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# LAWYERS' IDENTITIES, CLIENT SELECTION AND THE ANTIDISCRIMINATION PRINCIPLE: THOUGHTS ON THE SANCTIONING OF JUDITH NATHANSON

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LAWYERS' IDENTITIES, CLIENT SELECTION  
AND THE ANTIDISCRIMINATION  
PRINCIPLE: THOUGHTS ON THE  
SANCTIONING OF  
JUDITH NATHANSON

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INTRODUCTION

We lawyers disagree. We are, after all, schooled for contentiousness, and many of us construct our professional identities primarily through adversarial advocacy. That this advocacy is undertaken on behalf of clients and with the expectation of compensation does not always drain it of intensely personal meaning. We frequently come to identify strongly with the interests of the clients we represent. For those of us who specialize, in criminal defense, say, or in civil rights litigation, these interests can transcend the issues presented by any given matter for which we are retained, becoming both institutional and ideological. The frequency of journalists' solicitation of lawyers' views on issues of public concern is a result of this identification. Our opinions are sought less because we are lawyers than because of the political perspective we are (usually correctly) assumed to represent by virtue of the kind of lawyering we do.

For some of us, this confluence of professional identity and personal belief is as much a cause as a consequence of the careers we pursue. If we entered law school after, say, 1960, it is likely that our decision to do so was motivated, at least in part, by a desire to do justice as we saw it. Lawyers such as Ruth Ginsburg, Thurgood Marshall and Leonard Weinglass, to name three eminent examples, were mentors to many of us, even if we never met them. And, though educational loans, the job market, and the twenty-eight years since Earl Warren's retirement have made compromisers of

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us all, it is fair to say that lawyers actively pursuing their own sense of justice have significantly shaped the positive law under which we live today. Nowhere is this influence more significant than in the widespread popular endorsement, reflected in statutory enactment, of the legitimacy of public efforts to eliminate many types of formal, status-based discrimination by both government and private commercial enterprises.

### I. WHEN PROFESSIONAL INTEGRITY CONFLICTS WITH THE ANTIDISCRIMINATION PRINCIPLE

Typical of such efforts is the Massachusetts' Public Accommodations Statute,<sup>1</sup> which prohibits many types of status discrimination in "any place[] of public accommodation." The Statute defines a place of public accommodation as "any place . . . which is open to and accepts or solicits the patronage of the general public,"<sup>2</sup> and includes sex among the classes of prohibited discrimination.<sup>3</sup> It would probably not surprise many of the lawyers who urged this deployment of state power to enforce the antidiscrimination principle to learn that their own law offices are considered places of public accommodation and that their decisions to refuse potential clients' requests for representation would fall within the Statute's purview. There is, nonetheless, some irony in Judith Nathanson's becoming the first Massachusetts lawyer to be sanctioned by the Massachusetts Commission Against Discrimination ("MCAD") for violating the antidiscrimination principle in her selection of clients.<sup>4</sup>

Nathanson is a feminist, committed to using her lawyering skills to serve justice as she sees it. In her case, this commitment means that she seeks to "devote her expertise to eliminating gender bias in the court system."<sup>5</sup> It is highly likely that Nathanson's particular blending of personal belief and professional identity makes her a strong supporter of the Massachusetts' Public Accommodation Statute, at least as it applies to sex discrimination, and probably with respect to the other forms of discrimination proscribed by the Statute as well. The irony is that it is precisely Nathanson's devotion to the eradication of gender bias that has triggered the

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1. See MASS. GEN. LAWS ch. 272, §§ 92A, 98 (1996).

2. *Id.* § 92A.

3. See *id.* § 98.

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

5. *Id.* at 40.

