

ARTICLES

The Lawyer as Parent: Sympathy, Care and Character in Lawyers' Ethics

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You urged me as a judge; but I had rather
You would have bid me argue like a father.

John of Gaunt: *Richard II*, I iii 237–8

I. A SOLICITOR, A FATHER AND A SEXUAL OFFENDER

A. A Slip or Fall?

Solicitor 'X'—we cannot know his name¹—was a senior associate in a Sydney law firm. X met a woman, B, in 1993, and they started dating. B already had four children. As his relationship with B became more settled, X gave her and the children financial support, and even met costs of the children's education. By 1997, X had grown very close to the children. They trusted him, and called him 'Dad'. And then, in April and May, he slipped. Some will call it a fall.

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¹ Disclosure of the names of any person involved in these proceedings was prohibited by the Children (Criminal Proceedings) Act 1987 (NSW) s 11. The solicitor is referred to as 'the opponent' or 'the appellant' in the reports of the proceedings: *Law Society of New South Wales v A Solicitor* [2002] NSWCA 62 ('A Solicitor I'); *A Solicitor v Law Society of New South Wales* (2003) 216 CLR 253 (High Court of Australia) ('A Solicitor II').

In early 1997, X lost his job in the law firm and learnt that his father was dying. He was depressed, although it is unclear whether this affected his thinking during the four incidents that almost destroyed this family. All related to two of the girls: R, aged 13; and L, aged 11. When he was alone with them in their bedroom, X touched their vaginas (without penetration), rubbed their buttocks and lifted their clothes.

B learnt what had happened with R, and confronted X. While he denied that anything untoward had taken place, he agreed not to visit the girls' bedroom without B being present, and he sought psychiatric counselling. Later, government community services officers discovered that X had touched the girls, and interviewed him, B and the girls at their school. Apparently because he was worried that the children might be removed from B, X also attended a police station with his own lawyer in June, and confessed to the four incidents. He was subsequently charged with four counts of aggravated assault, and pleaded guilty to all of them. X was given three months' imprisonment, but on appeal the sentence was remitted to an unconditional good behaviour bond for three years. Throughout the criminal process, B and her father gave X moral support. At the time of the sentencing appeal, there was no evidence that R and L had been psychologically harmed by the incidents—although the judge admitted that there could be a belated effect. Indeed, all four daughters wanted X to continue in their lives as a father figure for them. The psychiatrist gave evidence that the likelihood of re-offending was minimal. In April 2000, X and B were married. All four children went to live with them.

Things, though, seem not to have returned to normal for R. In 2000, X was arrested and charged with two more counts of aggravated assault against her. These charges related to incidents said to have taken place late in April 2000—after X's marriage to B. In October 2000, after X had entered a plea of not guilty to the charges, he was convicted on both counts and sentenced to two years' imprisonment. However, on appeal, in April 2001, these convictions were quashed. X claimed that the charges made about the assaults on R in 2000 were false, and the judge's findings on appeal were, at the least, 'not inconsistent' with that.²

There is more to this case—reported as *A Solicitor v Law Society of New South Wales*³—including X's deliberate policy of not advising any law firms to which he was applying for work of the charges or his convictions, and his failure to tell them or the New South Wales Law Society of the convictions of 2000 before they were quashed.⁴

In 2001, the Law Society sought to discipline X in the State's Court of Appeal, submitting that, alongside the refusal to disclose them, his convictions and the underlying conduct evidenced character that was incompatible with the practice of law. Specifically, the conduct was 'a most serious breach of trust on [X's] part given the paternal like role he had with his victims'. X had such a 'personally disgraceful character', he was unfit to be a lawyer.⁵

² *A Solicitor I* [2002] NSWCA 62, [24].

³ [2002] NSWCA 62; (2003) 216 CLR 253.

⁴ A solicitor who had been convicted of an indictable offence could only work in legal practice if approval had been given by the Law Society. The solicitor also had to disclose any conviction for an indictable offence to an employing firm: Legal Profession Act 1987 (NSW) s 48K.

⁵ *A Solicitor I* [2002] NSWCA 62, [81]–[83].

The Court of Appeal ordered that X be permanently removed from practice. In light of the convictions and lack of candour, his name was struck from the court's roll of legal practitioners.⁶ But an appeal to the High Court of Australia in 2004 was partly successful. The justices of the High Court did think that there was professional misconduct in this case, but they were less concerned about the implications of the convictions and did not think this meant that X was unfit to be a lawyer. Rather, they believed that a suspension from practice would have been sufficient discipline for X. Because of the Law Society's complaints about him, X had been deterred from renewing his practising certificate for five years. He had therefore already effectively suffered suspension from practice. So the High Court set aside the Court of Appeal's order for removal, and made no other order in its place.⁷

B. Parental Qualities in Legal Practice—The Courts' Views

The discipline in *A Solicitor* raises a significant moral inquiry about the importance of parental qualities to a lawyer's character.⁸ It is not the sexual element of X's convictions that open this inquiry.⁹ It is his parental role. Across the common law world, expulsion from the profession has been thought, more often than not, to be the only discipline possible for a lawyer convicted of a sexual offence.¹⁰ In a small number of cases, though, lawyers in this

⁶ *Ibid*, [1], [112]–[114], [127].

⁷ *A Solicitor II* (2003) 216 CLR 253, 275–6.

⁸ The High Court's decision in *A Solicitor* received severe criticism in the Australian print media and on radio: L Haller, 'Lawyers and the Third Dimension: *A Solicitor v Council of the Law Society of New South Wales*' (2004) 23 *University of Queensland Law Journal* 211. It also received scholarly criticism because the High Court discounted the importance of traditional demands of unqualified candour about a lawyer's criminal record: S Le Mire, 'Striking Off: Criminal Lawyers and Disclosure of their Convictions' (2005) 79 *Australian Law Journal* 641, 647–8.

⁹ Haller (n 8) 215–16.

¹⁰ Australia: *Law Society of South Australia v Rodda* (2002) 83 SASR 541 (Solicitor befriended a 12-year-old school girl who was waiting at a bus stop outside his office. Convictions for kissing the girl on the lips, putting his tongue into her mouth, and touching her breast). Canada: *Re Cwinn and the Law Society of Upper Canada* (1980) 108 DLR (3d) 381 (Ontario lawyer was convicted in the United States of sexual offences. He kept horse-riding stables and recruited teenage girls to ride in competitions, where he systematically seduced at least six girls, including two aged 14. The abuse of his position in 'a relationship of dependence, trust and confidence' (at 389) shattered his professional integrity and was conduct unbecoming a barrister and solicitor). United States: *In re Jacobsen*, 202 Cal 289; 260 P 294 (CA Sup Ct, 1927); *In re Phillips*, 17 Cal 2d 55; 109 P 2d 344 (CA Sup Ct, 1941) (Conviction of attorney for indecent exposure held to be an offence of moral turpitude justifying an order for disbarment); *Florida Bar v McKeever*, 766 So 2d 992 (Fla Sup Ct, 2000) (Attorney convicted of five counts of aggravated child abuse, incidents involving severe beatings of naked boys. Disbarment was the only discipline remotely commensurate with respondent's offences); *In re Lesansky*, 25 Cal 4th 11; 17 P 3d 764 (CA Sup Ct, 2001) (Attorney convicted of attempting to commit a lewd act on a child aged 14 or 15, an offence necessarily involving moral turpitude and requiring disbarment); *Attorney Grievance Commission of Maryland v Thompson*, 367 Md 315; 786 A 2d 763 (Md Ct App, 2001) (Attorney convicted of stalking, for making an improper sexual remark to a 13-year-old boy, speaking to the boy at a shopping mall, calling him one time on the phone, and appearing uninvited at the boy's home. The attorney's stalking undermined the court's view of his trustworthiness and fitness as a lawyer, leading to an indefinite suspension).

position have not had their place in the profession permanently affected.¹¹ In one of them, the Visitors of Gray's Inn only reprimanded a barrister who had been convicted and fined for loitering in a public toilet, where he had gestured to men in ways that suggested he had an interest in 'immoral purposes'.¹² The Visitors made a sharp distinction between misconduct in private and professional lives: *this* sexual misconduct not being relevant in deciding whether to exercise discipline.¹³

Even among these exceptional cases, *A Solicitor* raises a completely new issue. Unlike any previous discipline involving sexual offences, there was in X's case an established, nurturing, domestic relationship between him and the girls. For three years, he had been 'Dad'. The rubbing, touching and peering betrayed the parental responsibilities of trust, care and protection that he had taken on over that time. This may have been temporary, but it was as serious a betrayal of a child as is possible—matched, perhaps, only by violence.¹⁴ An extended passage in the judgment of Justice Sheller in the Court of Appeal explains his anxiousness about X's breach of trust.

