to achieve their objectives.[189] In these cases the Court held that the States' interests in preventing conflict of interest, improper solicitation, and unauthorized practice of law were insufficient to overcome the associational rights guaranteed by the First Amendment.[190]

A state's efforts to use its anti-discrimination statutes to force an organization, such as the NAACP or ACLU, to have its staff attorneys represent clients or causes contrary to the objectives of the organization would likely be stricken as violative of the First Amendment. Thus, for example, a state Human Rights Agency could not force the NAACP, in contravention of its policies, to represent a white male who alleged reverse discrimination when he was denied admission to a law school.[191] Such a forced representation could send a message contrary to the ideological position of the NAACP and would be barred by the First Amendment as compelled expression or association.[192] However, application of the *Button* line of authority to the *Stropnicky* fact pattern, or to the situation where an individual attorney is not acting formally as part of, or in support of, an advocacy organization, appears to be inappropriate. It is the associational and expressive rights of the advocacy organizations that are protected by *Button* and its progeny, not the rights of an individual attorney acting independently.[193] The fact that Nathanson was listed with women's advocacy groups for referrals is too slender a tie to make her a representative of those associations. In her refusal to represent Stropnicky, she was acting alone, not as a representative

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[189] *See* Wolfram, *supra* note 120, at 24 (noting that *Button* prohibited state interference with the relationship between members of the NAACP and its legal staff as violative of due process).

[190] *See In Re Primus*, 436 U.S. at 424 (requiring rules that encroach upon political expression and association to be narrowly tailored); United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971) (noting that collective activity aimed at obtaining access to the courts is a fundamental right embodied in the First Amendment); United Mine Workers v. Illinois State Bar Ass'n., 389 U.S. 217, 222 (1967) (emphasizing that a state legislature cannot undermine associational rights just because a matter is otherwise within its competence); Bhd. of R. R. Trainmen v. Virginia, 377 U.S. 1, 8 (1964) (protecting the associational rights of union members and their lawyers); *Button*, 371 U.S. at 428-29 (recognizing a protected relationship between the NAACP and its legal staff for its modes of expression and association).

[191] *See* Wolfram, *supra* note 120, at 24 (recognizing forced representation would contradict the clear ideological message of the NAACP).

[192] *See id.* (suggesting associational claims that are both clear and expressive will receive protection); Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2451-53 (2000) (finding that the Boy Scouts could not be forced to condone a viewpoint concerning homosexuality that is contrary to their ideological position).

[193] *See Button*, 371 U.S. at 430 (1962) (affirming the protection that the First and Fourteenth Amendments afford orderly group activity advancing beliefs and ideas).

of a formal organization. While "'invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, . . . it has never been accorded affirmative constitutional protections.'"[194]

6. *Roberts v. United States Jaycees* Suggests That Most Lawyering is Primarily a Commercial Association

The United States Supreme Court has also addressed the "conflict between a State's efforts to eliminate gender-based discrimination . . . and the constitutional freedom of association asserted by members of a private organization" in *Roberts v. United States Jaycees*.[195] In *Roberts*, the Jaycees argued that requiring their organization "to accept women as regular members . . . would violate the male members' [First Amendment] rights of free speech and association."[196] In analyzing the appropriate level of constitutional protection available to the organization, the Court determined that the Jaycees were not an intimate or highly personal association,[197] noting the local chapters were "neither small nor selective," and that much of the central activity of the organization involved the participation of strangers.[198]

On the issue of freedom of expressive association, the Court noted the Jaycees were engaged in a variety of protected, expressive activities.[199] The Court stated there could "be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire . . . [and that] [f]reedom of association therefore plainly presupposes a freedom not to associate."[200]

While the Court seemed to be placing the Jaycees in the second category of expressive associations, the opinion then stated that "[t]he right to associate for expressive purposes is not . . . absolute."[201] "Infringements on that right may be justified by

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[194] Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (quoting Norwood v. Harrison, 413 U.S. 455, 470 (1973) (alteration in original)).

[195] 468 U.S. 609, 612 (1984).

[196] *Id.* at 615.

[197] *See id.* at 618-622 (outlining cases addressing whether highly personal relationships deserve constitutional protection).

[198] *Id.* at 621.

[199] *See id.* at 622, 626-27 (including civic, charitable, lobbying, and fundraising activities).

[200] *Id.* at 623.

[201] *Id.*; *see also* Boy Scouts of America v. Dale, 120 S. Ct. 2446, 2451 (2000) (recently reaffirming this concept, yet noting that the right to associate for expressive purposes is especially important).

regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[202] The Court then held the State's interests in eradicating gender discrimination and allowing equal access to places of public accommodation justified the infringement on the Jaycee's male members' associational freedoms,[203] especially since the Jaycees' had failed substantially to demonstrate that the admission of women to memberships would impose "any serious burdens on the male members freedom of expressive association."[204] The Court observed that while there may be "some incidental abridgement of . . . protected speech . . . acts of invidious discrimination in the distribution of publicly available goods [and] services . . . cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit," and therefore such actions are not entitled to constitutional protection.[205]

Roberts is an especially appropriate case for examining constitutional protections for lawyers' associational and expressive rights when rejecting potential clients. While concurring in the judgment and agreeing that the Jaycees were not an intimate personal association, Justice O'Connor was critical of the majority opinion's requirement that the organization make a "'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech.'"[206] This requirement, in the context of the Court's balancing of interests test, "raises the possibility that certain commercial associations, by engaging occasionally in certain types of expressive activities, might improperly gain protection for discrimination."[207]

In her analysis, Justice O'Connor evaluated the constitutional protections associated with expressive associations when compared with the third associational category: commercial associations.[208] She specifically explored the issue whether associations, entered into while practicing law, created either an expressive association

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[202] *Roberts*, 468 U.S. at 623.
[203] *See id.* at 623, 625-26.
[204] *Id.* at 626.
[205] *Id.* at 628.
[206] *Id.* at 632 (O'Conner, J., concurring).
[207] *Id.* (O'Conner, J., concurring).
[208] *Id.* at 634-38 (O'Conner, J., concurring). *See generally* Berenson, *supra* note 119, at 36-39 (rejecting an 'attorney subordination of financial self-interest' argument to remove Nathanson's law practice from the commercial association category).

with heightened protection or a commercial association that receives only minimal constitutional protection in its activities.[209]

Justice O'Connor noted that the distinction between expressive and commercial associations is often not clear cut because "[n]o association is likely ever to be exclusively engaged in expressive activities . . . [a]nd innumerable commercial associations also engage in some incidental protected speech or advocacy."[210] In her view, an association should be characterized as commercial if its activities are not deemed predominately expressive in nature.[211] When the association becomes commercial to any substantial degree, it is subject to state regulation and loses the absolute right to determine its membership,[212] including the right to select its employees, suppliers, or customers.[213]

In determining which category an association will fall, it is necessary to determine the purposes of the association and its members.[214] The purpose of a shopkeeper, when entering or refusing to enter into a transaction with a customer, is clearly commercial in nature and, therefore, the "shopkeeper has no constitutional right to deal only with persons of one sex."[215] But a lawyer is not a shopkeeper, and lawyers' purposes may vary depending on the client and the client's needs. Thus, "[l]awyering to advance social goals may be speech,"[216] "but ordinary commercial law practice is not."[217]

How should one characterize Judith Nathanson's refusal to represent men in divorces? Was her refusal to represent Stropnicky essentially the exercise of her First Amendment right to speaker autonomy and, as such, a refusal to enter into a group voice with a male, which would distort her feminist message? This characterization could possibly entitle her to First Amendment protection from the state's anti-discrimination statute if this is ultimately viewed by the courts as lawyering meant to advance a

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[209] *See* Roberts v. United States Jaycees, 468 U.S. at 635 (O'Conner, J., concurring) (noting the characteristics distinguishing a commercial association from an expressive one cannot be articulated with simple precision).

[210] *Id.* (O'Conner, J., concurring).

[211] *See id.* (O'Conner, J., concurring).

[212] *See id.* at 636 (O'Conner, J., concurring) (explaining that only expressive activities and organizations are beyond state regulation).

[213] *See id.* at 634 (O'Conner, J., concurring) (finding the most simple commercial participants, including a shopkeeper, subject to state restraint).

[214] *See id.* at 636 (O'Conner, J., concurring) (pointing out the two main criteria for the expressive activity tests).

[215] *Id.* at 634.

[216] *Id.* at 636 (citation omitted).

[217] *Id.* at 636 (O'Conner, J., concurring) (citation omitted).

social goal through an expressive association.[218] Several arguments can, however, be made to the contrary.

First, as was noted previously, Nathanson was acting alone in pursuit of her political and personal agendas rather than as a member or representative of a formal organization. While "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment,"[219] Nathanson's activity was not collective, but rather individual in nature, therefore the *Button* line of authority should not support her position.[220]

Second, Nathanson's blanket rejection of males in divorce proceedings may actually be contrary to the feminist agenda she supposedly so ardently supports. Stropnicky's legal position was, in essence, a role reversal from that of the typical male breadwinner to that of the atypical male homemaker.[221] Nathanson chose to reject Stropnicky based upon his sex, not his legal claim, even though his legal claim may have offered an opportunity to advance gender equity in the law.[222]

> In seeking to eradicate the inequitable and discriminatory treatment of women in family law, Nathanson relies upon and reinforces the same stereotypical beliefs about sex and gender that she purports to attack. Her justification rests on an essentialist vision of gender which assumes, and reinforces, the legitimacy of gender as a classificatory scheme.[223]

A lawyer who rejects potential clients based purely on the basis of their sex, race, religion, or other suspect criteria, rather than on the basis of their legal claims, should not be sheltered from the reach of the anti-discrimination statutes by the First Amendment.[224]

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[218] *See* Berenson, *supra* note 119, at 53, 60 (arguing that Nathanson's law practice could be viewed as a political association and therefore entitled to heightened constitutional protection).

[219] Roberts v. United States Jaycees, 468 U.S. at 637 (quoting *In re* Primus, 436 U.S. 412, 426 (1978)).

[220] *See supra* notes 187-93 and accompanying text.

[221] *See* Vojdik, *supra* note 132, at 141-42 (suggesting that Stropnicky's responsibility for homemaking and childcare provided an opportunity for Nathanson to challenge the very gender essential notions she proclaimed to be against).

[222] *See id.* at 139-40; *Identities and Roles*, *supra* note 86, at 1576-77. *But see* Mahoney, *supra* note 26, at 84-85, 91 (arguing that Nathanson's selection of clients is only a particular form of specialization similar to those in civil and criminal representation).

[223] Vojdik, *supra* note 132, at 140; *see also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (suggesting that gender categorization only serves to protect privileged classes and silence the voices of others).