Commission's determination to sanction her. The Commission objects to Nathanson's declaration, prompted by her political values, that she is willing to represent only women in divorce cases. This decision, according to a hearing officer of the Commission, constitutes unlawful discrimination on the basis of gender in violation of the Public Accommodations Statute.<sup>6</sup>

Nathanson's articulation of her reasons for limiting her divorce practice to female clients offers a remarkable portrait of a lawyer who has fused her personal values and professional skills with deep integrity. In her testimony before the MCAD, she stated that in matters which do not involve controversies between men and women, she "has no ethical problem with representing men."<sup>7</sup> In divorce cases, however, she believes that the "issues that arise in representing wives . . . differ from those involved in representing husbands. By example, she noted that wives' attorneys emphasize the value of homemaker services and the limited future earning potential of homemakers re-entering the work force, while husbands' attorneys tend to minimize these issues."<sup>8</sup> More fundamentally, Nathanson further testified that she

needs to feel a personal commitment to her client's cause in order to function effectively as an advocate, and that in family law she has only experienced this sense of personal commitment in representing women. She testified that her female divorce clients derive a specific benefit from her limited practice. They feel comfortable sharing their anxieties and concerns with an advocate whom they trust to be wholeheartedly as well as intellectually committed to their interests. Nathanson believes that her practice of advancing arguments only on behalf of women enhanced her credibility with judges she appeared before in the family law courts.<sup>9</sup>

If Nathanson's assessment of the impact of her choice is correct, it is noteworthy that the choice is not only essential to her personal integrity but that it also serves the most defining goal of our profession, the effective representation of clients. Nathanson's decision to represent only women in divorce cases can be seen as analogous to that of a labor lawyer to represent only unions (or management) or of a personal injury lawyer to work only on the

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6. *See id.* at 41.

7. *Id.* at 40.

8. *Id.*

9. *Id.*

plaintiff's (or insurance defense) side. These latter divisions of professional labor are, of course, commonplace and uncontroversial.

Still, the hearing officer's judgment that Nathanson's principle for selecting divorce clients was unlawful reflects an understandable reading of the Public Accommodations Statute. To draw distinctions between workers and employers or between injured people and tortfeasors is not to engage in prohibited discrimination; to draw them between men and women is, at least presumptively discriminatory. Further, as a partner in a law office that operates for profit and both provides a service to and solicits business from the general public, Nathanson appears to join most other lawyers (and other professionals) in private practice as a proprietor of a "place of public accommodation" within the Statute's meaning.<sup>10</sup> Thus, unless a law office should be viewed differently from the office of a doctor or a dentist, thereby rendering lawyers "exempt from compliance with the anti-discrimination laws of the Commonwealth with respect to selecting clients,"<sup>11</sup> it is hard to avoid the hearing officer's conclusion that Nathanson's refusal to accept male divorce clients constitutes unlawful discrimination.

## II. JUDITH NATHANSON'S ASSOCIATIONAL VOICE

Leora Harpaz's thoughtful article on the Nathanson matter argues that there are good reasons why a law office is different from that of a doctor or a dentist.<sup>12</sup> These reasons may be found in the First Amendment's protection of a lawyer's freedom of speech. Professor Harpaz's basic point is that the heart of a lawyer's work, advocacy on behalf of clients, is fully protected by the First Amendment.<sup>13</sup> For this reason, state regulation of a lawyer's choice of clients amounts to public conscription of that advocacy in violation of the lawyer's right to control the message communicated by her speech.<sup>14</sup> Relying primarily on the Supreme Court's 1995 decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,<sup>15</sup> Professor Harpaz maintains that a lawyer's ideologically motivated decision not to represent a client is exempt from scrutiny under the antidiscrimination principle because compliance with the

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10. See MASS. GEN. LAWS ch. 272, § 92A (1996); *Stropnicki*, 19 M.D.L.R. at 41.

11. *Stropnicki*, 19 M.D.L.R. at 41.

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

13. See *id.* at 63.

14. See *id.* at 71.

15. 515 U.S. 557 (1995).

principle would force the lawyer to alter the ideological message she wishes to communicate and because her advocacy, though compelled, might be publicly perceived as entailing her endorsement of the altered message. Compulsion of this sort, Professor Harpaz concludes, violates the lawyer's First Amendment right to speaker autonomy.