The breach of trust has two sides to it. A child relies on the integrity and trustworthiness of the adult who stands in the place of a father. Naturally that trust is absolute and unquestioning and was encouraged by [X] who sought the affection of the children. On the other hand, [X] standing in the place of a father assumed the obligation and responsibility of respecting and honouring that trust. In such a situation the child is by reason of her age and experience in life unprotected and vulnerable. By contrast [X's] power was very great.¹⁵

X claimed that the incidents of 1997 were 'out of character',¹⁶ but Justice Sheller thought that what seemed to have been good character to that point was lost by the man's treatment of his 'daughters'. It reflected poorly on his 'inherent qualities', and on his duty as a lawyer.¹⁷ Parental traits added to the shape of the character needed of lawyers, and were related to the lawyer's ability to help in the effective delivery of legal justice.

The solicitor's duty is to be faithful to the oath of office, to the courts, to fellow practitioners and most importantly to the clients who may on occasion also be people who are vulnerable and

¹¹ England: *In re a Solicitor* [1956] 1 WLR 1312 (Male solicitor convicted of indecent assault on a soldier in a sleeping compartment in a train, but thought not to be a serious case—'assaults, not attempts at corruption' (at 1314). Two year suspension). United States: *In re Boyd*, 48 Cal 2d 69; 307 P 2d 625 (CA Sup Ct, 1957) (Attorney convicted of vagrancy for engaging in homosexual acts in a public place was held to have committed an offence involving moral turpitude, and suspended from practice for three years); *In re Safran*, 18 Cal 3d 134; 554 P 2d 329 (CA Sup Ct, 1976) (Attorney convicted of indecently exposing himself to a child under 18 was suspended from practice for three years).

¹² *Re H (a Barrister)* [1981] 1 WLR 1257.

¹³ *Ibid*, 1259.

¹⁴ Cf *In re Walker*, 597 NE 2d 1271 (Ind Sup Ct, 1992), where an attorney assaulted his girlfriend and her nine-year-old daughter. However, they were not cohabiting and there is no question of a parent-like relationship with the child. A 60 day suspension was ordered.

¹⁵ *A Solicitor I* [2002] NSWCA 62, [100].

¹⁶ *Ibid*, [92].

¹⁷ *Ibid*, [101].

unprotected and who should be able confidently to expect that the solicitor will honour the obligation and responsibility imposed by the relationship of solicitor and client. The sworn duty is a public duty. The administration of justice depends in a large measure on the trust the courts and the public place in those who practise the law.¹⁸

Justice Sheller's colleague in the Court of Appeal, Justice Giles, made the same connection. The incidents of 1998 did not take place when practising law, but 'were incompatible with the qualities of character and trustworthiness required of a member of his profession'.¹⁹

The High Court justices disagreed with the Court of Appeal's assessment of X's situation in two respects, both of which implicate the moral relevance of parental traits in lawyers' ethics. The first was the identification of good character. Was an unprecedented and unrepeatable, one-month period of illegal sexual assault enough to disprove that a man possessed good character? The justices thought not. More significance was placed on the fact that B forgave X, the support of character witnesses, the isolated quality of the offences, and the exceptional circumstances of the whole episode.²⁰

The second difference was that the High Court did not see any connection whatsoever between the character required of a good parent and the character required of a lawyer.

It is true that the conduct involved a form of breach of trust, being the trust reposed by the mother of the children ... and the children themselves. However, *the nature of the trust*, and the circumstances of the breach, were *so remote from anything to do with professional practice* that the characterisation of [X's] personal misconduct as professional misconduct was erroneous.²¹

The justices could have let the decision turn exclusively on X's extraordinary circumstances. But they did not. The nature of the trust required of a father was not the trust required of a lawyer; a father's treatment of his children could not reveal anything of the character needed also in legal practice. The High Court therefore reached the same conclusion as the Visitors of Gray's Inn. When considering the discipline of a lawyer, some aspects of personal conduct are unrelated to the lawyer's role.²² This mutual exclusion of aspects of the professional role and personal morality will be questioned later. But even if it is possible to insulate the lawyer's role from some kinds of sexual conduct, the Visitors were dealing with a lawyer who gestured to complete strangers in a public toilet. The High Court was dealing with abuse in a longstanding domestic relationship. *If* this kind of distinction between the personal and professional can be made, the implications of making that distinction in the familial circumstances of *A Solicitor* are quite different to those faced by the Visitors of Gray's Inn.

¹⁸ *Ibid*, [101].

¹⁹ *Ibid*, [118].

²⁰ *A Solicitor II* (2004) 216 CLR 253, 274–5.

²¹ *Ibid*, 274 (emphasis added).

²² *Re H (a Barrister)* [1981] 1 WLR 1257, 1259.

C. Outlining the Argument

A Solicitor shows senior courts, deliberating on the point at length, reaching opposite conclusions as to the place of parentalism in lawyers' ethics. The High Court of Australia found that parental qualities had no place in judging someone's qualification for legal practice. The NSW Court of Appeal disagreed. This disagreement is an important one. Although both courts claimed to be making traditional judgments about character, they disagreed over the extent to which the lawyer's life could be seen as a unified whole. The different conclusions they reached about the relevance of parental qualities made all of the difference to the place of solicitor X in the profession.

I argue that parent-like qualities are at the centre of good character for a lawyer because 'the parental' as a metaphor for legal practice highlights the importance of sympathy or care in lawyers' ethics. However, it should be understood as one personal trait within a scheme of other traits and virtues—especially justice and judgment—and not treated as a supreme co-ordinating value. The parental metaphor should not be pressed too far.

In the next section (II), I introduce the idea of 'the parental'. This centres on Thomas Shaffer's account of parentalism within his Christian ethics of care for legal practice, but develops and presents a critique of Shaffer's approach. Although Shaffer's work has been especially indebted to the neo-Aristotelian philosophies and theologies of Alasdair MacIntyre and Stanley Hauerwas, his ethics of care contradicts basic themes of both scholars' work. I, too, wish to put lawyers' ethics on the ground developed by MacIntyre and Hauerwas, as well as by Anthony Kronman and Charles Fried, but without Shaffer's inclination towards relativism and without the confidence that a religious ethics can be as useful for the nonreligious lawyer as Shaffer suggests. The critique in this section leads to section III's argument that parental qualities of care, sympathy and trust have a place inside a stronger conception of lawyers' character. Part IV concludes with observations on the suitability of the parental metaphor, at least as a partial picture of the lawyer's role, and arguments for considering it a better metaphor for the moral qualities of lawyers than others—such as Fried's idea of 'lawyer as friend'.