[224] As one author has noted:

Third, courts have repeatedly held that the practice of law is a business and that the commercial elements of the practice can be regulated by the states.[225] Even if some of Nathanson's actions can be viewed as expressive in nature, they were merely incidental to her overall law practice, which was predominantly commercial in nature.[226] This goes to Justice O'Connor's concern in *Roberts* that commercial associations, which may occasionally engage in expressive activities, "might improperly gain protection for discrimination."[227] A law firm, as a commercial enterprise, therefore cannot claim First Amendment immunity from anti-discrimination laws merely by showing that the firm has engaged in a substantial amount of expressive activity.[228]

Although, as one commentator has suggested, "it is often impossible to separate those lawyers who are 'shopkeepers' from those who aim to create, with their clients, an associational voice,"[229] it is conceivable that a court may in the future, find the freedom of expressive association argument to be persuasive in protecting a lawyer from sanction under an anti-discrimination statute for rejecting clients based on suspect criteria, given an appropriate fact pattern. In the most typical scenario, however, contacts between

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> [R]espect for a lawyer's personal integrity requires that he not be forced to advocate *causes* that he finds morally reprehensible. It is quite another matter, however, to assert that an attorney may decline to represent individuals on the basis of their *status*. Such conduct violates the overarching moral injunction against treating people differently on the basis of morally irrelevant characteristics such as gender or skin color.

Identities and Roles, *supra* note 86, at 1577 (footnotes omitted); *see also* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1039 n.51 (1995) [hereinafter *Race, Ethics, and the First Amendment*] (noting a sincere and moral justification for refusing to represent a black person might still merit disbarment); Vojdick, *supra* note 132, at 142 (suggesting that feminist litigators avoid refusing male clients on the essentialist rationale); Harpaz, *supra* note 119, at 71 (distinguishing client selections based on gender and those based on the legitimacy of claims).

[225] *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 74 (1983) (concluding Title VII of the Civil Rights act is implicated whenever an employment contract is formed); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56 (1978) (refusing to allow an element of speech to preclude state regulation); Bates v. State Bar of Arizona, 433 U.S. 350, 383 (1977) (refusing to completely suppress attorney advertising but recognizing acceptable limitations); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) (holding that states have broad power to regulate licensed practitioners).

[226] *See* Stropnicky v. Nathanson, 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997) (finding that Nathanson practices law for a profit in the form of a partnership, solicits business by advertising in various media and with a sign, and is listed with a number of referral services); *see also* Berenson, *supra* note 119, at 38; *Lawyers' Identities*, *supra* note 112, at 99.

[227] *Roberts*, 468 U.S. at 632.

[228] *See id.* at 637 (finding no special First Amendment protections in commercial law practice); *Hishon*, 467 U.S. at 78 (1983) (holding that law firms are granted no First Amendment immunity from employment discrimination claims).

[229] *Lawyers' Identities*, *supra* note 112, at 99.

lawyers and potential clients will likely be viewed as commercial encounters, and, therefore, First Amendment protections will be available only in rather unusual circumstances. A more broad-based argument, however, can be advanced in support of the lawyers' unfettered right to select clients, which is applicable to a considerably wider spectrum of potential attorney-client relationships.

D. The Personal and Professional Autonomy of a Lawyer Is So Essential to the Effective and Fair Administration of Justice That the Need for Absolute Discretion in the Selection of Clients Offsets the Public Policies Underlying Anti-discrimination Statutes.

This argument is an "example of interest balancing in the regulatory context."[230] It requires a weighing of the public policies underlying the anti-discrimination statutes, the principles of equality and equal access, against the public policies supporting the need for an efficient and fair system of justice that are expressed in the constitutional assurances of the right to effective assistance of counsel and in lawyers' ethics codes.[231] Some argue that the lawyers' absolute discretion in client selection is necessary for the integrity of our adversarial system of justice and thus should prevail against the contravening public policies expressed in the equality principle.[232] Others view this attempt by lawyers to hold themselves out as "above the law", as unnecessary to the effective practice of law and detrimental to a profession which, in the past,

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[230] Stonefield, *supra* note 15, at 106. "[A] lawyer must retain ethical discretion when selecting clients that allows a balancing of interests when discriminatory considerations are pitted against the lawyer's personal and professional integrity." Day & Rogers, *supra* note 46, at 38.

[231] *See* Day & Rogers, *supra* note 46, at 34 (suggesting there is no inconsistency in anti-discrimination advocacy and the concept of lawyer autonomy); Iijima, *supra* note 48, at 74 (arguing that a lawyer's interest in being able to discriminate is outweighed by society's interest in securing equal treatment for clients). The Supreme Court has stated that "lawyers are essential to the primary governmental function of administering justice . . . ." Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

[232] *See* Chin, *supra* note 15, at 13-14, 16-21 (suggesting that a lawyer who is compelled to represent a client will not meet standards of zealous advocacy); Day & Rogers, *supra* note 46, at 38 (suggesting "legitimate, lawful interests" may exist even when discriminatory issues are before an attorney who refuses to provide legal representation); Quick, *supra* note 101, at 10 (recognizing the attorney's need to refuse representation for legitimate reasons); Stonefield, *supra* note 15, at 106-07 n.13 (noting there are a number of exemptions in anti-discrimination statutes because of the realization that there is a balance between unequivocally prohibiting all discrimination and maintaining personal autonomy); Miller, *supra* note 15, at 166 (noting the potential discrepancy in providing zealous advocacy when client representation is compelled and maintaining personal integrity and autonomy).

has held itself out as a champion of the cause of equal rights.[233] Since the focus of this article is on New York, it is appropriate to begin the analysis of this issue by examining the nature and source of public policies on both sides of the issue which would affect a lawyer practicing in New York State.

1. Competing Public Policies

Public policy in New York clearly supports equal protection under the law and equal opportunity for the State's inhabitants to participate fully in the economic, cultural and intellectual life of the state.[234] To this end the state has enacted legislation to eliminate and prevent discrimination in employment, places of public accommodation, educational institutions, public services, housing accommodations and other important areas of concern.[235] This equality principle is viewed as essential not only for protecting the rights and proper privileges of individuals, but also for protecting "the institutions and foundation of a free democratic state."[236] Public policy also supports the fundamental right of equal access to the judicial system, including the right to assistance of counsel.[237] Similarly, at the federal level, the principle of equality has been a defining element of government policy reflected in the Declaration of Independence,[238] the Constitution,[239] and the current plethora of federal anti-discrimination statutes.[240] Government policy has moved inexorably toward the elimination of improper discrimination in our society and toward the right of equal access to our system of justice.[241] Therefore, the privilege demanded by lawyers that they be free from the strictures of the anti-discrimination statutes is arguably a vestige of the past, and no

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233 *See* Iijima, *supra* note 48, at 74; Stonefield, *supra* note 15, at 120-21.

234 *See* N.Y. CONST. art. I, § 11 (guaranteeing equal protection of the laws to all persons); N.Y. EXEC. LAW § 290(3) (McKinney 1993) (creating a division in the executive branch to promote these goals).

235 *See* N.Y. EXEC. LAW § 290(3) (McKinney 1993).

236 *Id.*

237 *See* N.Y. CONST. art. I § 6.

238 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

239 *See* U.S. CONST. amend. XIV, § 1.

240 *See, e.g.*, 42 U.S.C. § 2000a (1994) (prohibiting discrimination or segregation in public places); 42 U.S.C. §§ 12101-213 (1994) (prohibiting discrimination based on disability).

241 Begg, *supra* note 7, at 300-01 (noting changes in public policy have made discrimination in employment, education and private property transactions completely unacceptable and illegal).

longer in keeping with current social norms, expectations, or government policy.[242]

Yet public policies in New York also support the need for an effective and fair system for the administration of justice. Since our system of justice is adversarial in nature, it is recognized that, if the system is to work properly, those exposed to the system as civil litigants and criminal defendants need effective advocates to represent their sides in the controversies.[243] This need for an advocate is recognized in the United States and New York State Constitutions,[244] Federal[245] and New York State[246] statutes, and in case law.[247] The demand that a lawyer be an effective, zealous, loyal, and competent advocate infuses the Lawyer's Code of Professional Responsibility,[248] and also underlies state legislation setting forth standards for admission,[249] mechanisms for disciplining lawyers,[250] and case law creating causes of action for malpractice.[251]

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[242] *See* RESTATEMENT, *supra* note 27, § 14 cmt. b (stating that anti-discrimination statutes are generally applicable to lawyers in client selection); Iijima, *supra* note 48, at 73 (noting the irony in suggesting lawyers have a "somehow more special and sacred" position in society, and can therefore "giv[e] free rein" to personal racial and gender prejudices in deciding whom to represent).

[243] *See, e.g.*, United States v. Cronic, 466 U.S. 648, 655-56 (1984) (emphasizing the essential role the adversary system plays in ensuring adequate representation in the criminal justice system); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 26-27 (1999) (arguing that a constitutional democracy relies on attorneys making moral decisions based on public, not private, morality).

[244] *See* U.S. CONST. amend. VI (guaranteeing assistance of counsel in criminal proceedings); N.Y. CONST. art. I, § 6 (guaranteeing the criminally accused the right to counsel); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (recognizing the importance of guaranteed representation for criminal defendants); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) (identifying the right to counsel for defense to a criminal charge as a "fundamental human right").

[245] *See* 18 U.S.C. § 3006A (1994) (requiring district courts to regulate the appointment, representation, and payment of counsel).

[246] *See* N.Y. COUNTY LAW §§ 716-721, 722-722(f) (McKinney 1991) (detailing provisions for appointment of counsel in Criminal, Family, or Surrogate's Court).

[247] *See Gideon*, 372 U.S. at 344 (stating that right to counsel as a means for securing fair trial is an "obvious truth"); Smith v. O'Grady, 312 U.S. 329, 334 (1941) (reversing conviction in part because of court's failure to provide counsel); Avery v. Alabama, 308 U.S. 444, 446 (1940) (stating that guarantee of counsel requires an opportunity for counsel to confer with the client and prepare the defense and cannot be satisfied by mere formal appointment); *Johnson*, 304 U.S. at 462 (suggesting the right to counsel is "essential" in preventing the deprivation of rights); Powell v. Alabama, 287 U.S. 45, 72 (1932) (stating "a logical corollary" of the right to be heard is the appointment of counsel).

[248] *See* DR 5-101 to DR 5-110; DR 6-101 to DR 6-102; DR 7-101 to DR 7-110 (setting forth standards for attorney representation which discuss conflicts of interest, competency, and advocacy).

[249] *See* N.Y. JUD. LAW §§ 90(1), 460 (McKinney 1983) (providing appellate divisions with authority to regulate admission to the bar).

[250] *See id.* § 90(2) (providing appellate divisions with the authority to censure, suspend, and remove attorneys from the bar).