If Professor Harpaz's position would provide a blanket First Amendment exemption for all decisions by lawyers to engage in otherwise prohibited discrimination in the selection of clients, it may be overbroad.<sup>16</sup> After all, much of what lawyers do cannot be described as public advocacy or even as work in preparation for public advocacy. The speaker autonomy interests of a racist or sexist estate planning lawyer may be more analogous to those that might be claimed by a similarly disposed accountant (or doctor or dentist) than those of a courtroom advocate, and may warrant an accordingly lesser degree of First Amendment protection. More fundamentally, Professor Harpaz's emphasis on the *Hurley* decision's protection of speaker autonomy interests elides the extent to which even lawyers' public advocacy may legitimately be constrained by the antidiscrimination principle just because it is already conscripted—albeit by the market rather than by government.

In *Hurley*, the Supreme Court sustained the South Boston Allied War Veterans Council's claim to First Amendment protection of its decision to exclude an organization of open gays and lesbians from its annual St. Patrick's Day Parade.<sup>17</sup> As Professor Harpaz shows, the Court rested on the "fundamental rule . . . that a speaker has the autonomy to choose the content of his own message."<sup>18</sup> But the South Boston Allied War Veterans' Council is an autonomous speaker in a way that most lawyers engaged in the private practice of law are not. The Council's choice of what public communication to make through its sponsorship of the parade was, however nebulous in content, speech that grew exclusively out of the shared associational interests of its members.<sup>19</sup> There is no suggestion in *Hurley* that the Council's decisions about when, where, or what to

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16. See Harpaz, *supra* note 12, at 51 (arguing that "the application of the state Public Accommodation Statute to a lawyer's ideologically motivated decision not to represent a client violates the First Amendment"). *But see* Deborah L. Rhode, *Can a Lawyer Insist on Clients of One Gender?* NAT'L L.J., Dec. 1, 1997, at A21 (suggesting that the First Amendment does not protect Nathanson's rejection of Male divorce clients on the basis of sex).

17. *Hurley*, 515 U.S. at 581.

18. Harpaz, *supra* note 12, at 52 (quoting *Hurley*, 515 U.S. at 573).

19. See *Hurley*, 515 U.S. at 569-74.

communicate were ever offered for sale to members of the public. Most lawyers, even politically committed lawyers like Judith Nathanson, obviously cannot make this claim.

This distinction may justify application of the antidiscrimination principle to the client selection decisions of many lawyers, even though the First Amendment precludes its application to the Veteran's Council's selection of parade participants. First, it suggests that a private lawyer whose advocacy on behalf of a particular client is coerced by her compliance with the antidiscrimination principle may not run a serious risk that the general public will perceive her to endorse personally the positions she takes for the client. After all, if lawyers' services are a market commodity, they are likely to be seen as such by the public. If anything, the public may tend to overestimate the extent to which lawyers operate purely as hired guns with little personal attachment to the causes they advocate or the clients they represent.

More controversially, speech whose content is itself the consideration in a commercial transaction merits less First Amendment protection than speech emerging from other forms of personal association. As Professor Harpaz implies, to the extent legal services are seen as a commodity that is analogous, say, to a meal in a restaurant,<sup>20</sup> they become a more legitimate object of public regulation, at least when the purpose of the regulation is to ensure that the services are available to members of the public on a nondiscriminatory basis.

Justice O'Connor's concurring opinion in *Roberts v. United States Jaycees*,<sup>21</sup> decided in 1984, offers a persuasive description of this distinction:

On the one hand, an association engaged exclusively in protected expression enjoys First Amendment protection of both the content of its message and the choice of its members. Protection of the message itself is judged by the same standards as protection of speech by an individual. Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice. . . . A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment—that citizens, not government, control the content of public discussion.

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20. See Harpaz, *supra* note 12, at 59.

21. 468 U.S. 609 (1984).

On the other hand, there is only minimal constitutional protection of the freedom of *commercial* association. There are, of course, some constitutional protections of commercial speech—speech intended and used to promote a commercial transaction with the speaker. But the State is free to impose any rational regulation on the commercial transaction itself. The Constitution does not guarantee a right to choose employees, customers, suppliers, or those with whom one engages in simple commercial transactions, without restraint from the State. A shopkeeper has no constitutional right to deal only with persons of one sex.<sup>22</sup>

Justice O'Connor's account of the disparate reasons for human association captures the essence of the conflict between Judith Nathanson and the Massachusetts' Public Accommodations Statute. If Nathanson is a "shopkeeper" seeking exemption from rational state regulation of her commercial transactions, her position is, of course, meritless. But if her choice of clients is taken in pursuit of an expressive association, if her divorce practice is the "creation of a voice" with her female clients, then her exclusion of men from that expressive association is indeed the definition of the voice she and her clients are creating.