II. THE PARENTAL IN LAWYERS' ETHICS

Elizabeth Anderson describes parental qualities as both trusts and commitments. 'Parents' rights over their children are trusts, which they must exercise for the sake of the children.' Parental love is an 'unconditional commitment to nurture one's child by providing her with the care, affection and guidance she needs to develop her capacity to maturity'.²³ The language of trusts, and of trustees, is familiar to legal practice, and is prominent in the Court of Appeal's account of parental qualities in *A Solicitor*. These trusts should constrain how a parent guides his child. Still, it is not immediately self-evident that parental trust is a natural

²³ E Anderson, *Value in Ethics and Economics* (Harvard University Press, 1993) 170.

metaphor for the qualities of trusteeship that we look for in lawyers, and parental commitments seem an even stranger fit for legal practice. Initially, it seems that the High Court's exclusion of parental qualities from questions of legal practice could have a foothold.

A. Shaffer: The Parental as a Christian Ethic

A closer look, nevertheless, suggests a place for both parental trusts and commitments as traits of good lawyers. In what is a most influential philosophical contribution to lawyers' ethics,²⁴ Thomas Shaffer introduced the idea of parentalism, and especially its affective commitments, into moral thinking about legal practice. Shaffer ventured to describe professional standards as 'parent-like' or 'parentalistic'—synonyms for 'fatherly' and 'motherly', or 'paternalistic' and 'maternalistic'.²⁵ His immediate concern was that 'paternalism' was unfairly regarded in professional ethics as a 'bad word'.²⁶ Shaffer suggested that we cannot understand the root term *pater* or father as a bad word: 'it cannot be', and '[w]riters on professionalism erred in thinking otherwise'.²⁷

Shaffer's idea of the parental is both descriptive and normative. It describes a truth, a fact or a 'given' that must be accepted as a 'cultural deposit'.²⁸ That fact—broadly conceived as the 'family' or parents within the family—is a moral resource that can be used in professional life, and which can help to shape professional behaviour.²⁹ In short, a professional ethic that is based on the isolated individual, 'a parentless moral agent', is a false way to describe the moral world that lawyers live in.³⁰

Shaffer's parentalism is grounded in a broad Judeo-Christian perspective. He draws on the biblical anthropomorphism of God as father, the centrality of families in God's dealings with Israel and the church, a Pauline view (in I Corinthians at least) of the indissolubility of marriage, and the idea of the church as a family.³¹ Shaffer has certainly been most prominent

²⁴ D Luban (ed), *The Ethics of Lawyers* (Dartmouth, 1994) xii.

²⁵ TL Shaffer, 'The Legal Ethics of Radical Individualism' (1987) 65 *Texas Law Review* 963, 987 ('*Radical Individualism*'). For an argument that the term 'nurturing' (which is an aspect of Anderson's definition) is preferable to 'parenting', see SR Paterson, 'Against "Parenting"' in J Trebilcot (ed), *Mothering: Essays in Feminist Theory* (Rowman and Allanheld, 1984) 62, 68.

²⁶ *Radical Individualism* (n 25) 986.

²⁷ *Ibid*, 987. Cf TL Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Brigham Young University Press, 1981) 33 ('*A Christian and a Lawyer*'), where Shaffer claimed that an ethics of care did not tolerate paternalism. However, this was referring to paternalism as the controlling perspective for the lawyer's moral role, rather than involving a moral conversation between lawyer and client. It is arguably compatible with the view taken in *Radical Individualism* (n 25).

²⁸ *Radical Individualism* (n 25) 987, 988.

²⁹ *Ibid*, 987.

³⁰ *Ibid*, 987. See also A MacIntyre, *After Virtue: A Study in Moral Theory* (Duckworth, 2nd edn 1985) 56–59, 84 ('*After Virtue*').

³¹ *Radical Individualism* (n 25) 986, 987–8. There are profound theological and empirical problems with this justification. The Archbishop of Canterbury, Rowan Williams, has pointed out that the appeal to 'family' in one historically contingent form rather than another 'is always to select, prefer ... not to utter what everyone knows': R Williams, *On Christian Theology* (Blackwell, 2000) 228. Unlike Shaffer, Williams does not endorse the moral value of 'family' in the abstract, without reference to the quality of relationships in this particular family or that: *ibid*, 233, 237.

in the contemporary development of applied Christian ethics in legal practice.³² However, Shaffer also argues for parentalism in lawyers' ethics on the basis of alternative accounts of the religious significance of families for American lawyers. The first of these—which I will call *the argument of culture*—takes aspects of the surrounding religious inheritance as 'cultural deposits' for lawyers,³³ and therefore assumes the relevance of the religious tradition independently of any individual lawyer's faith. It does not require the lawyer to be a believer. The cultural deposit of Judeo-Christian religious views amounts to a moral fact that even unbelievers must take into account if they are to understand the social settings in which people around them act and make decisions. 'Failing to take account of the tradition is therefore failing to be truthful.'³⁴ Even if the lawyer did not consciously adhere to the tradition, subconsciously it still influences the lawyer's behaviour and gives silent moral direction.³⁵ This is 'the religious tradition in ordinary, Wednesday-afternoon law practice'.³⁶ Shaffer suggests that the argument of culture is both a contribution to the dominant liberal ethics of the legal profession and a corrective to its 'radical individualism'.³⁷

The argument of culture is too ambitious a basis for the parental in lawyers' ethics, especially if it is understood in the light of Shaffer's debt to MacIntyre's notion of 'tradition'. Shaffer has commonly claimed to draw on the work of Alasdair MacIntyre—especially *After Virtue*—and did so in developing his idea of the parental in lawyers' ethics.³⁸ He has also appealed to the Protestant virtue ethicist Stanley Hauerwas, who in turn is also considerably indebted to MacIntyre.³⁹ Admittedly, although Shaffer uses the term 'tradition', he does not explicitly claim a connection with MacIntyre in his argument of culture. But nevertheless Shaffer's argument of culture performs exactly the same role in Shaffer's argument for an ethics of care as MacIntyre's idea of 'tradition' does in shaping a community's virtues.⁴⁰

³² For a sample, see *A Christian and a Lawyer* (n 27); TL Shaffer, *Faith and the Professions* (Brigham Young University Press, 1987) ('*Faith and the Professions*'); 'Faith Tends to Subvert Legal Order' (1998) 66 *Fordham Law Review* 1089 ('*Subversion*'); 'Should a Christian Lawyer Sign Up for *Simon's Practice of Justice*?' (1999) 51 *Stanford Law Review* 903 ('*Signing Up*'); 'Lawyers and the Biblical Prophets' (2003) 17 *Notre Dame Journal of Law, Ethics and Public Policy* 521.

³³ *Radical Individualism* (n 25) 988.

³⁴ *Ibid.*, 988.

³⁵ *Ibid.*, 988.

³⁶ *Ibid.*, 990.

³⁷ *Ibid.*, 989.

³⁸ For a sample, see TL Shaffer, 'The Moral Theology of Atticus Finch' (1981) 42 *University of Pittsburgh Law Review* 181, 212 ('*Atticus Finch*'); 'The Gentleman in Professional Ethics' (1985) 10 *Queen's Law Journal* 1, 4, 7, 16 ('*Gentleman*'); *Radical Individualism* (n 25) 964n, 965n, 983n; *A Christian and a Lawyer* (n 27) 240–1; *Faith and the Professions* (n 32) 19, 296; 'On Lying for Clients' (1996) 71 *Notre Dame Law Review* 195, 197, 205 ('*Lying*'); *Signing Up* (n 32) 903, 907n, 912n; TL Shaffer and JB Meister, 'Is this Appropriate?' (1997) 46 *Duke Law Journal* 781, 803n.