Public policy also recognizes that lawyers play an essential role in our system of justice as gatekeepers and, as such, lawyers have the professional responsibility to filter out meritless or frivolous claims that potential clients may seek to bring merely out of avarice or spite.[252] Thus, New York's Code of Professional Responsibility requires lawyers to reject certain clients,[253] or withdraw from representation when actions are brought to simply harass another or when a claim is meritless, frivolous, or illegal.[254] If a lawyer should proceed in such actions the lawyer may be subject to sanction under court rules[255] or statute.[256] Not only do these public policies *recognize* the need for an effective advocate as essential to the integrity of our system of justice, but they *mandate* that lawyers exercise discretion in the selection of their clients. Finally, it must be noted that, for many purposes, the attorney-client relationship is contractual in nature,[257] and that public policy has long supported

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[251] *See, e.g.*, Davis v. Klein, 671 N.E.2d 1268, 1269 (N.Y. 1996) (setting out elements for *prima facie* case of lawyer malpractice); Carmel v. Lunney, 511 N.E.2d 1126, 1128 (N.Y. 1987) (discussing the requirements for stating a cause of action for a lawyer malpractice claim in a criminal case).

[252] The nature of the gatekeeper role is perhaps best captured in a famous quote attributed to Elihu Root: "'About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.'" PHILIP C. JESSUP, 1 ELIHU ROOT 133 (1938); *see also* Collett, *supra* note 155, at 150-51 (professionally obligating attorneys to make an initial determination about the merit of the client's claim); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 19 (1983) (discussing how screening out frivolous claims is a gatekeeping function for attorneys); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616-18 (arguing that to permit discrimination based on personal scruples undermines clients' personal autonomy and their ability to achieve "first class citizenship").

> [A]s the guardians of our law-dependent democratic society . . . lawyers are gatekeepers of the substance, process and procedures of law enabling parties to articulate, prosecute and defend individual claims. It is through legal representation that clients are assured open, equal and fair access to courts and our system of justice.

Day & Rogers, *supra* note 46, at 28.

> Lawyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims. This discretion involves not a personal privilege of arbitrary decision, but a professional duty of reflective judgment. . . . [T]he basic consideration should be whether assisting the client would further justice.

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

[253] *See* DR 2-109 [22 NYCRR § 1200.14].

[254] *See* DR 2-110(b)(1) [22 NYCRR § 1200.15]; DR 7-102(a)(1)-(2), (7) [22 NYCRR § 1200.33]; EC 7-5 (forbidding an attorney from assisting a client in any illegal activities or frivolous legal positions); *see also* RESTATEMENT, *supra* note 27, § 23 (prohibiting a contract or client instruction from removing an attorney's power to act in a manner consistent with the law).

[255] *See* FED. R. CIV. P. 11; 22 NYCRR § 130-1.1 to -1.5.

[256] *See* N.Y. C.P.L.R. § 8303-a (McKinney Supp. 2000).

[257] *See* WOLFRAM, *supra* note 8, § 4.1, at 146-47 (discussing the contractual nature of the relationship and accompanying fiduciary duties "that have no parallel in the law of contract").

the freedom of individuals to enter into or refuse to enter into contracts, especially those for personal employment.[258]

2. The Case for Lawyer Autonomy

In order to be an effective advocate and to play the role of a meaningfully independent gatekeeper in our system of justice, lawyers argue that they must have the personal and professional autonomy to reject certain clients and causes even when this might conflict with the principle of equality expressed in anti-discrimination statutes.[259] But should lawyers have more personal autonomy in selecting clients than is allocated to other professionals, and many others, in our society? Is the practice of law truly unique in this respect? Many would answer these questions in the affirmative.

If one assumes that the public policies requiring a fair and efficient system for the administration of justice are equivalent to, or of greater importance than, the public policies underlying the equality principle, then the professional rules and duties that have historically made the system function properly should be accorded great deference.[260] More specifically, the professional requirements

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See generally 10 SAMUEL WILLISTON & WALTER H. E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS § 1285 (3d ed. 1967) (discussing the relationship of contractual and fiduciary obligations between attorneys and their clients).

[258] Freedom of contract is derived from the Fourteenth Amendment to the United States Constitution as a liberty guaranteed by the due process clause, and has been frequently applied as a restraint on federal and state power. While freedom of contract is not absolute, any "legislative authority to abridge it could be justified only by exceptional circumstances." S. Doc. No. 103-6, *reprinted in* CONGRESSIONAL RESEARCH SERVICE OF THE LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1581-82 (Johnny H. Killian & George A. Costello eds., 1996). In *Coppage v. Kansas*, 236 U.S. 1 (1915), the Supreme Court stated:

> [I]ncluded in the right of personal liberty and the right of private property–partaking of the nature of each–is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense.

Id. at 14; *see also* Simon, *supra* note 252, at 1128 (considering the right to control one's labor to be fundamental); *Race, Ethics, and the First Amendment*, *supra* note 224, at 1039 (recognizing the argument supporting a lawyer's "moral right to control his or her own labor").

[259] *See* Quick, *supra* note 101, at 12 (discussing how a lawyer's compliance with anti-discrimination rules can result in violation of other ethics rules, particularly those requiring competent and zealous representation); *see also* Day & Rogers, *supra* note 46, at 34-35 (arguing that a lawyer does not violate anti-discrimination statutes by refusing to represent a client who is a member of a protected class, as long as her refusal is based on autonomous, ideological principles and not naked prejudice).

[260] *See* Day & Rogers, *supra* note 46, at 26 (claiming a lawyer's political and ideological aversion may undermine the ability to provide effective advocacy); Stonefield, *supra* note 15,

that mandate that lawyers be zealous, loyal, effective, and professionally independent in their gatekeeper role should be viewed as fundamentally important to the integrity of the system.[261] A lawyer's personal autonomy, since it infuses each of these professional responsibilities, also deserves similar deference and respect.[262]

The importance of zealous advocacy by a lawyer "both to his client and to the legal system" is strongly emphasized in the Code of Professional Responsibility.[263] While the Code places some limits on a lawyer's zeal,[264] a client has a right to expect that his or her lawyer will put forth his or her best efforts to achieve the client's legitimate objectives.[265] Professional services are usually provided in exchange for a fee, but the ethical provisions require zealous representation even if the services are provided *pro bono* or for the reduced fees that often accompany court appointments.[266] Thus, the Code requires a lawyer to make a professional commitment to advocating for the client even in the absence of financial incentives. This is one of the characteristics that makes law a profession rather than merely a business.

It has been noted that many lawyers shape their professional identities through their role as advocates in our adversarial system of justice,[267] and that this role is often intensely personal.[268]

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at 106-07 (noting how "other goals, such as autonomy, privacy or efficiency, sometimes trump the policy of nondiscrimination").

[261] *See* EC 7-19 (asserting that an attorney's duty to provide zealous representation benefits the judicial system as well as the client); Chin, *supra* note 15, at 14-21 (noting that lawyers are often encouraged, if not forced, to refuse representation when they face a conflict of interest).

[262] *See* Green, *supra* note 107, at 41 (arguing that "if a lawyer's personal moral or religious understandings are reasonably likely to restrain the lawyer from acting for a client in the manner in which a lawyer ordinarily would be expected or required to act, the lawyer should not accept the client"); *Lawyers' Identities*, *supra* note 112, at 93 (recognizing a link between professional identity and personal belief).

[263] EC 7-1; *see* EC 7-19.

[264] *See* EC 7-1; EC 7-19 (restricting attorney actions to those that are "within the bounds of the law"); DR 7-101 [22 NYCRR § 1200.32]; DR 7-102 [22 NYCRR § 1200.33] (placing restrictions on "zealous advocacy," by prohibiting lawyers from condoning or participating in clients' illegal acts, and requiring lawyers to report such acts to the affected person or tribunal, except where such disclosure is prohibited by confidentiality).

[265] *See* DR 7-101(a)(1) [22 NYCRR § 1200.32] (requiring attorneys to use all legal and reasonable means to serve the client's interest); EC 7-1; EC 6-1 (noting that "[b]ecause of the lawyer's vital role in the legal process, the lawyer should act with competence and proper care in representing clients").

[266] *See* EC 2-25; EC 2-33 (exhorting *pro bono* attorneys to provide the same quality of representation); *see also In re* Smiley, 330 N.E.2d 53, 58 (N.Y. 1975) (observing that lawyers from private and publicly-funded *pro-bono* organizations must adhere to the same professional standards as compensated and publicly-provided attorneys).

[267] As one author has noted:

Lawyers, as advocates and advisors, often personally identify quite strongly with the interests and causes of the clients they represent despite the concept of professional detachment.[269] As one commentator has stated relative to the personal commitment and zeal brought to lawyering by many attorneys:

> We are indeed persons when we provide legal services, and our very personhood is crucial to both the appearance and reality of legal work. Our beliefs, our words, our genders, races and reputations infuse, enable and limit what we can offer those in need of legal help. We sometimes do and always should be able to marshal our very selves as lawyers on behalf of causes.[270]

Understandably, lawyers with such an intense commitment can, in many instances, have a difficult time separating their personal and professional reaction to a particular client or cause, and it is because of this integration of the lawyer's persona with his or her

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> Recognition of the lawyer's right to reject prospective clients is also necessary to protect the lawyer's ability to fashion his or her professional identity. In choosing the clients one represents, the lawyer engages in an act expressing the lawyer's conception of self, and contributing to the further formation of that self.

Collett, *supra* note 155, at 159-60; *see also* Timothy W. Floyd, *The Practice of Law as a Vocation or Calling*, 66 FORDHAM L. REV. 1405, 1416 (1998) (suggesting lawyering will ultimately shape one's entire character); *Lawyers' Identities*, *supra* note 112, at 93 (noting that many lawyers construct and reveal their true identity through the adversarial process).

[268] *See* Joseph Allegretti, *Shooting Elephants, Serving Clients: An Essay on George Orwell and the Lawyer-Client Relationship*, 27 CREIGHTON L. REV. 1, 8 (1993) (noting that "lawyers often deal with their clients in a face-to-face, long-term, and intensely personal relationship"); Day & Rogers, *supra* note 46, at 31 (suggesting effective persuasion is the result of personal sincerity); Miller, *supra* note 112, at 93 (identifying a connection between "professional identity and personal belief"); *see also supra* note 48 and accompanying discussion (noting how lawyers identify personally with their clients' claims and concerns).

[269] *See* Allegretti, *supra* note 268, at 10-12 (discussing how lawyers continue to represent their clients' interests despite doubts concerning the validity of the client's cause and the means necessary to achieve the client's ends); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978) (arguing that lawyers are not "legally, professionally, or morally accountable for the means used or the ends achieved" for their clients); *Identities and Roles*, *supra* note 86, at 1505 (1998) (suggesting that objectivity and neutrality have an important place in the legal arena); John J. Worley, *Foreword: Neutralism, Perfectionism, and the Lawyer's Duty to Promote the Common Good*, 40 S. TEX. L. REV. 1, 4 (1999) (noting criticism of the view that an attorney simply acts as a "mouthpiece" for client).

[270] Martha Minow, *Foreword: Of Legal Ethics, Taxis, and Doing the Right Thing*, 20 W. NEW ENG. L. REV. 5, 8 (1998); *see also* Collett, *supra* note 155, at 161. Collett noted that the lawyers discretion to select clients,

> is supported by a belief in the primacy of liberty over license, the importance of the moral autonomy of lawyers, the systemic benefits derived from the exercise of that autonomy, and a recognition in the limited desirability of legal regulation of all immoral conduct. It is grounded in the lawyer's moral right to craft a professional identity consistent with his or her deeply held beliefs.

