; also authorization to nurses, social workers and psychologists to refuse to give counseling with respect to abortions).

\(^{78}\) See \textit{Harris v. McRae}, 448 U.S. 297 (1980); \textit{Roe v. Wade}, 410 U.S. 113 (1973). While \textit{Roe} and its progeny establish a right to be free of unreasonable government regulation in obtaining an abortion, \textit{McRae} established that the right was a \textit{negative} right to be free from unreasonable government regulation and not a \textit{positive} right to be entitled to government support.
quacy. A desire "to devote her expertise to eliminating gender bias in the court system" identifies an acceptable and commendable end but does not justify the discriminatory means employed to achieve it. The desire "to feel a commitment to her client's cause ... that in family law she has only experienced ... in representing women" is the "strong personal feelings" rationale that was examined and found wanting in Section III-A. A statement that her practice focuses on "the issues that arise in representing wives in divorce proceedings" describes an acceptable area of specialization but does not begin to address—let alone explain—why such specialization requires the rejection of men whose cases involve the same issues. Professor Miller suggests another reason—to enhance "her credibility with judges"—that seems to me to trade unacceptably on both gender stereotyping and vouching.

On the other hand, Judith Nathanson may be like Lawyer 3. Although not fully developed in the record, one reading of the Nathanson-Stropnicky interaction is that Mr. Stropnicky wanted to retain Judith Nathanson because he had strategically determined that she, as a female attorney making the argument that worked so effectively for female homemakers, could most persuasively make the male homemaker argument on his behalf and that she rejected him precisely because she refused to make the same argument for him as she would for a female homemaker. In this view, he wanted to enlist her and her representation to do exactly what she legitimately did not want to do. If that is the case, then she is like Lawyer 3 and can and should explain the restrictions on her advocacy to Mr. Stropnicky and allow him to decide if he wants the conditional representation that she is willing (or, should I say, required) to offer him.

Lawyer 6 is a combination of Lawyer 3 and Judith Nathanson. Like Judith Nathanson, he cannot justify the outright rejection of female clients. Specialization does not justify such discrimination, and his male clients have no right to a "pure" lawyer, one who represents only men. Unlike Lawyer 3 (and like Lawyer 4), his personal and political beliefs go beyond the bounds of reasonable interpretation. However, if Lawyer 6 limited his family law practice to representing only the wealthier party, or the highest income

wage-earner, he presumably could accomplish many of his goals without impermissibly discriminating because of sex.

V. A POSSIBLE APPROACH TO THE STROPNICKY APPEAL

Judith Nathanson has appealed the Single Commissioner's decision in the Stropnicky case to the Full Commission of the Massachusetts Commission Against Discrimination, where the matter is currently under review.80 The Full Commission might consider the approach suggested in this essay when it interprets the Massachusetts Public Accommodation Statute. While the text of the law does not contain any affirmative defenses,81 as a matter of statutory construction and based on its expertise and experience, the Commission could well determine that the purposes of the statute would be best served by recognizing the two suggested affirmative defenses. If the Commission recognized that affirmative defenses were part of the proper interpretation of the statute, it would then be wise to remand the case for further proceedings, to determine whether Judith Nathanson qualifies for either of the affirmative defenses. It is likely that, upon remand, the Single Commissioner would want to hear further testimony and argument on the many factual and policy issues in the context of the particular case. It is also possible that the Single Commissioner would want to use the flexible powers granted the administrative agency and invite participation (in some form—as amicus curiae or as intervenors) from the Massachusetts Board of Bar Overseers and from bar groups (including the Massachusetts Bar Association, the Women’s Bar Association and others) and civil rights and civic and professional organizations.

A hearing on remand might provide a more comprehensive and public engagement of the issues than was possible at the initial hearing. By considering these issues within a familiar framework that is clearly established in advance of the hearing, the Single Commissioner and the Full Commission are likely to receive stronger, more focused presentations from the parties and possible intervenors and amici. This suggestion—a recognition of affirmative defenses and a remand for further proceedings—does not guarantee any particular result. It does, however, provide some

81. The statute was originally enacted in 1865. See supra note 20.
assurance that the issues will be joined and adjudicated in a context conducive to a reflective and fully-considered resolution.

CONCLUSION

The issue of lawyer discrimination brings new perspectives to traditional topics like the practice of law, the role of the lawyer and the relationship with, and rights of, the client. It forces us to examine the nature of lawyer discretion, the limits of that discretion and the consequences of trying to regulate that discretion. The examination is a daunting task.

This essay offers an approach that attempts to protect both the prohibition against discrimination and the practice of law and to accommodate the tension that necessarily accompanies this effort. It suggests that the best solution is to prohibit lawyers from discriminating in client selection but to permit attorneys to use reasonable professional judgment in selecting the issues and arguments that they are willing to raise on behalf of a client. It discusses the concept of "conditional representation" inherent in the proposal and concludes that the problems associated with this concept are far preferable to the problems associated with any other alternative.

With the new California rule, the requirements of the Americans with Disability Act and the recent MCAD decision, this issue will be increasingly before courts, legislators, bar associations, civil rights agencies and, ultimately, the public. I offer my proposal as a contribution to the ongoing debate.