³⁹ For a sample, see TL Shaffer, 'Serving the Guilty' (1980) 26 *Loyola Law Review* 71, 85; *Atticus Finch* (n 38) 182, 188–90, 196–7, 214, 216; *Radical Individualism* (n 25) 965, 967–989; *A Christian and a Lawyer* (n 27) 56, 84, 123, 138, 174–5, 189–207, 223, 240; *Faith and the Professions* (n 32) 35, 290–3, 305–6; *Lying* (n 38) 197, 205; TL Shaffer (with M Shaffer), *American Communities and their Lawyers* (University of Notre Dame Press, 1991) xi.

⁴⁰ See *After Virtue* (n 30) 221–5; A MacIntyre, *Whose Justice, Which Rationality* (University of Notre Dame Press, 1988) 326–88 ('*Whose Justice*'); *Three Rival Versions of Moral Enquiry: Encyclopaedia, Genealogy, and Tradition* (University of Notre Dame Press, 1990) ('*Three Rival Versions*').

MacIntyre's idea of tradition has shifted over time, but began as 'an historically extended, socially embodied argument, and an argument precisely in part about the goods that constitute that tradition.'⁴¹ The embodiment of tradition, nevertheless, takes place in groups that are better described as communities than as whole societies. It is in communities that we find greater moral cohesion and the practices that embody the goods of the tradition.⁴² MacIntyre therefore names southern black or white Protestant communities in the United States as examples of groups that represent distinctive traditions.⁴³ The location for a social (or 'cultural') standpoint for Shaffer's particular concept of family is therefore more likely to be found in a religious community, which habituates believers into the thinking and practices that embody this concept, than in society-as-a-whole. The unbelieving lawyer would therefore need a broader rationale for the parental than is provided by Shaffer's argument of culture before she could accept it as having a place in the way she reasons through the problems of ordinary Wednesday-afternoon practice. This naturally limits the claims of Shaffer's theory, as it does for any religious ethics which takes the moral pluralism of contemporary western legal professions seriously.

Indeed, Shaffer's second argument for the religious significance of families—the *argument of a faith community*—is more compatible with MacIntyre's and other neo-Aristotelian accounts of the virtues. In this case the lawyer is a believer, and the cultural deposit of the religious tradition held and sustained within smaller communities of synagogue and church, is more intense, and explicit.⁴⁴ But the faith community's tradition does not make a contribution to liberal democracy. It is rather a confrontation with, and a 'radical alternative' to, the dominant liberal ethics of the legal profession.⁴⁵

In this article, I have no plan to replace Shaffer's argument of culture with another claim to a comprehensive rationale for the parental. So, I will just acknowledge, and bypass, the problem of the more limited reach of a Christian ethics. That does not necessarily make the argument of a faith community for the parental completely irrelevant or unpersuasive for the nonreligious lawyer. Antagonists have described Shaffer's Christian ethics as undesirable and 'impossible to admire'. But they have also thought that his willingness to use an unpopular God-talk showed 'admirable courage',⁴⁶ and that it gave points of consensus that reinforce secular ethical arguments.⁴⁷ This will be especially so for virtue-based arguments. There may yet be moral resources for the secular lawyer in the account that follows.

⁴¹ *After Virtue* (n 30) 222.

⁴² This is also why, despite his denials, MacIntyre is often dubbed a communitarian: cf A MacIntyre, 'The Spectre of Communitarianism' (1995) 70 *Radical Philosophy* 34; 'I'm not a Communitarian, But ...' (1991) 1 *The Responsive Community* 91.

⁴³ *After Virtue* (n 30) 252.

⁴⁴ *Radical Individualism* (n 25) 989–90.

⁴⁵ *Ibid.*, 989.

⁴⁶ M Ashe, "'Bad Mothers', 'Good Lawyers', and 'Legal Ethics'" (1993) 81 *Georgetown Law Journal* 2533, 2544.

⁴⁷ *Ibid.*, 2550, 2555.

B. Parentalism as Sympathy

According to Shaffer, professional legal practice should be parental. In a general sense, then, this means that the lawyer should feel as a mother or father feels. Specifically, the lawyer should have *sympathy*.⁴⁸ It is at this point that Shaffer suggests that the idea of lawyer as parent raises useful traits for lawyers. Attempting to put this idea in context, he uses Stanley Kaplan's *Case of the Unwanted Will*—an ethical quandary posed to lawyers in the *American Bar Association Journal*.⁴⁹ *The Unwanted Will* appears to be hypothetical, but is a not unrealistic example of the common practice scenario of a lawyer instructed to draw mutual wills for a married couple.

John and Mary Smith want to sign wills before going on an overseas holiday. As John has instructed, the lawyer draws two wills making identical gifts. The Smiths then visit the lawyer to sign the wills. After John has signed his, the lawyer asks him to leave the room so that the lawyer can speak with Mary alone before she signs her will. John withdraws. The lawyer asks Mary whether this is how she would want her estate distributed if John had not been present and the terms of the gifts were kept secret from him. She replies no. She would deal with the property differently if the will could be kept secret from John. However, she is also unwilling to cause domestic discord by making a will that John knows differs from his wishes.⁵⁰

Kaplan takes *The Unwanted Will* a little further, but Shaffer leaves it at that point. Even there, the lawyer has made problems for himself and the Smiths.⁵¹ First, he cannot allow Mary to sign the will he has prepared. It does not reflect her true testamentary intent. Secondly, John has signed a will on the assumption that Mary's is going to mirror it. That assumption is incorrect, and the lawyer cannot allow John to go on the holiday without letting him know. Thirdly, John has signed the will on the assumption of Mary's mutual will and, equally, the lawyer cannot therefore arrange for Mary to sign a different will that accords with her own intentions.⁵² Fourthly, but less explicitly in Shaffer's analysis,⁵³ the lawyer owes Mary a duty of confidentiality. Unless she wants the lawyer to tell John of her true intention (and she does not), he can only address the second problem by breaking his legal duty of confidentiality to Mary.⁵⁴

⁴⁸ *Radical Individualism* (n 25) 986–7.

⁴⁹ S Kaplan, 'The Case of the Unwanted Will' (1979) 65 *American Bar Association Journal* 484.

⁵⁰ *Ibid.* Shaffer's version of *The Unwanted Will* differs slightly, but in no material respect: *Radical Individualism* (n 25) 968–9.

⁵¹ The legal duties implicated in this dilemma are thoroughly addressed in TS Collett, 'Disclosure, Discretion, or Deception: The Estate Planner's Ethical Dilemma from a Unilateral Confidence' (1994) 28 *Real Property, Probate and Trust Journal* 683.

⁵² *Radical Individualism* (n 25) 969; Collett (n 51) 703, 704, 740.

⁵³ This may have implications for Shaffer's suggested approach to *The Unwanted Will*. In *Radical Individualism*, where the duty of confidentiality owed to Mary is not addressed, he concludes that withdrawal from representation is immoral: see accompanying text at n 67. Later, when the issue of Mary's confidences was raised with him, Shaffer seems to have accepted that silent withdrawal from representation might be best: see Collett (n 51) 738.