Id.

legal work that a lawyer arguably must have absolute discretion relative to those clients and causes they will represent.[271]

From a practical standpoint there is an underlying concern that a lawyer compelled to represent a client or cause the lawyer finds repugnant may not be able to provide the personal commitment that is essential to truly zealous and effective advocacy.[272] Qualified or impaired advocacy can result when a lawyer has such an "inner conflict" resulting from a forced relationship, that it threatens the lawyer's personal belief system.[273] Since "[n]ot every lawyer will be able to meet the requirements of zealous advocacy under conditions of personal, political or ideological aversion,"[274] it is feared that the client will not receive the zealous and effective advocacy to which he or she is entitled, and that the integrity of the system of justice will be called into question in the process. In criminal cases, and "[e]ven in routine civil matters, a lackadaisical lawyer can do a great deal of harm," and the errors or nonfeasance may be difficult or impossible to repair after the fact.[275]

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[271] This has been described as a "confluence of professional identity and personal belief. . . ." *Lawyers' Identities*, *supra* note 112, at 93. One author has stated: "few would question that, when an individual or entity seeks to retain a lawyer, the lawyer acts consistently with the professional norms in refusing to render legal services if the prospective client or the prospective cause is repugnant, or even mildly offensive, in light of the lawyer's personal values." Green, *supra* note 107, at 53; *see also* Day & Rogers, *supra* note 46, at 35, 37 (arguing that lawyers should be given the discretion to reject a repugnant client or cause based on professional considerations).

[272] *See* EC 2-30 (stating that a lawyer should refuse employment when "unable to render competent service"); WOLFRAM, *supra* note 8, at 157-59 (discussing the importance of communication between lawyer and client regarding both legal and non-legal matters); Chin, *supra* note 15, at 17-19 (describing the ineffective counsel clients' receive when their attorney feels little commitment toward them because of their particular race or gender); Day & Rogers, *supra* note 46, at 26 (discussing the implications of *Stropnicky v. Nathanson*, 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997)); Stonefield, *supra* note 15, at 113 (noting the "legislature found the rationale for the traditional rule . . . . wholly unconvincing"); Quick, *supra* note 101, at 10 (noting that "the courts have found that a lawyer's personal prejudice against a prospective client is a legitimate reason for declining representation").

[273] *See* Allegretti, *supra* note 268, at 14-15 (discussing why a lawyer should listen to his client's position even though the lawyer may believe it to be morally dubious); Day & Rogers, *supra* note 46, at 36 (claiming that forced representation will result in diminished advocacy); Quick, *supra* note 101, at 14-15 (arguing that it is the clients who suffer when a lawyer is forced to represent them).

[274] Day & Rogers, *supra* note 46, at 26; *see also* Chin, *supra* note 15, at 13 (stating that the legal system has an interest "in preventing clients from going into cases where from the beginning it is clear that they are likely to be shafted").

[275] Chin, *supra* note 15, at 14. The author also states "[t]here are powerful reasons that both legal culture and legal rules impose a special duty of loyalty on attorneys towards their clients." *Id.* If lawyers cannot discriminate in selecting clients and are enjoined to take clients who they do not want, they would likely perform adequately, like conscripts in the army, rather than being highly motivated. *See id.* at 14, 17. Recalcitrant counsel may therefore only practice at a level sufficient to avoid malpractice liability or discipline, thus

Similarly, the Code of Professional Responsibility deems loyalty by a lawyer to his client to be a fundamental component of the attorney-client relationship, and hence essential to the integrity of our system of justice.[276] A lawyer, as a fiduciary, must be absolutely loyal to his client.[277] This, in turn, implicates a lawyer's responsibilities to avoid conflicts of interest,[278] to maintain a client's confidences and secrets,[279] and not to "[p]rejudice or damage the client during the course of the professional relationship".[280]

These professional responsibilities are meant to encourage clients to trust their legal advocate and advisor with their confidences, financial well being, or even their freedom.[281] Trust and confidence require a personal relationship or rapport in which strong bonds may develop between attorney and client.[282] Many lawyers believe this close attachment or bonding is essential to the effective practice of law.[283] Some commentators have argued that this personal

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potentially resulting in injustice or loss to the client. *See id.* at 17-18; *see also* EC 6-5 (stating that a lawyer should be motivated by more than civil liability when representing a client).

[276] *See* Polk County v. Dodson, 454 U.S. 312, 318-319 (1981) (stating that "a defense lawyer best serves the public. . .by advancing 'the undivided interests of his client'") (citation omitted); EC 5-1 (claiming that the lawyer's interest in and loyalty to the client are paramount). "[T]he stakes go beyond those of the client's interests; the justice system has an interest in ensuring that parties to actions are represented by committed counsel. By way of analogy, some conflicts of interest between lawyer and client are not waivable, even if the client consents." Chin, *supra* note 15, at 16; *see also* Wendel, *supra* note 243, at 47 (noting that "the judiciary has supported the organized bar's position that loyalty to one's client is *the* polestar value for lawyers").

[277] *See* RESTATEMENT, *supra* note 27, at § 16; JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE 829-30 (5th ed. 1941) (emphasizing the highly fiduciary relationship between an attorney and his client); Letourneau, *supra* note 27, at 147-49 (listing intimacy, confidence, and loyalty as characteristics of the lawyer-client relationship).

[278] JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES Canon 6, at 498 (explaining that a lawyers "obligation to represent [their] client with undivided fidelity" forbids the lawyer from taking on adverse interests); RESTATEMENT *supra* note 27, at §16(3) (stating the importance of fidelity and good faith in the attorney-client relationship).

[279] *See* DR 4-101 [22 NYCRR § 1200.19]; N.Y. C.P.L.R. § 4503 (McKinney 1992) (stating the importance of confidential communication between attorneys and their clients).

[280] DR 7-101 [22 NYCRR § 1200.32 (a)(3)].

[281] *See* David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons From the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 878 (1998) (noting that trust is so important in the attorney-client relationship that a client has "an unqualified right to fire their lawyers 'at any time, and with or without cause'"); *see also* Linton v. Perini, 656 F.2d 207, 212 (6th Cir. 1981) (holding Sixth Amendment was violated when an individual was deprived of the right to choose his own retained counsel).

[282] *See* Smith v. Westside Transit Lines, Inc., 313 So.2d 371, 376 (La. Ct. App. 1975) (finding that a "breakdown of communications" was good cause to discharge an attorney); EC 3-4 (suggesting that it is because of the significant responsibilities involved that only those regulated by the legal profession may be permitted to act in the capacity of a lawyer); Stonefield, *supra* note 15, at 121 (arguing that a "close attachment with a client is necessary for the effective practice of law).

[283] As one author has stated:

relationship can become so intense as to be similar to that of a marriage,[284] or that clients may have a claim on their lawyer similar to that of family members or friends.[285] Clearly, forcing a lawyer to enter into a personal relationship with a client or cause that the lawyer finds abhorrent or repugnant would have a negative impact on the lawyer's professional commitment and loyalty to the client, and on the effectiveness of the lawyer as an advocate or counselor.

Public policies derived from constitutional sources also buttress lawyers' claims to autonomy in client selection. Historically, American lawyers have not been viewed as being open to or available to all comers, as are common carriers or public utilities;[286] neither has the English "Cab Rank" rule, which requires lawyers to represent any client seeking legal services, been adopted in this country.[287] Therefore, forcing lawyers into contractual relationships against their will not only strikes at the lawyers' traditional professional prerogative of autonomy in client selection, but is also contrary to the fundamental tenet of American society that citizens have the freedom to enter into contracts or to refuse to enter into contracts.[288] Of course, central to any contractual relationship is the mutual assent or agreement of the parties.[289]

> Attorneys such as Judith Nathanson . . . 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.

Stonefield, *supra* note 15, at 120.

[284] *See* LUBAN, *supra* note 146, at 167-68.

[285] See Fried, *supra* note 146, at 1067 (suggesting the "efforts [one will] expend for [their] friend [or] relative are more likely to be effective" due to the strong social tie between them).

[286] *See* MORTIMER D. SCHWARTZ ET AL., PROBLEMS IN LEGAL ETHICS 59 (3d ed. 1992) (stating the general rule that "a lawyer is not a public utility . . . . [a]bsent special circumstances, you are free to decide whom you will represent (assuming they want you) and whom you will not represent. You only have to answer to your conscience and your stomach."); Richard H. Underwood, *Taking and Pursuing A Case: Some Observations Regarding "Legal Ethics" and Attorney Accountability*, 74 KY. L.J. 173, 174 (1985-86) (cautioning against relying on clichés when taking or rejecting cases despite the fact that "it is regularly observed that the American lawyer is not a 'common carrier'").

[287] *See* HAZARD, *supra* note 169, at 89 (describing the lawyer as merely an agent to his client, much like a cab driver who must accept anyone who beckons); WOLFRAM, *supra* note 8, at §10.2.2 (describing the "cab rank" rule which, in theory, requires English barristers to accept every client).

[288] "[O]ne of the basic sources of the lawyer's power–the ability to refuse assistance–is grounded in what most people would consider a fundamental right to control one's labor." Simon, *supra* note 252, at 1128. In *People v. Marcus*, the New York Court of Appeals stated, "[t]he free and untrammeled right to contract is a part of the liberty guarantied [sic] to every citizen by the federal and state Constitutions." 77 N.E. 1073, 1073 (N.Y. 1906).

[289] "Indeed it is and always has been central to the very concept of a 'contract' that there be 'assent by the parties who form the contract to the terms thereof.'" Runyon v. McCrary, 427 U.S. 160, 194 (1976) (White J., dissenting) (citation omitted); *see also* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:3 (4th ed. 1990) (defining the

While it is recognized that lawyers, as officers of the court, and as bearing an obligation associated with the privilege of practicing law, have a duty to represent clients when appointed to do so by a court,[290] this is a major exception to the general rule of freedom to contract. This exception, which usually arises in the criminal justice setting, implicates significant constitutional rights of criminal defendants, as well as the integrity of the criminal justice system.[291] While conceding the need for this exception, lawyers should, nevertheless, not be forced into nonconsensual contractual relationships with potential clients in routine civil litigation or transactional matters where the public policies underlying representation of criminal defendants are implicated to a far lesser extent.[292] The lawyer's freedom to contract should not be abridged except for the most essential of public concerns, such as the protection of the constitutional rights of defendants, especially when alternative sources of legal assistance are readily available to the potential client.[293]

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term of "agreement"); 1 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.9 (rev. ed. 1993) (discussing the term "agreement"); 1 RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) (defining "agreement"). *But see* NATHAN M. CRYSTAL, AN INTRODUCTION TO PROFESSIONAL RESPONSIBILITY 24-26 (1998) (noting that not all attorney–client relationships are formed by mutual assent).