Nathanson's law practice plainly includes elements of the shopkeeper's calling. Like most other lawyers, and like doctors, dentists, accountants, and restaurateurs, she provides a service to members of the public for financial consideration in expectation of earning a profit. But unlike many other lawyers and most, perhaps all, doctors, dentists and restaurateurs, Nathanson, as a feminist seeking "to devote her expertise to eliminating gender bias in the court system," is, with the female clients she chooses to represent, the author of a "specific group voice" entitled to the highest measure of First Amendment protection. It is this commitment, growing from the strength and clarity of Nathanson's fusion of personal values and professional skills, that provides the strongest argument for exempting her refusal to accept male divorce clients from sanction under the Massachusetts Public Accommodation Statute.

As a practical matter, it may be objected, it is often impossible to separate those lawyers who are "shopkeepers" from those who aim to create, with their clients, an associational voice. But Judith Nathanson's explanation of her reasons for refusing male divorce clients suggests that this obstacle is not as insuperable as it might first appear. Recall that Nathanson has no objection to represent-

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22. *Id.* at 633-34 (O'Connor, J., concurring).

ing men in matters which do not themselves involve controversies between men and women. Her limited refusal to accept men as clients is motivated as much by widely shared professional values as by her own commitment to gender justice. If Nathanson is warranted in believing that excluding men as divorce clients enhances her own commitment to her female clients, her clients' trust in her, and her credibility with judges, then the exclusion is as integral to her obligation to represent her clients as effectively as she can as it is to her political commitment.

This direct relationship between Nathanson's refusal to represent men in divorce cases and the vigorous, effective representation of her women clients completes her argument for a First Amendment exemption from the antidiscrimination principle. The linkage between the refusal and her professional role is what makes the voice Nathanson seeks to create associative, belonging as much to her clients as to herself. Moreover, the professional service Nathanson provides to the women she represents in divorce cases is advocacy of the very message forged by this associative voice. That is why, in Justice O'Connor's terms, the right of the association between Nathanson and her female clients "to define its membership" is protected by the First Amendment.<sup>23</sup> An estate planning or personal injury lawyer with a discriminatory preference for white or male clients could rarely, if ever, offer either of these justifications for exercising that preference. Neither would a client be likely to retain an estate or tort lawyer because that lawyer turned away other potential clients of a different race or sex. Nor would the lawyer's work for such a client ordinarily express or in any way depend on the prejudice that brought them together.<sup>24</sup>

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23. *Id.* at 633.

24. This does not mean that Nathanson's argument could never be asserted by a lawyer whose choice of clients is motivated by racial, sexual, religious, or other forms of bigotry. A bigoted lawyer's political commitments are fully protected by an indispensable principle of First Amendment law: That the government may not discriminate among citizens on the basis of the viewpoints they hold. *See, e.g.,* R.A.V. v. City of St. Paul, 505 U.S. 377, 388-96 (1992). But under the argument advanced here, such a lawyer may invoke the First Amendment as a shield against the application of the antidiscrimination principle only if his/her discrimination in selecting clients also enhances the quality of the legal representation provided to the clients he/she does represent. For example, a lawyer, if there is one, whose practice is devoted to furthering the perceived common integrity of Aryan, Christian men could refuse representation to Blacks, Jews, and women. A racist, sexist, anti-Semitic commercial litigator, however, could not.

### CONCLUSION

The Massachusetts Commission Against Discrimination might justifiably apply the Public Accommodations Statute to the client selection practices of some, perhaps many, lawyers. But it should leave Judith Nathanson alone. Nathanson's decision to represent only women in divorce cases is protected by the First Amendment, not because she is entitled as a lawyer to indulge whatever biases she chooses in her selection of clients, but because, as a lawyer of integrity who has melded her personal values and professional skills in service to the profession's best ideals, she is entitled to represent her chosen clients as she sees fit.