⁵⁴ In Kaplan's original *Unwanted Will*—(1) the lawyer advises Mary to sign the will he has prepared, but also (2) advises Mary to see another lawyer who (without any duties to John) can prepare a will that more accurately

In *The Unwanted Will*, whatever the lawyer does or doesn't do, he will break his duties to Mary, John, or both. The base problem in this scenario, according to Shaffer, is that the legal duties to the clients that create this quandary do not describe or address the true question that this lawyer must deal with. The quandary only arises because the legal duties to the client see the client as an individual. This lawyer has duties to John (as an individual) and Mary (as an individual).⁵⁵ The relations between them are assumed to arise through transactions: contract, consent and promises. And, as their intentions are found, mid-way through the legal task, to differ, the lawyer finds himself having actually conflicting duties to two different individuals. However, to Shaffer, the liberal structure of the law's vision of the client 'is sad, corrupting, and untruthful'.⁵⁶ In *The Unwanted Will*, the lawyer does not have John and Mary in his office. He has the Smith family in his office, and the Smith family is his client. The family made the contracts and promises. It is the source of the harmonies and disharmonies that inform the terms of the will.⁵⁷ The family is the reason why people consult lawyers to prepare wills.⁵⁸ In Shaffer's version of *The Unwanted Will*, John and Mary, like many laypeople, think of the estate as the family's—not as the property of different individuals in it.⁵⁹ And, finally, as our culture's stories, comic-strips, advertising and (above all) religious traditions attest, the family must be seen as a contemporary moral fact.⁶⁰

If parentalism is to be of any significance as a trait for lawyers, it should then make some difference to the way that the lawyer deals with the Smiths in *The Unwanted Will*. A lawyer whose ethics incorporates the parental will, in Shaffer's analysis, sees the family as 'organic' and 'prior to individuality'⁶¹ (although this sees Shaffer confusingly shift the location of the parental from the lawyer to the client). In the first place, the lawyer has to inquire into the 'deep things of the family'.⁶² This is not because these are a source of potential conflict between John and Mary, but because for Shaffer the client is the family and the lawyer needs to understand the client. If this situation demands that members of the family be interviewed separately, then the lawyer should do this. Mary's concerns about John's plans for the

reflects her true intentions. She (3) signs the will, but does not have a new will prepared before she leaves for the holiday—during which both of the Smiths are killed. The Smiths' son, appointed executor under both wills, then consults the lawyer for the grant of probate and the administration of the estates: Kaplan (n 49) 484. On the above analysis, at points (1) and (3) the lawyer has broken his duties to Mary. He has also broken his duties to John, as he has information that there is a likelihood that the assumptions John made when signing his will could soon become false but, presumably, has withheld this from John.

⁵⁵ This is the usual position, even when the preparation of the wife's will is incidental to the lawyer's general representation of the husband: *Bunrock v Bunrock*, 419 So 2d 402 (Fla Dist Ct App, 1982).

⁵⁶ *Radical Individualism* (n 25) 970. For other views that, in family estate planning, the definition of clients in individualistic terms does not reflect many lawyers' understandings of the transaction, see Collett (n 51) 736; 'Reports of the Special Study Committee on Professional Responsibility: Editor's Introduction' (1994) 28 *Real Property, Probate and Trust Journal* 763.

⁵⁷ *Radical Individualism* (n 25) 970.

⁵⁸ *Ibid*, 967.

⁵⁹ *Ibid*, 977–8.

⁶⁰ *Ibid*, 970.

⁶¹ *Ibid*, 971, 974, 975.

⁶² *Ibid*, 976.

distribution of the property need to be taken into account, because she is *in* the family.⁶³ That may force the family to resolve its internal differences; to confront Mary's secret.⁶⁴ It gives the lawyer a more truthful picture of the family.⁶⁵

In the second place, the lawyer is to work with the Smiths as they recognise their disharmonies—the disharmonies evident in Mary's secret wish to have the family property distributed differently. The likely legal course for any lawyer confronting the dilemma of the *The Unwanted Will* is to withdraw from acting for both John and Mary (and notify the indemnity insurer).⁶⁶ Shaffer holds, emphatically, that this is the most irresponsible thing that the lawyer could do, even if that is what is required by the profession's rules.⁶⁷ The damage to the family has been done and, most likely, Mary's secret is out, so the lawyer would be abandoning the family, leaving them to deal with an internal crisis to which he has contributed. The *moral* response, although it means disobeying the *legal* requirement, may therefore be for the lawyer to remain engaged, and to try to keep the family working together on resolving its internal differences. A 'lawyer for the family' will see himself as the lawyer for the working harmony that makes the family.⁶⁸

C. Sympathy and Care

Shaffer brings the affective commitments of the parental to *The Unwanted Will*, although there are structural problems with his account. The first problem is that the parental qualities shaped by 'family' are supposed to belong to the lawyer,⁶⁹ but in Shaffer's treatment of *The Unwanted Will* much of his account of parent and family is devoted to describing *the client*—the Smith family. The parental is brought to the ethics of the lawyer only in Shaffer's claim that the lawyer's affective commitment, once Mary's secret is out, means that he should stick with the family—even though sticking with the family is acting in professional disobedience because conflicting duties have arisen.

A second problem lies in Shaffer's more basic proposition that parentalism entails the lawyer's *sympathy* for the client⁷⁰—a quality for lawyers that is endorsed by a number of schools of lawyers' ethics. The parental certainly must involve sympathy, and it is a central parental trait. Shaffer's account nevertheless tends to treat the parental and sympathy as interchangeable. However, if the idea of the parental is to be of even limited use in lawyers' ethics it must incorporate other qualities as well. In Part III of this paper, I therefore begin

⁶³ *Ibid*, 976.

⁶⁴ *Ibid*, 982.

⁶⁵ *Ibid*, 978.

⁶⁶ Cf the analysis in Collett (n 51), although she is adamant that, once the question of maintaining Mary's confidences is accepted, withdrawal is the likely course: *ibid*, 701, 715. Shaffer notes that the rules relating to withdrawal when there are conflicting duties do not refer explicitly to situations involving families: *Radical Individualism* (n 25) 974.

⁶⁷ *Ibid*, 982.

⁶⁸ *Ibid*, 974.

⁶⁹ *Ibid*, 986–7.

⁷⁰ *Ibid*, 987.

to sketch a richer dimension of the parental, while recognising the central place of sympathy in the idea.

When we say 'lawyer L *sympathises* with client C', we generally mean that:

- (1) L knows that C is a conscious being, or at the very least a feeling person.⁷¹
- (2) L knows, or thinks that she knows, C's state of mind.
- (3) The affinity between L and C means that L can at least imagine C's state of mind.
- (4) L has an unselfish concern for C's welfare.⁷²

Especially as sympathy is developed in Kronman's ethics, its core is condition (3): the affinity between two people, to the extent that both of them are, or imagine themselves to be, affected by the same powers, pressures or influences.⁷³ This is deeper than knowledge of C's situation—*empathy*⁷⁴—although the cognitive quality of empathy is needed to build sympathy. In its emotive identification with the other person, sympathy can suggest that there is also acceptance, approval or judgment of the appropriateness of the other's response to his situation.⁷⁵ The difference highlights an important quality of sympathy, and of Anderson's definition of the parental. It demands something approaching compassion.⁷⁶ In Kronman and, for that matter, Aristotle, it is *felt* with C.⁷⁷ This feeling will usually be about something that is unpleasant or that involves C in some kind of suffering.⁷⁸ In the lawyer–

71 If, as is commonly the case in legal practice, C is a corporation—a 'soulless entity'—it would not be expected that L could sympathise with the entity C. However, L may well sympathise with the people who are C's human agents: its management, employees and shareholders; and their joint interests as a group. In Shaffer's account, C could well be a group like a family.

72 P Mercer, *Sympathy and Ethics* (Clarendon Press, 1972) 19.

73 A Kronman, 'Practical Wisdom and Professional Character' (1986) 4 *Social Philosophy and Policy* 203, 213–16 ('*Practical Wisdom*'); A Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, 1993) 69–71 ('*Lost Lawyer*'). 'Sympathy ... is an exercise of the imagination involving self-consciousness and comparison': HB Acton, 'The Ethical Importance of Sympathy' (1955) 30 *Philosophy* 62, 66.