[290] *See generally* N.Y. C.P.L.R. § 1102(a) (McKinney 1997) (mandating that the court appoint an attorney to the indigent); *In re* Smiley, 330 N.E.2d 53, 55 (N.Y. 1975) (stating that it is in the court's discretion whether or not counsel should be assigned); RESTATEMENT, *supra* note 27, at § 14(2) (stating that "a tribunal with power to do so appoints the lawyer to provide the services").

[291] *See* U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6; JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 2.3 (2d ed. 1996) [hereinafter HALL] (noting that the Sixth Amendment is applicable whenever incarceration can be imposed, including juvenile and contempt proceedings).

[292] There is no constitutional right to a lawyer in private litigation. *See* Mallard v. U.S. District Court, 490 U.S. 296, 298 (1989) (holding that 28 U.S.C. § 1915d does not authorize the appointment of an unwilling attorney to represent an indigent in a civil matter). *LEGAL REPRESENTATION OF MINORITIES: BACKGROUND BRIEFING PAPER #3, in* 5 REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES at III-15 (1991) (noting that "no clear constitutional mandate" exists for free civil legal service to the poor); *see also Race, Ethics, and the First Amendment, supra* note 224, at 1034 (stating that "in civil cases . . . the 'right to counsel' is not a guarantee that a litigant will actually be represented by counsel."). *But see In re* Smiley, 330 N.E.2d at 58 (stating that "[t]he courts have a broad discretionary power to assign counsel without compensation in a proper case") (citations omitted).

[293] *See In re* Smiley, 330 N.E.2d at 58 (discussing alternative ways to secure legal counsel including voluntary organizations, federally-funded programs, and the possibility of *pro bono* representation from lawyers fulfilling their obligations to indigents under legal canons).

3. Public Policies Supporting the Principle of Equality Outweigh the Lawyer Autonomy Argument

In a dialogue between competing public policies and interests, a convincing case can be made that lawyers' personal and professional autonomy is important to the practice of law, necessary to the fair and efficient administration of justice, and an essential element in the level of a lawyers' job satisfaction. But the claim that lawyers should have an unfettered or absolute right to reject potential clients on *any* basis whatsoever, be it pure whimsy or outright invidious discrimination based on race, religion, gender, or other suspect criteria, is arguably not supportable based on public policy, lawyers' professional responsibilities, or the personal needs or rights of individual attorneys.

The public policies underlying the principle of equality are reflected in a constitutional and statutory structure that attempts to prevent discrimination targeted at certain groups or status categories by those offering goods or services to the public[294] or by those who would refuse to enter into contracts with certain members of our society.[295] Clearly, there is sufficient flexibility within this structure to allow lawyers legitimate personal and professional autonomy in client selection without granting absolute discretion.[296] An unfettered right invidiously to discriminate is simply not essential to the effective and ethical practice of law.[297]

Take, for example, the lawyer's gatekeeping function, which is clearly an essential, legitimate role required of lawyers. The role of a gatekeeper in our system of justice, whether the lawyer is using objective or subjective criteria in determining whether to accept a case, will, on occasion, require the lawyer to deal with issues that relate to a potential clients' race, sex, religion, or other status listed in the anti-discrimination statutes. A lawyer is required by disciplinary rules and statute to reject potential clients when they wish to bring an action simply to harass another or to bring a claim

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[294] *See* N.Y. EXEC. LAW § 296(2)(a) (McKinney 1993); 42 U.S.C. § 12101-213 (1994); *supra* notes 36-41 and accompanying text (referring to New York's anti-discrimination statutory scheme).

[295] *See* 42 U.S.C. § 1981 (1994).

[296] *See* RESTATEMENT, *supra* note 27, at § 14 cmt. b (noting that statutes prohibiting certain types of discrimination are a legitimate limitation on lawyers' freedom to select clients).

[297] *See* Stonefield, *supra* note 15, at 120 ("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.").

that is frivolous or illegal.[298] The lawyer has a responsibility to bring his professional skill and knowledge to bear in objectively making such a determination.[299] Therefore, if anyone in a protected status sought out a lawyer for assistance in bringing a frivolous, meritless or illegal case, the lawyer must reject him or her, despite his or her membership in a protected class.[300] This is not discrimination, but rather the mandated exercise of the gatekeeper's professional discretion. In exercising this function it must be emphasized that, traditionally, the character of the client's case, not the character of the client, is the prime determining factor.[301]

Subjective factors can also legitimately influence a lawyer as gatekeeper in rejecting potential clients or causes. A potential client may have a nonfrivolous claim that the lawyer believes is immoral, or perhaps harmful to the environment, or one that will cause great harm to the adverse party at little gain to the client. Alternatively, the client may wish the lawyer to help him in forwarding a cause to which the lawyer is personally opposed.[302] In his gatekeeper role, a lawyer normally has the personal autonomy to reject such clients for these reasons so long as they are not a subterfuge for rejecting a client based on unlawful motives.[303]

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[298] *See* DR 7-102(a)(2)(7) [22 NYCRR § 1200.33] (stating that lawyers must represent their clients within the boundaries of the law); DR 2-109 [22 NYCRR § 1200.14] (stating that lawyers have an obligation to decline employment if the client wishes to proceed on non-legal grounds).

[299] *See* Simon, *supra* note 252, at 1083 (adding reflective judgment as a dimension of the lawyer's professional duties); Stonefield, *supra* note 15, at 125 (stating that a lawyer has the right to make a personal interpretation of the law); 1 HAZARD & HODES, *supra* note 10, at § 1.2:104 (claiming that the provision of high quality service is "[a] pact between lawyers and clients").

[300] *See supra* note 298 and accompanying text (indicating DR 2-109 [22 NYCRR § 1200.14] requires a lawyer to decline representation initially, while DR 2-110 [22 NYCRR § 1200.15] requires withdrawal after the representation began).

[301] *See* Hon. William Howard Taft, *Ethics of the Law*, *in* ADDRESSES AND LECTURES 15 (Earle C. Bastow ed., 1914) (opining that every member of the legal profession must do some "free" work; it is a matter of personal preference how much and what work to accept).

[302] *See* EC 7-9 ("[W]hen an action in the best interest of the client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action."); HAZARD & HODES, *supra* note 10, § 1.2:303 at 38 (recognizing that an attorney is not obliged to accept a case he or she considers repugnant and that, if representation has already been undertaken, an attorney may withdraw from representation on this ground); Green, *supra* note 107, at 25-26 (addressing the role of the lawyer's religious and moral understandings in the client selection process). *But see* Lloyd N. Cutler, Book Review, 83 HARV. L. REV. 1746, 1750 (1970) (suggesting that, for the adversary system to work, even unsavory defendants need vigorous representation).

[303] *See* Stonefield, *supra* note 15, at 122 (expressing that a lawyer can choose to work on behalf of any client or cause he or she wishes to support as a long as the selection criteria used are lawful); Wendel, *supra* note 243, at 57 (stating a lawyer cannot be "compelled to

Beyond the gatekeeper analogy several other responses to the lawyers' need for personal and professional autonomy arguments merit consideration.

First, as previously mentioned, most relationships between lawyer and client do not require bonding or a close, intimate, personal relationship.[304] For example, routine transactional lawyering, and even criminal defense work, always require the best efforts of the lawyer, but rarely require personal bonding.[305]

Second, lawyers can and do effectively represent clients for whom they have no personal regard, and for causes in which they may not believe, and, in fact, some lawyers even provide effective service to clients despite actual animosity or resentment toward their clients.[306] The concept of professional detachment allows a lawyer to provide professional and effective representation, even without the lawyer's personal commitment to the client or the cause.[307] This is true of court appointed lawyers, government lawyers, in-house counsel, associates in law firms, and possibly in the scenario of the "last lawyer in town."[308] The feature common to these examples is that the lawyers do not always have a say over which clients or

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represent a particular client in a case where the client would be able to secure alternate representation").

[304] *See supra* notes 267-75 and accompanying text.

[305] *See* HALL, *supra* note 291, § 10.13 at 340-41 (citing U.S. Supreme Court's refusal to require an attorney to develop a "meaningful relationship" with the client); Day & Rogers, *supra* note 46, at 30 (noting that "[m]uch of the time, a client's cause and the legal argument that supports it lack partisan interests to an attorney"); Wendel, *supra* note 243, at 50 (suggesting that the lawyer and client enter a relationship as "contracting parties, not friends").

[306] *See* HALL, *supra* note 291, § 10.13, at 341 ("Lawyers represent people all the time that they do not like and cannot stand to talk to, yet they still provide excellent representation."); WILLIAM G. ROSS, THE HONEST HOUR: THE ETHICS OF TIME-BASED BILLING BY ATTORNEYS 35 (1996) (enumerating reasons, particularly moral ones, for a lawyer's strong negative feeling about their clients); Allegretti, *supra* note 268, at 5-13 (advancing the idea that George Orwell's 1936 essay *Shooting the Elephant* helps us better achieve an understanding of the dynamics between attorney and client); Wendel, *supra* note 243, at 55-57 (claiming that one way lawyers distance themselves from unsavory clients is by claiming to advocate for the abstract rights of their clients, not the "evil" clients themselves).

[307] *See* JERRY GIESLER & PETE MARTIN, THE JERRY GIESLER STORY 326 (1960) (emphasizing the importance of keeping a distance from one's clients); HAZARD & HODES *supra* note 10, § 1.2:301 at 35-36 (explaining lawyers "administer justice in the broadest sense" when they remove the "moral filter" and just provide citizens with what the law allows); Stonefield, *supra* note 15, at 121 (arguing that professional standards should override conflicting personal concerns in the attorney-client relationship); *see also* Hall, *supra* note 291, § 4.11 at 93 (stating that a lawyer's representation of a client does not indicate the lawyer supports the client's views); Wendel, *supra* note 243, at 52-53 (acknowledging the "lawyer's role . . . is instrumental—to provide expertise that clients lack and assisting clients in pursuing their interests").

[308] *See* Begg, *supra* note 7, at 288 (referring to situations where a lawyer's discretion in selecting clients is limited).

matters they handle, yet they have the professional duty to represent their clients competently, zealously, and in compliance with the Code of Professional Responsibility. Those who would argue that absolute discretion in client selection is essential to the practice of law must admit that there are already major segments of the lawyering population, including all the lawyers in California, who do not have absolute discretion in client selection, and yet still perform competently and ethically as advocates and advisors.[309]

Third, though lawyers clearly owe a duty of loyalty to their clients as fiduciaries and agents, this is professional loyalty, not personal loyalty.[310] Loyalty requires a lawyer to maintain the client's confidences and secrets, avoid conflicting interests, avoid the appearance of impropriety, and not prejudice or damage the client during the representation.[311] It does not mean that the lawyer will share the client's cell in prison if convicted, or help pay the damages in a personal injury case that the client has lost. Loyalty is a professional, rather than personal duty; it is owed by all fiduciaries and agents to their clients.[312] The loyalty duty is not unique to law and does not support a demand for absolute discretion in client selection.[313]

Fourth, requiring lawyers to comply with anti-discrimination statutes results in some marginal infringement on the lawyer's freedom to refuse to enter into contracts. Yet, the freedom of contract is not absolute.[314] "It is now well established that [federal

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[309] *See* Begg, *supra* note 7, at 288-289 (discussing how the possible enactment of a mandatory *pro bono* law in New York "would clearly be a significant and controversial erosion of the lawyers' prerogative in selecting clients"); *supra* note 54 and accompanying text (citing CAL. CIV. CODE § 51 (West 1982) and CAL. RULES OF PROF'L CONDUCT Rule 2-400(2) (West Supp. 2000)).

[310] *See* EC 7-17 (limiting duty of loyalty to professional obligations); Wendel, *supra* note 243, at 92-94 (cautioning that caring too much for one's client may in fact "be an impediment to providing effective legal services").

[311] *See* DR 4-101 [22 NYCRR § 1200.19]; DR 5-101 [22 NYCRR § 1200.20]; DR 7-101(a)(3) [22 NYCRR § 1200.32]; DR 9-101 [22 NYCRR § 1200.45] (collectively addressing the lawyer's duty of loyalty).

[312] RESTATEMENT (SECOND) OF AGENCY § 13 (1958) (clarifying that an agent has fiduciary duties only with respect to matters within the scope of the agency); *see also* HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 67 at 125-27 (2d ed. 1990) (concluding that a fiduciary's duty only extends to matters connected to his or her agency).

[313] *See* REUSCHLEIN & GREGORY, *supra* note 312, at 125 (applying a broad definition of fiduciary); *see also* GEORGE T. BOGERT, TRUSTS § 31 at 105 (6th ed. 1987) (requiring fiduciaries to account for their own actions, even where they are seeking to withdraw as trustees).

[314] *See* Nebbia v. New York, 291 U.S. 502, 527-28 (1934); 42 U.S.C. § 1981 (1994) (subjecting all persons who contract to the same "punishments, pains, penalties, taxes, licenses, and exactions of every kind . . ."); *supra* note 258 (stating "exceptional

law] . . . prohibits racial discrimination in the making and enforcement of private contracts."[315] New York State statutes prohibiting discrimination in places of public accommodation,[316] and federal statutes, such as the Americans With Disabilities Act[317] and § 1981,[318] are a constitutionally valid exercise of the government's power even though they may infringe on the lawyer's right to refuse to enter into a contractual relationship with certain potential clients.[319]

Fifth, it can be argued that the public policies underlying the equality principle are simply too important to allow them to be overcome by the personal whims, biases, or inner conflicts of individual attorneys.[320] Improper discrimination harms not only the individuals who are discriminated against, but also society in general and the integrity of our system of justice.[321] The legal profession cannot ignore history or the trend toward equal rights.[322]

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circumstances" have to be made out in order for the legislature to abridge the freedom of contract).

> The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified.

Nebbia, 291 U.S. at 527-28 (footnotes omitted).

315 Runyon v. McCrary, 427 U.S. 160, 168 (1975); *see also* Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989) (discussing the elements and burdens involved in a case alleging private discrimination); Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459-60 (1975) (recognizing that federal law provides a remedy against racial discrimination in private employment); Tillman v. Wheaton-Haven Recreation Ass'n., 410 U.S. 431, 439-40 (1973) (applying federal anti-discrimination law to private organizations); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 441-43 n.78 (1968) (concluding that the Thirteenth Amendment guarantees the right to make and enforce contracts, regardless of race or color).

316 *See* N.Y. EXEC. LAW § 296(2)(a) (McKinney 1993); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992).

317 42 U.S.C. § 12101-213 (1994).

318 42 U.S.C. § 1981 (1994).

319 Section 1981 is premised on the Thirteenth Amendment. U.S. CONST. amend XIII. The Americans with Disabilities Act, 42 U.S.C. § 12101-213 (1995), is based on the Commerce Clause. U.S. CONST. art. I § 8, cl. 3. *See* cases cited *supra* note 39 (providing caselaw upholding the constitutionality of anti-discrimination statutes).

320 *See* Iijima, *supra* note 48, at 74-75 (deciding that the ultimate choice of representation should rest with the client); *Race, Ethics, and the First Amendment*, *supra* note 224, at 1069 ("Lawyers have a special responsibility to ensure that the promise of 'Equal Justice Under Law' implicit in our Constitution amounts to more than just empty rhetoric.").

321 *See* Begg, *supra* note 7, at 295 (balancing the attorney's desire to have discretion in selecting clients against the costs of invidious discrimination, and concluding that the "overall costs to individuals and society of invidious discrimination may simply be too great to bear"); Quick, *supra* note 101, at 13 (reporting that the purpose of a Michigan anti-discrimination rule "was to protect the public's confidence in the legal system" and that "'[a]ny manifestation of invidious discrimination by lawyers or judges damages public confidence in the fairness and impartiality of the administration of justice'") (alteration in original).

322 *See* Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

In claiming a license to discriminate in client selection, the legal profession is attempting to hold itself out as above the laws that apply to all other professions.[323] Publicly espousing this position will harm a profession that has held itself out as being in the forefront of the equal rights movement.[324] The irony and hypocrisy of such a position are clearly evident.[325] In any balancing of interests, the benefits of a rule of absolute discretion in client selection are overwhelmingly outweighed by its costs. While all would agree that lawyers need a level of discretion in client selection, absolute discretion that violates the principle of equality is too extreme a position and must be regarded as an unwarranted anachronism.

Finally, whether lawyers are happy in their work or not, or whether the lawyers doe or do not find personal and professional rewards in their law practice, is not sufficient to defeat the public policies that underlie the equality principle. The connection between the need for friendship, bonding, or personal rapport with clients, and the fair and effective administration of justice, is tenuous at best,[326] and even if given credence, should not be

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> The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere . . . .

Id. at 188; *see also* Runyon v. McCrary, 427 U.S. 160, 191 (1975) ("The policy of the Nation as formulated by the Congress . . . has moved constantly in the direction of eliminating racial segregation in all sectors of society.").

[323] *See* David B. Wilkins, *In Defense of Law* and *Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 289 (1996) (arguing that "the prima facie obligation to obey the law should have a special significance for lawyers . . . [and] lawyers have always presented themselves as having a special responsibility to support legally sanctioned schemes of social cooperation and to ensure that the law remains an instrument of justice"). *But see* William H. Simon, *Should Lawyers Obey the Law?* 38 WM. & MARY L. REV. 217, at 236-39 (1996) (arguing that lawyers have no categorical duty to obey the law and "[p]opular respect for law may *require* lawyers to violate the positive law").

[324] *See* Stonefield, *supra* note 15, at 133 ("[T]he prior message that lawyers can discriminate, even though virtually no one else can . . . was harmful to the moral authority and image of the legal profession and undermined the societal commitment to eradicating discrimination."); *Identities and Roles*, *supra* note 86, at 1581.

> Lawyers have been granted a monopoly by the state to perform an essential service . . . [T]he profession's commitment to 'equal access under law' is undermined if individual lawyers are allowed systematically to refuse to represent individuals on the basis of considerations that have nothing to do with either their moral worth as human beings or the legitimate interests of attorneys.

Id.

[325] *See* Iijima, *supra* note 48, at 73 (noting the irony in lawyers championing equal protection while reserving the right to represent clients based on their own gender and racial biases).

[326] *See* Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

adequate to defeat the public policies underlying the anti-discrimination statutes.

In discussing the lawyers' need for personal and professional autonomy, it was argued that as a practical matter, a lawyer who could not develop a personal commitment to the client or the clients cause, would not provide the zealous and effective advocacy which a client deserves—thus potentially injuring the client. The lawyer, in such instances, therefore, has a professional responsibility to avoid such representations. As presented, this is a "lawyer centered" argument premised on a lawyer's professional duties. Yet, a "client centered" argument can also be presented as follows.

E. It is Not in the "Client's Best Interests" to Force a Lawyer to Represent a Potential Client When the Lawyer Has Strong Feelings Against Doing So.

This argument in favor of exempting lawyers from the reach of the anti-discrimination statutes when selecting clients is premised on the notion, touched on previously, that a potential client may be harmed by having an advocate or counselor who is dragooned into representing the client against the lawyer's will, especially when the lawyer has a personal animosity or prejudice against the client or his or her cause. Not only may it be difficult to determine if or when such harm has occurred, but it may also be difficult or impossible to repair the harm after the fact.[327] It is, therefore, in a potential client's "best interest" not to force a lawyer into a position where the lawyer's responsibilities to the client may be compromised.[328] It is precisely for this reason that the Code of Professional Responsibility requires lawyers not to take particular

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no court could possibly guarantee that a defendant will develop the kind of rapport with his attorney– privately retained or provided by the public–that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel.

Id.; see also Shaw v. United States, 403 F.2d 528, 529 (8th Cir. 1968) (holding a lack of rapport with counsel is not ineffective assistance of counsel); HALL, *supra* note 291, §2:6 at 34 (noting that defendants have no right to be represented by an attorney of a particular race).

[327] *See* Chin, *supra* note 15, at 14-18 (illustrating the weakness of redressability in attorney malpractice cases); Quick, *supra* note 101, at 14-15 (noting that a malpractice claim, with its added attorneys' fees and court expenses, offers no guarantee of compensation to an injured client who must still prove she would have won her initial claim but for the defendant attorney's conduct).

[328] *See* Day & Rogers, *supra* note 46, at 30 (concluding that both the potential client and the attorney benefit when representation is refused).

clients[329] or to withdraw from representation when there are certain conflicts of interest.[330]

Common sense dictates that no sensible client should want a particular lawyer when the lawyer believes himself or herself unable zealously to represent the client's interests.[331] Therefore, it is necessary to protect such potential clients from their own folly in dealing with a particular lawyer, as is done when the rules prevent clients from waiving certain types of conflicts of interest.[332] A second point supporting this argument premised on the integrity of the legal system, is that the state has an interest "in preventing clients from going into cases where from the beginning it is clear they are likely to be shafted."[333]

In short, the need to protect the client and the integrity of the legal system are sufficiently important that they should be given precedence, even in cases of invidious discrimination, over the application of the anti-discrimination statutes and disciplinary rules.[334] The protection of clients' interests from harm must be viewed as paramount, even though this may limit potential clients' choice of counsel.

1. Potential Clients May Have Sound Reasons for Wanting a Particular Lawyer to Represent Them Despite a Conflict of Interest

The paternalistic "client's best interest" argument may deserve credence in some cases, but it is not valid in all instances. There are times when clients may rationally want to retain a lawyer who does not wish to represent them.[335] Several examples come to mind where a potential client would, rather than being foolish, have valid reasons for wanting a particular lawyer to represent them, despite

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329 DR 2-109 [22 NYCRR § 1200.14].

330 *See* DR 2-110(b)(2) [22 NYCRR § 1200.15] (mandating withdrawal if it is obvious that continued employment would result in violation of a disciplinary rule).

331 *See* Chin, *supra* note 15, at 18 (noting that injustice was caused by attorneys who did not zealously represent their clients' interest).