74 Mercer (n 72) 15, 85n.

75 TL Shaffer and JR Elkins, *Legal Interviewing and Counseling in a Nutshell* (West Publishing, 2nd edn 1987) 76, 79–80; RM Bastress and JD Harbaugh, *Interviewing, Counseling, and Negotiating: Skills for Effective Representation* (Little, Brown, 1990) 116; D Binder, P Bergman and SC Price, *Lawyers as Counsellors: A Client-Centered Approach* (West Publishing, 1991) 40, 53, 59–60; S Ellmann, 'Lawyers and Clients' (1987) 34 *UCLA Law Review* 717, 733–9; S Ellmann, 'Empathy and Approval' (1992) 43 *Hastings Law Journal* 991, 991–4. Ellmann has argued, however, that empathy in client counselling does need to be augmented by 'approval'—a positive judgment of the client's 'world view': *ibid*, 993–1005.

76 Martha Nussbaum suggests that the difference between sympathy and compassion is one of intensity: *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, 2001) 302.

77 *Practical Wisdom* (n 73) 221–2; *Lost Lawyer* (n 73) 70–71; HJ Curzer, 'Aristotle: Founder of the Ethics of Care' (2007) 41 *Journal of Value Inquiry* 221, 230. Acton notes that, without the feeling, a person could not understand what it is to give help. The other's problem could be learned, but it could not be *seen*: Acton (n 73) 63. The point underlines the ethical significance that Hauerwas, Shaffer and Iris Murdoch give to vision; to describing the client and problem truthfully: S Hauerwas, *Vision and Virtue: Essays in Christian Ethical Reflection* (University of Notre Dame Press, 1974) 30–47 ('*Vision and Virtue*'); I Murdoch, *The Sovereignty of Good* (Schocken Books, 1971).

78 Mercer (n 72) 5; Nussbaum (n 76) 302. See also C Taylor, *Sympathy: A Philosophical Analysis* (Palgrave Macmillan, 2002) 7: 'Sympathy, the phenomenon of being moved by the suffering of another'.

client relationship, L and C almost always meet because C has a legal problem, thinks he might have one, or wants to avoid one. The relationship is inevitably formed because C is in an unpleasant position, or sees something unpleasant coming. If L's efforts to see the world as C sees it, though achieved through developed acts of imagination, are even partly successful, then L's feelings in response to the situation are gradually to reach a closer approximation to C's. As mentioned, any discussion of this affective side of the parental was not as conspicuous in the Court of Appeal's judgments in *A Solicitor*, although it is not completely missing. In contrast, Shaffer's emphasis on sympathy as a parental commitment is prominent in his theory, although he probably does not recognise any aspect of parental trusts in his response to *The Unwanted Will*.

As we will see, sympathy also has a prominent place in Kronman's virtue ethics. The idea that considerations of care should be 'central'⁷⁹ to moral reasoning emerged as a significant school of moral philosophy in the early 1980s, when Carol Gilligan argued that women are more inclined to make moral decisions in terms of caring for other people, and holding relationships with them.⁸⁰ Nel Noddings followed by placing care for people known to us at the centre of a feminine morality.⁸¹ And although Gilligan did use examples of women in legal practice,⁸² Carrie Menkel-Meadow brought a feminist ethics of care into scholarship on the legal profession in 1985.⁸³ Whether care is characteristically a woman's mode of moral thinking is a contested point, and need not detain us here.⁸⁴ Gilligan herself thought that care should have a role in the moral understanding of every mature person,⁸⁵ and Stephen Ellmann applied this suggestion to the moral judgments and reasoning of all lawyers.⁸⁶ Shaffer's ethics of care nevertheless predates Gilligan's work, and has a solid Christian grounding.⁸⁷ He would later nominate the Parable of the Good Samaritan as the source of this ethics.⁸⁸ So, while it is broadly consistent with the feminist school, as a religious ethics

⁷⁹ S Ellmann, 'The Ethic of Care as an Ethic for Lawyers' (1993) 81 *Georgetown Law Journal* 2665, 2677.

⁸⁰ C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982) ('*Different Voice*').

⁸¹ N Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (University of California Press, 1984).

⁸² *Different Voice* (n 80) 98, 169–70.

⁸³ C Menkel-Meadow, 'Portia in a Different Voice: Reflections on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39.

⁸⁴ Equally, it is not necessary to this argument, which *assumes* a legitimacy for the ethic of care, to enter the critical debate between feminist theorists of cultural difference, dominance and anti-essentialism over the origins and implications of the ethic: cf CG Bowman and EM Schneider, 'Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession' (1998) 67 *Fordham Law Review* 249, 251.

⁸⁵ *Different Voice* (n 80) 98.

⁸⁶ Ellmann (n 79) 2666–7.

⁸⁷ *A Christian and a Lawyer* (n 27) 21–33; *Radical Individualism* (n 25) 986–990. Virginia Held argues that to include non-feminist theories of care in the school called 'the ethics of care' 'is to unduly disregard the history of how this ethics has developed': *The Ethics of Care: Personal, Political, and Global* (Oxford University Press, 2006) 22 ('*Ethics of Care*'). She claims: 'no ethic of care that is not feminist is entitled to call itself that': *ibid.*, 66. However, the chronological development of these theories certainly does not justify excluding Shaffer's Christian theory from the school on this ground. For an argument that the ethics of care originated with Aristotle, see Curzer (n 77).

⁸⁸ St Luke 10: 25–37; TL Shaffer and RF Cochrane, *Lawyers, Clients and Moral Responsibility* (West Publishing, 1994) 70–71.

Shaffer's still holds a distinctive position in the ethics of care. The school of care as a whole, however, helps to add shape to the parental qualities that could be expected of good lawyers.

It is characteristic of this school that care is 'the most basic moral value',⁸⁹ and is the object, motive and standard of moral judgment and action. Later, we will see that this probably asks the idea of care to do too much. In the meantime, though, we can note that the basic moral value of care gives rise to two overlapping primary values:⁹⁰ *contextualism* and *relationalism*. Shaffer's response to *The Unwanted Will* demonstrates both. In lawyers' ethics, the demand that moral reasoning attend closely to the particular context in which lawyer and client find themselves is exemplified by the expectation that the lawyer should take an holistic approach to the client and his problem. They are not to be described in mere legal terms, or even just financial terms. The client's whole relational, psychological and reputational context is also to be seen, considered and accounted for in the lawyer's work.⁹¹ Further, in that close consideration of the particularity of the client's context, care theorists prefer to build and maintain relations between lawyer, client and others when approaching the client's work and thinking about ways of solving his problems. If co-operative means are available for dealing with people who are at odds with each other, they should be preferred over litigation.⁹² A feature of the lawyer–client relationship is that the lawyer, if a genuine caregiver, would become so 'engrossed' in the client as to sense the pain (or the pleasure) the client experiences.⁹³ In other words, the lawyer sympathises.⁹⁴ In Noddings' view, which is by no means distinctive to the ethics of care, *feeling* with the other is intrinsic both to the commitments involved in being parental—and to care generally.⁹⁵ She suggests that 'all caring involves engrossment. The engrossment need not be intense nor need it be pervasive in the life of the one-caring, but it must occur.'⁹⁶

An aspect of relationalism in a lawyer's ethics of care is the emphasis placed on participatory approaches to legal tasks.⁹⁷ This is not unique to the ethics of care; Kronman suggests the same in his virtue-based ethics for lawyers. Helped by the client, the lawyer who sympathises, who is engrossed in the client's problem, is also better placed to suggest solutions that deal with the problem in the client's larger relational and psychological context. The legal issues are not segregated, and the client is not dealt with exclusively in legal terms. That is why in *The Unwanted Will*, once Mary's secret is out, Shaffer wants the parental lawyer

⁸⁹ *Ethics of Care* (n 87) 71–72.

⁹⁰ *Ibid*, 19, 119. Christine Parker identifies three features, which I have collapsed into two: 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49, 68–74.

⁹¹ Parker (n 90) 70.

⁹² Menkel-Meadow's scholarship has also been devoted to ADR in legal practice: eg C Menkel-Meadow, 'Introduction: What will we Do when Adjudication Ends? A Brief Intellectual History of ADR' (1997) 44 *UCLA Law Review* 1613; 'Lawyer Negotiations: Theories and Realities—What We Learn From Mediation' (1993) 56 *Modern Law Review* 361; C Menkel-Meadow (ed), *Mediation: Theory, Policy and Practice* (Dartmouth, 2001); *Dispute Processing and Dispute Resolution: Theory, Practice & Policy* (Dartmouth, 2003).

⁹³ Cf Noddings (n 81) 19.

⁹⁴ For Noddings, 'engrossment' involves both emotion and rational objectivity: *ibid*, 33.

⁹⁵ *Ibid*, 44–45.

⁹⁶ *Ibid*, 17.

⁹⁷ Parker (n 90) 70–71.

to remain engaged with the family, and to try keeping it working together to solve John and Mary's disagreement.⁹⁸ The solutions adopted may or may not be of a legal kind, and the adopted solution is preferably one that lawyer and client agree on. Unlike some liberal theories, where the client is given ultimate control,⁹⁹ or moral activist theories, in which the lawyer's moral views must ultimately prevail (even if just by withdrawing representation),¹⁰⁰ the emphasis in the ethics of care on maintaining relationships sees even greater efforts at making a joint decision. Again, Shaffer's preferred response in *The Unwanted Will* is that the lawyer should (contrary to law) forget his competing duties of loyalty to John and Mary, compromise them, and show care by working with both *within* the family. The methods adopted, again, must aim to make viable personal relationships or maintain them.¹⁰¹

D. Tensions in the Ethics of Care

Theories of care adopt different positions on the possibility of any moral partiality to care for some people over others, the significance of the role of care in moral reasoning, and its relationship with other 'values'—especially justice. In the approach adopted in relation to all of these tensions, Shaffer's ethics of care, or at least the parentalism of his response to *The Unwanted Will*, arguably emerges as a theory that can collapse into moral relativism. This claim is developed further below, but at the outset it can be noted that the problems that the lawyer faces in Shaffer's *Unwanted Will* originate with both the clients themselves and the lawyer's lack of care in his work and for his client at the precise time of engagement. The Smiths are keeping secrets from each other, or at least Mary is from John. There might be a deeper dynamic in the family that explains this, but, whether it is understandable or to be lamented, this is the root of the lawyer's problem.¹⁰² Still, any lawyer with general practice experience will know that disagreement over the destination of 'the family property' is the stuff of estate planning, and would, if capable of imagining what can happen when asked to draw mutual wills, be ready for it. Teresa Collett's solution, for a lawyer who takes care in his work, is more conventional than Shaffer's. She would have the husband and wife agree explicitly in the retainer to the lawyer sharing with both any individual confidences received from one or the other.¹⁰³ However, in *The Unwanted Will* the lawyer, when he is first retained, shows no care for Mary. She is given no opportunity to provide instructions. He has seen her husband alone—maybe as *paterfamilias*, maybe not—but certainly as the family spokesman. The lawyer has drawn mutual wills, and even had one executed, on the assumption that there

⁹⁸ *Radical Individualism* (n 25) 974.

⁹⁹ Eg M Freedman, 'Personal Responsibility in a Professional System' (1978) 27 *Catholic University Law Review* 191, 197.

¹⁰⁰ Eg D Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) 173–4.

¹⁰¹ *Radical Individualism* (n 25) 982.

¹⁰² Collett (n 51) 743.

¹⁰³ *Ibid*, 686, 696–7. This will protect the lawyer. However, this kind of retainer can simply reinforce the dominant spouse's power. Knowing that her confidences will be shared, Mary might not be as willing to tell the lawyer how she wants the property distributed.

is mutual agreement about the distribution of the estate in this family when there is not. It is spouses keeping secrets from each other that is the root problem, but the lawyer seriously complicates the difficulties by having a will executed before he has made any effort to imagine that Mary might have different feelings about the distribution of the estate. His failure to care for Mary itself amounts to a failure of professional competence.¹⁰⁴ These difficulties also illuminate tensions between different theories of care.

1. Partiality

'Can we care for all? How many (our client, the other client, the other lawyer, the entire system) can we be responsible for at any one time?'¹⁰⁵ Menkel-Meadow's early *crie-de-coueur* contextualises a question, answered differently by care theorists. Should the caring lawyer prefer the client over others?¹⁰⁶ Gilligan assumed that the caregiver had to care for all: 'Care ... becomes universal in its condemnation of exploitation and hurt.'¹⁰⁷ This idea which, oddly, is expressed like a Kantian principle, led to a serious debate about maternal qualities as a model for care. For example, it was argued that practices of maternal care should shape and incorporate our conceptions of justice, and therefore should extend to all children.¹⁰⁸ Ellmann, though, doubted that this paid enough attention to the caregiver's specific context, and that, even if an obligation of universal care were accepted, it simply could not be that each person had to care for all *equally*.¹⁰⁹ This latter approach reflects the idea of 'circles and chains', with the nature and intensity of care adjusting as we move from our most intimate relationships (including parent and child), to those for whom we have personal regard, to strangers.¹¹⁰

Statements suggestive of equal universal care might just reflect an early point in the development of an ethics of care when theorists expressed their aspirations, rather than a seriously considered moral position. The Aristotelian accounts certainly reinforce that, in its nature, sympathy is not capable of being universalised.¹¹¹ The caregiver's engrossment in the other's situation, even if it is not intense or pervasive, is an emotional and imaginative exercise that, for anyone, will be physically and psychologically limited to a relatively small circle. These limitations, inherent in our humanity, must have moral significance. Few would question that a child has a claim on her parents' sympathy that no other has, or even that it is *immoral* to withhold care from one's child in order to look after others. This was precisely

¹⁰⁴ After all, incompetence—or negligence—is measured by a failure to maintain a standard of *care*.

¹⁰⁵ Menkel-Meadow (n 83) 63.

¹⁰⁶ See *Ethics of Care* (n 87) 95–97.

¹⁰⁷ *Different Voice* (n 80) 74.

¹⁰⁸ S Ruddick, 'Maternal Thinking' in Trebilcot (n 25) 213, 226; cf J Resnick, 'On the Bias: Feminist Reconsiderations of the Aspirations for our Judges' (1988) 61 *Southern California Law Review* 1877, 1917.

¹⁰⁹ Ellmann (n 79) 2680–1.

¹¹⁰ Noddings (n 81) 46–48. There is a similar idea in Aristotle: Aristotle, *Nicomachean Ethics* in J Barnes (ed), *The Complete Works of Aristotle* (Princeton University Press, 1984) 1833 (1159b35–1160a2), 1836 (1162a31–33), 1841 (1165a16–18), 1848 (1169a18–34) ('*Nicomachean Ethics*').

¹¹¹ Curzer (n 77) 227.

the moral failure of Mrs Jellyby in Dickens' *Bleak House*. Her philanthropic concern for the people of Borrioboolah-Gha may well have properly justified the view that she was 'a lady of very remarkable strength of character',¹¹² had it not been expressed *by* neglecting her children's emotional and physical needs.¹¹³ It is, of course, barely conceivable that we could have equal parent-like commitments to our children, acquaintances and strangers. The child's physical, psychological and emotional development needs close, sustained and persistent attention over time. Mostly, we can rightly expect partiality for the child.¹¹⁴

Similarly, the lawyer as caregiver can also be expected to prefer the client, and the client's concerns, over others. Ellmann believes that, as a moral question for lawyers, care can be partial because the lawyer assumes special responsibilities to the client that are not promised to others.¹¹⁵ While telescoping care to others, like 'the other client', might be possible, the risk is that this kind of sympathy is again shown *by* neglecting the lawyer's own client. Take 'Hilary', for instance, the lawyer in Gilligan's *In a Different Voice*. Hilary wondered whether, in order to show care for her client's opponent in the course of a trial, she should help the other side by disclosing a document that the opponent's lawyer had overlooked. Ultimately, Hilary complied with (we will assume) her *legal* duties as an advocate and withheld the document, but as a result she saw herself as a *moral* failure. Gilligan justifies Hilary's decision within an ethics of care on the ground that Hilary needed to care for herself—presumably by avoiding discipline or the client's claim for breach of duty.¹¹⁶ However, we do not know what Hilary's client would have thought about releasing the document, and we can wonder whether Hilary would be genuinely feeling with her client if the outcome of her caring motive is to have two lawyers working for the opponent, and none for the client.