332 DR 5-101(b) [22 NYCRR § 1200.20]; DR 5-104(b) [22 NYCRR § 1200.23]; *see also* Chin, *supra* note 15, at 16 (stating that "the justice system has an interest in ensuring that parties to actions are represented by committed counsel"); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 420-423 (1998) [hereinafter *Waiving Conflicts*] (arguing that overriding client consent is justified by the need to protect the client, to protect independent interests of the legal system, and to prevent improper influence by lawyers).

333 Chin, *supra* note 15, at 13.

334 *See id.*

335 *See* H. MONTGOMERY HYDE, CARSON 151 (1974) (providing an example in the practice of Sir Edward Carson); *Identities and Roles*, *supra* note 86, at 1581 (noting that these clients have the added protection of a malpractice suit and other doctrines prohibiting incompetence or deceit).

the lawyer's personal reservations, prejudices, or downright hostility.[336]

Perhaps most obvious is the situation where the lawyer has an excellent reputation for expertise or success in the community in an area of law involving the potential client's legal concerns. A sophisticated client would not necessarily be foolish in wanting the best legal services available, even if the lawyer potentially harbored reservations.[337] The risks of not developing a personal rapport with the lawyer, or of having mildly impaired representation at a certain level, may be offset by the value of having "the best lawyer in town" in your corner. It is also conceivable that the potential client may wish to keep the "best lawyer in town" from representing the adverse party.[338]

Another example would be where a male client might view it as being in his "best interest" to be represented by the best female lawyer available, or possibly in certain circumstances by an African-American lawyer, because mere representation by a women or an African-American would be to the client's tactical advantage.[339] It is well recognized that, at times, a lawyer's personal attributes can be attributed to the client or the cause either positively or negatively, therefore a potential client's selection or rejection of a particular lawyer may be dictated by such attributes as race, religion, or gender.[340] Similar strategies are commonly employed by lawyers in

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[336] *See Race, Ethics, and the First Amendment*, *supra* note 224, at 1042 (referring to the Klu Klux Klan's decision to retain a black lawyer in a case challenging a disclosure order by the state of Texas).

[337] *See* RESTATEMENT, *supra* note 27, at § 122 (noting that decisions upholding a waiver of attorney conflict generally look at the client's sophistication and experience in legal matters); RICHARD L. ABEL, AMERICAN LAWYERS 204 (1989) (recognizing that many clients, including corporate executives, wealthy individuals, and the in–house counsel of many corporations are the social equals, if not social superiors, to many lawyers).

[338] From a strategic standpoint, a client with adequate resources may wish to tie up all the best legal resources in the community by retaining several lawyers or large firms, or consulting with them, thus creating a conflict of interest and preventing them from representing the adverse party. Whether these lawyers are hostile, unfriendly, or unmotivated is irrelevant from a strategic viewpoint, since they can no longer assist the other party. *See* Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157, 1162 (1996). *But see* SWS Fin. Fund A v. Salomon Bros., 790 F. Supp. 1392, 1402 (N.D. Ill. 1992) (noting that there is the potential for clients with significant resources to parcel out their legal business among many firms for the sole purpose of creating conflicts of interest that would prevent potential adversaries from using these firms).

[339] *See Race, Ethics, and the First Amendment*, *supra* note 224, at 1038, 1042 (pointing out that race is often an integral part of the moral and legal significance of a case); Letourneau, *supra* note 27, at 149-50 (noting how important it is for a client's lawyer to understand her background in order to then make her background understood by both judge and jury).

[340] Perhaps the best recent example of race being used as a trial tactic is the O. J. Simpson case, which has been discussed in a torrent of books and articles. *See, e.g.*, MARCIA CLARK, WITHOUT A DOUBT 114, 126-127, 211, 289-90 (1997).

jury selection in order to enhance the chances of a favorable verdict.[341]

A final example is where the potential client is acting on principle. A potential client may be a member of a minority group that has demanded that its members be treated equally, or an AIDS activist, or a gay rights activist, and is willing to force a recalcitrant lawyer to represent him or her just to make a point.[342] Or perhaps, ironically, a white male may be rejected by a female lawyer for representation in a divorce case, merely on the basis of his gender, and the male takes offense.[343] Such people may have had a good reason for going to a particular lawyer in the first instance, but perhaps they feel even more strongly about it after being rejected for apparently discriminatory motives. It can become a matter of principle to the rejected client, even if, in the lawyer's view, it may be in the "best interests" of the potential client to find another lawyer.

2. The Client Has a Right to Choose

If one accepts that any or all of these examples might have some validity, and that, based on previous arguments, lawyers are subject to the anti-discrimination statutes,[344] an argument can be made that lawyers should not be granted an exemption from such statutes because of a lawyer's personal conflict of interest premised on invidious motives if the client wishes to proceed.[345] As one commentator has noted, "[l]awyers often justify their misdeeds as necessary to protect the interests of their clients."[346]

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[341] *See, e.g.*, Albert W. Alshuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291, 311-14 (1998) (describing how the race card was played in the jury selection for the O.J. Simpson trial); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WISC. L. REV. 501, 502 (1999) (noting the "ritual of racial and gender stereotyping" that occurs during *voire dire*); Paul R. Lynd, *Juror Sexual Orientation: The Fair Cross-Section Requirement, Privacy, Challenges for Cause, and Peremptories*, 46 UCLA L. REV. 231, 233 (1998) (discussing a case where there was a deliberate effort to exclude gays and lesbians from a jury pool).

[342] The use of "test cases" to advance civil rights is a common practice. *See, e.g.*, NAACP v. Button, 371 U.S. 415 (1963).

[343] This is obviously the scenario in *Stropnicky v. Nathanson*, 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997).

[344] *See supra* parts IV.4–1b to 4–1c.

[345] See John Leubsdorf, *Using Legal Ethics to Screw Your Enemies and Clients*, 11 GEO. J. LEGAL ETHICS 831, 832 (1998) (observing that ethical rules are often used by attorneys to justify unethical conduct).

[346] *Id.* at 836.

Given a scenario in which a potential client rationally desires to retain a lawyer, even though the lawyer may, for statutorily improper reasons, not wish to represent that person, an argument can be made in favor of mandating representation, or alternatively, subjecting the lawyer to some other sanction under an anti-discrimination statute and DR 1-102(a)(6).

The principle issue underlying such an argument is that of client autonomy.[347] Clients have the right to make certain decisions relative to their legal matters, even over the objections of their lawyers, and even if there is a potential that the client may be harmed in some fashion.[348] Thus, a client may normally waive most conflicts of interest.[349] While certain conflicts may not be waived due to the effect on third parties or the difficulty of the waiver being truly informed,[350] a client should normally be able to waive a conflict concerning a personal prejudice, or even the hostility of their lawyer.[351] A client who is aware of a conflict has the right to assume the risk, or to ignore the risk, depending on the client's personal situation.[352]

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[347] *See* Iijima, *supra* note 48, at 75; Wendel, *supra* note 243, at 51-52 (stating that client autonomy includes "the power to compel the lawyer to accept the client's resolution of a contested moral issue, and the duty on the part of the lawyer to . . . adopt the client's [moral commitment] as her own").

[348] *See* EC 7-7; EC 7-8 (stating that it is the lawyers' responsibility to predict harsh consequences but it is the client who makes the ultimate decision); MR 1.2(a); *see also* RESTATEMENT, *supra* note 27, at Ch. II Topic 3, Introductory Note; CRYSTAL, *supra* note 289, at 64-65 (1998) (noting that the traditional view of the lawyer as an expert entrusted to handle client matters as the lawyer sees fit has been rejected by the Model Rules and the Restatement (Third) of the Law Governing Lawyers as being "paternalistic" and "suffer[ing] from fundamental defects," and including "[t]he expert model subordinates the actual client to the lawyer's view of the client's interests"); Josephine Ross, *Autonomy Verses A Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1344-48 (1998) (discussing the availability of a nonresponsibility defense when a lawyer chooses to place a client's autonomy before his or her legal interests); Zacharias, *supra* note 15, at 916 (discussing how clients may be willing in a contractual sense to enter into an attorney–client relationship in which they receive "less than perfect representation").

[349] DR 5-101(a) [22 NYCRR § 1200.20]; DR 5-104(a)(2)(3) [22 NYCRR § 1200.23]; *see also Waiving Conflicts*, *supra* note 332, at 412-16 (listing a number of reasons why a client may want to waive the conflict-of-interest protection including strategy, familiarity, and qualifications).

[350] *See* Chin, *supra* note 15, at 16 (noting that, in the interest of the justice system, some conflicts of interest between client and lawyer cannot be waived).

[351] DR 5-101 [22 NYCRR § 1200.20]; *see also Race, Ethics, and the First Amendment*, *supra* note 224, at 1044, 1054 (believing current ethics rules fail to consider situations where a lawyer publicly opposes the ideology of his or her client).

[352] *See* RESTATEMENT, *supra* note 27, at § 122 cmts. a, b, and c (discussing the client's level of sophistication relative to forgoing some of the protections against conflicts of interest); *Race, Ethics, and the First Amendment*, *supra* note 224, at 1038 (discussing the Klu Klux Klan's retention of a black lawyer who was openly critical of the organization's ideology).

In weighing the risk of a lawyer's personal prejudices resulting in a lack of zeal or impaired advocacy, a potential client may be comforted by the fact that, once lawyers enter into attorney-client relationships, even if against their will, they have ethical responsibilities to serve competently[353] and not to injure their clients' interests.[354] These duties are bolstered by the threat of malpractice and discipline.[355] It is also important to note that, in New York, law firms as entities may also be subject to discipline for allowing firm members to violate the disciplinary rules, thus providing an even greater incentive for competent representation.[356]

Therefore, a lawyer who wishes to reject a potential client based strictly on race, gender, religion, or other invidious criteria cannot hide behind the ethics rules by claiming that he or she is acting in the "best interest" of the client if the client is willing to enter into the attorney client relationship and to waive the conflict.[357] The choice lies with the client.[358] If the lawyer still refuses to enter into the relationship, despite the waiver, the lawyer will be subject to liability under the Human Rights Law,[359] and to sanction under DR 1-102 (a)(6).[360]

The very idea that a legislative enactment can dictate how a lawyer practices law or can sanction a lawyer for actions taken in the practice of law, as is suggested in the last paragraph, would be viewed as an improper usurpation of judicial authority by the legislature in many jurisdictions. This leads to the sixth and last argument supporting a lawyer's right to exercise absolute discretion in the selection of clients.

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353 *See* DR 6-101 [22 NYCRR § 1200.30]; EC 6-5 (stating that "the obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty"); RESTATEMENT, *supra* note 27, at § 16 cmt. f (discussing a lawyer's intentional failure to fulfill a valid contract); Wendel, *supra* note 242, at 60 (stating that a client's interest must prevail over the lawyer's, even if they significantly diverge); Zacharias, *supra* note 15, at 949-50 (discussing different levels of lawyer competency).

354 *See* DR 7-101(a)(3) [22 NYCRR § 1200.32]; Chin, *supra* note 15, at 17 (noting lawyer's are "subject to contractual, fiduciary, and ethical duties to act in the interest of their clients").

355 *See* RESTATEMENT, *supra* note 27, at §16, cmt. d ("the law seeks to elicit competent and diligent representation through civil liability [and] disciplinary sanctions . . . .").

356 *See* DR 1-102(a)(1) [22 NYCRR § 1200.3]; *supra* notes 23, 25.

357 *See* DR 5-101 [22 NYCRR § 1200.20].

358 *See* William L. F. Felstiner and Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1451-54 (1992) (examining conventional views of power between lawyer and client, noting that power varies by status, economic resources, or the vagaries of particular clients); Iijima, *supra* note 48, at 75 (arguing that a client has a choice to go elsewhere when faced with an attorney who is forced to take their case).

359 *See* N.Y. EXEC. LAW § 296 (McKinney 1993).

360 *See* DR 1-102(a)(6) [22 NYCRR § 1200.3].

F. Under the Separation of Powers Doctrine, Legislatures May Not Regulate the Practice of Law. That Authority is Reserved to or Inherent in the Judiciary.

In the United States, under the separation of powers doctrine, regulation of lawyers' conduct and the practice of law has been viewed primarily, and at times exclusively, as a function of the judiciary.[361] In some jurisdictions this power is bestowed by the state's constitution upon the judiciary, yet even when state constitutions do not expressly grant such authority, courts have claimed the authority to regulate the practice of law as an "inherent power" of the courts.[362] In instances where other coordinate branches of government have attempted to infringe on the judiciary's authority over the practice of law, most courts have ruled such actions unconstitutional under the "negative inherent powers" doctrine, thus preserving their control over the legal profession.[363]

These doctrines may come into play when a state statute or a state administrative agency created by the legislature attempts to compel lawyers to represent certain classes of clients under threat of sanction or civil liability. The *Stropnicky v. Nathanson*[364] decision in Massachusetts is an example where the separation of powers issue was raised. There, the Massachusetts Commission Against Discrimination sanctioned a lawyer for violating the state's anti-discrimination statute by refusing to represent a potential client strictly on the basis of his gender. Some have argued that the Commission had no authority to sanction any lawyer since the Massachusetts Constitution has separated various powers among the Executive, Judicial, and Legislative Departments,[365] with the Judicial Department being granted ultimate authority over the practice of law.[366] Since the judiciary has not adopted an anti-discrimination ethics rule, and since the ethics code in

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[361] *See* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 2-3 (5th ed 1998) (discussing legislative attempts to usurp the authority of the judiciary to regulate the practice of the law); WOLFRAM, *supra* note 8, §§ 2.2.1, 2.2.2, at 22, 24.

[362] *See* Michael B. Browde & M. E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407, 474-83 (1985) (providing an appendix listing how the various states view judicial separation of powers).

[363] *See* WOLFRAM, *supra* note 8, § 2.2.3, at 27 (1986).

[364] 19 M.D.L.R. 39 (M.C.A.D. Feb. 25, 1997).

[365] MA. CONST. pt. 2, chs. I-III; pt 1, ch. 1 art. XXX.

[366] *See, e.g.*, Marino v. Tagaris, 480 N.E.2d 286, 289 (Mass. 1985) (stating the "court is the 'ultimate authority' over the conduct of members of the bar"); *In re* Keenan, 37 N.E.2d 516, 520 (Mass. 1941) (finding the judiciary has power over admittance to and removal from the bar and over practice of the law).

Massachusetts grants lawyers great discretion in client selection, Nathanson has arguably done nothing to warrant sanction by the courts, and the Commission arguably has no authority to sanction a lawyer for activities undertaken in the practice of law due to the separation of powers doctrine.[367]

1. Separation of Powers Relating to the Practice of Law is Not an Issue in New York

While this argument can be made in Massachusetts and in some other jurisdictions,[368] it is not valid in New York State. Under the New York State Constitution, "the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature."[369] While the Legislature has, in turn, broadly delegated authority to the courts, "any rules the courts adopt must be consistent with existing legislation and may be subsequently abrogated by statute."[370] Thus, the separation of powers doctrine is not an issue in New York concerning the legislative regulation of the practice of law.

It is also worthy of note that, unlike Massachusetts, the judiciary in New York has adopted both an anti-discrimination disciplinary rule that tracks the state Human Rights Law,[371] and a Statement of Client's Rights and Responsibilities and Statement of Client's Rights, which state that a lawyer may not discriminate in client selection.[372] In New York there is no conflict between the legislature and judiciary over who controls the practice of law. On the issue of client selection, it appears that the judiciary has gone to greater lengths than even the legislature in clearly stating that improper discrimination based on certain suspect criteria or status should

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[367] *See* Wolfram, *supra* note 120, at 22, 24. It must be noted that constitutionally based prohibitions against discrimination would control over a state court's efforts to regulate the practice of law. *See, e.g., In re* Griffiths, 413 U.S. 717 (1973); *see also* Kristen L. Christophe, *Recent Developments in the Law Affecting Professionals, Officers, and Directors*, 33 TORT & INS. L.J. 629, 637 (1997) (noting the failure of the *Stropnicky* decision to cite Mass. DR 5-105, which barred attorneys from accepting employment where their independent professional judgment may be adversely affected).

[368] *See* Occhialino and Browde, *supra* note 362, at 474-83.

[369] A. G. Ship Maint. Corp. v. Lezak, 503 N.E.2d 681, 683 (N.Y. 1986) (citing N.Y. Const. art. VI, § 30); *see also* WOLFRAM, *supra* note 8, § 2.2.2, n.31, at 24.

[370] *Lezak*, 503 N.E.2d at 683 (citing Cohn v. Borchard Affiliations, 250 N.E.2d 690 (N.Y. 1969)); *see also* N.Y. JUD. LAW § 211(1)(b) (McKinney 1983) (providing legislative authority for the Chief Judge, after consultation with the Administrative Board, to adopt court rules regulating practice and procedures in the courts).

[371] *Compare* DR 1-102 (a)(6) [22 NYCRR § 1200.3], *with* N.Y. EXEC. LAW § 296(2) (McKinney 1993).

[372] *See* 22 NYCRR § 1210.1 and Part 1400 App. A.

have no part in the practice of law from either a legal or ethical perspective.

V. CONCLUSION

The ethical landscape in New York has changed because the law has changed. The ruling in *Cahill v. Rosa*,[373] interpreting the definition of place of public accommodation to include "'establishments dealing with goods or services of any kind,'"[374] is so expansive that most law practices will now fall within this definition. A generalized argument that law is different from other professions, and, therefore, that law offices are not places of public accommodation, is not likely to be successful given the broad language in *Cahill*. Should a specific lawyer wish to argue that his or her practice is not a place of public accommodation, the burden of proof would be on the individual lawyer to show that his or her specific practice was "distinctly private," and therefore not covered by the Human Rights Law.[375] The overall effect is that the Human Rights Law[376] as interpreted by *Cahill*[377] and earlier federal statutes, such as the Americans With Disabilities Act,[378] and 42 U.S.C. § 1981,[379] now constitute a body of legal authority prohibiting various forms of improper discrimination by lawyers.

This expansion of anti-discrimination law puts teeth into New York's anti-discrimination disciplinary rule, which sanctions *unlawful* discrimination in the practice of law.[380] In turn the Statement of Client's Rights and the Statement of Client's Rights and Responsibilities are the mechanisms created by the judiciary for alerting potential clients that discrimination in client selection by lawyers is inappropriate.[381] Thus, a judicial decision concerning a dentist, a unique disciplinary rule, and the two court rules delineating clients' rights, when taken together, appear to have revoked the lawyers' traditional right to exercise absolute discretion in the selection of clients in New York. This new ethical regime should prevail over the arguments presented concerning lawyers' constitutional rights and personal and professional autonomy, as

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373 674 N.E.2d 274 (N.Y. 1996).
374 *Id.* at 276; *see also* N.Y. EXEC. LAW § 292(9) (McKinney Supp. 2000).
375 *Cahill*, 674 N.E.2d at 277.
376 N.Y. EXEC. LAW § 296(2) (McKinney 1993).
377 674 N.E.2d 274 (N.Y. 1996).
378 42 U.S.C. § 12101-213 (1994).
379 42 U.S.C. § 1981 (1994).
380 DR 1-102(a)(6) [22 NYCRR § 1200.3].
381 *See* 22 NYCRR 1210.1, and Part 1400 App. A.

well as the need to protect clients' interests, except in unusual circumstances.

It is important to emphasize the nature of the limitations being placed on lawyers' traditional rights. Since it is generally accepted that lawyers must have a significant degree of discretion in client selection if they are to be effective advocates, advisors, and gatekeepers, lawyers may continue to exercise their discretion based on any legitimate, non-discriminatory ground, but they may not reject a client strictly on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation.[382] If, in exercising discretion, a lawyer's motives are viewed as suspect, then, as stated in *Cahill*, "they may be tested under the usual rules."[383]

The traditional view, which allowed absolute discretion in client selection, was rooted in the history and lore of the legal profession. It has remained unchallenged for years, but laws and our society have changed. While some may continue to argue on principle, or based on a specific sympathetic fact pattern,[384] that lawyers need absolute discretion in client selection, there is a fundamental discomfort inherent in arguing that lawyers, and lawyers alone of all the professions, have a right to invidiously discriminate.[385]

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[382] *See Cahill*, 674 N.E.2d at 278 (N.Y. 1996); DR 1-102 (a)(6) [22 NYCRR 1200.3]; N.Y. EXEC. LAW § 296(2)(a) (McKinney 1993).

[383] *Cahill*, 674 N.E.2d at 278.

[384] Even as staunch a defender of the lawyers' right to exercise discretion in client selection as Charles W. Wolfram, whose quotation at note 8 *supra*, reflecting the traditional view helped introduce this article, has concluded that a lawyer may not *unlawfully* discriminate in client selection. Nevertheless, he argues that "a lawyer providing advocacy services that directly involve ideology, is entitled to distinguish among her prospective clients based on their gender . . . ideology has a direct link to decisions about which clients to represent." Wolfram, *supra* note 120, at 26; *see also Lawyers' Identities*, *supra* note 112, at 101 (citing the First amendment and professional discretion in favor of allowing lawyers to choose who their clients will be); Minow, *supra* note 270, at 7 (stating that "lawyers should have the ability to select and reject clients based on political visions and personal commitments"); Deborah L. Rhode, *Can A Lawyer Insist on Clients of One Gender?* NATL. L. J., Dec. 1, 1997, at A21 (noting the discomfort of bar leaders (who normally are supportive of anti-discrimination legislation) over the Commissioner's decision in *Stropnicky v. Nathanson*). From this point of view, the interaction of anti-discrimination statutes and court rules in New York is a negative manifestation of the "law of unintended consequences." Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851, 862 (1996).

[385] *See* supra note 88 and accompany text (suggesting that enabling lawyers to discriminate invidiously in client selection is contrary to the oath lawyers swear to uphold and would undermine the integrity of the profession).