The Unwanted Will raises a parallel problem of trading a particular expression of care for one client for harm to another. In one way, Shaffer ducks out of the problem by defining the family as the client, but this only shifts the problem into the family itself. The lawyer who continues to act for the Smiths to help them solve the disagreement has, in doing so, disclosed Mary's secret to John. The duties to John are therefore satisfied, but potentially—again—*by* harming Mary and the broader family. Few in this position would know what harm they could cause.¹¹⁷ At best, the Smiths might argue over dinner. But it could also trigger violence or divorce. In its peculiar way, although it is consciously severing the relationship between lawyer and client, the legal directive to withdraw could well be the more caring response—if only because, when it is inevitable that someone will be hurt, it might cause the least harm.

¹¹² C Dickens, *Bleak House* (Random House, 1991) 34.

¹¹³ Esther (an exemplar of Victorian care) says, 'It *must* be very good of Mrs Jellyby to take such pains about a scheme for the benefit of Natives—and yet—Peepy and the housekeeping!': *ibid.*, 42. See JH Miller, "'Bleak House" and the Moral Life' in AE Dyson (ed), *Dickens: Bleak House—A Case Book* (Macmillan, 1969) 157, 174.

¹¹⁴ V Held, *Rights and Goods: Justifying Social Action* (Free Press, 1984) 31 ('*Rights and Goods*').

¹¹⁵ However, consistently with Ellmann's singular focus on care as a supreme value, these responsibilities themselves must be compatible with care: Ellmann (n 79) 2681–2.

¹¹⁶ *Different Voice* (n 80) 135–6, 165.

¹¹⁷ Collett (n 51) 714–15. To use another of Shaffer's favourite authors, Iris Murdoch. In *The Sea, The Sea* (Vintage, 1999) Charles Arrowby's well-meaning, but destructive and ultimately cruel, attempt to extract Mary Fitch from her marriage is a salutary warning to outsiders not to assume that they know more about a marriage than the spouses themselves do.

2. Detachment and Justice

In general, care theorists doubt that any stance of mental or emotional distance from another could be morally worthy, as it cannot be reconciled with the relationalism that is intrinsic to care. A person's indifference to another is a moral failure. Gilligan herself claimed that 'detachment is *the* moral problem'.¹¹⁸ Here, the implications for lawyers' ethics are profound, as detachment is considered an essential trait of justice and, in Gilligan's thinking, justice of a legal kind: 'the ability to judge dispassionately, to weigh evidence in an even-handed manner, balancing the claims of others and self'.¹¹⁹

This raises the struggle within the school of care to find a credible relation between considerations of care and notions of justice. The question is whether justice can be regarded as conceptually distinct from care and, if it is, how much weight it is then given in moral reasoning. There are care ethicists who see that 'the ethics of justice' brings ideas of equality, rights and general fairness of treatment, and a consistent application of these ideas—which the particularistic approach of the ethics of care cannot bring.¹²⁰ Gilligan herself bifurcated care and justice and thought they could not be held together. She subordinated justice to considerations of care.¹²¹ In contrast, the more recent tendency is to define justice in terms of care.¹²² For example, Virginia Held once went so far as to delineate areas—such as law—where considerations of justice must have priority. But now, while still making this claim, she wants justice defined within the parameters of care as 'the most basic moral value'.¹²³

E. The Risk of Relativism

Despite these tensions, all versions of the ethics of care elevate a single value—care—which absorbs the objects, motives and standards of moral reasoning. Nevertheless, the particular theories of care that strongly emphasise the distinctiveness of context for moral reasoning, and that subordinate justice (or other values or virtues) to considerations of care, are more likely to see moral judgments structured in accordance with the agent's perception of what will promote care. The relationalism of an ethics of care certainly brings a suspicion of individualism, and a corresponding emphasis on the web of relations in which people are found.¹²⁴ Together, a focus on achieving caring relations or caring effects, the consciousness of the moral agent as a relational person, and the importance of dialogue with others about

¹¹⁸ C Gilligan, 'Moral Orientation and Moral Development' in EF Kittay and DT Meters (eds), *Women and Moral Theory* (Rowman & Littlefield, 1987) 31 ('Moral Orientation'). See also Ellmann (n 79) 2668, 2676.

¹¹⁹ *Moral Orientation* (n 118) 30–31.

¹²⁰ *Ethics of Care* (n 87); S Ruddick, 'Injustice in Families: Assault and Domination' in V Held (ed), *Justice and Care: Essential Readings in Feminist Ethics* (Westview Press, 1995) 203, 208–10.

¹²¹ *Different Voice* (n 80) 62–63, 99–100, 173–4; *Moral Orientation* (n 118) 10, 26, 30–32. See L Kohlberg, C Levine and A Hewer, *Moral Stages: A Current Formulation and a Response to Critics* (Karger, 1983) 21–22.

¹²² D Bubeck, *Care, Gender and Justice* (Clarendon Press, 1995) 206. Michael Slote takes the same approach to justice, although he begins with care as *the* supreme virtue and claims his theory of care as one of virtue: M Slote, *Morals from Motives* (Oxford University Press, 2001) 122–36.

¹²³ *Ethics of Care* (n 87) 71–72; cf *Rights and Goods* (n 114) 34–35, 36.

¹²⁴ *Ethics of Care* (n 87) 13–14, 46–48.

moral decisions, will inevitably shape what action is taken, or what decision is made. It is nevertheless inescapable that the judgment made is ultimately the caregiver's and, in many theories of care, made principally by reference to one consideration only—care. Shaffer's response to *The Unwanted Will* especially reflects this close-to-linear approach to moral reasoning in overlooking, say, considerations of justice expressed through moral commitments to the law. This brings us to some unresolved contradictions in Shaffer's account of the parental in legal practice, stemming again from his claim to rely on the work of MacIntyre and Hauerwas. Equally, the resolution of these tensions also suggests how a more adequate account of the parental (and of sympathy and of care) might be found in lawyers' ethics.

1. *The Collapse into Situation Ethics*

While some care theorists see the weakness of understanding care as 'a series of unrelated actions',¹²⁵ others who make care the supreme value, and deny the importance of developing regular moral practices, risk a collapse into a form of situation ethics. Especially as it crystallised in Joseph Fletcher's moral theology,¹²⁶ situation ethics allows the individual to deal with every decision with the inherited moral resources of her social tradition but, depending on the situation, 'to compromise them or set them aside *in the situation* if [*agapē*] love seems better served by doing so'.¹²⁷ It adapts the consequentialist reasoning of utilitarianism to individual ethics, and turns the agent's decision-making into an agapeic (or 'loving') calculus in which she 'follows a moral law or violates it according to love's need'.¹²⁸ The aim is not the good (as in virtue ethics) or the right (as in deontological ethics), but a fitting answer to the question in the situation.¹²⁹

Fletcher's situation ethics is explicitly relativist. He held to *agapē* love as the absolute object of ethical calculation, but relativised it by arguing that the individual should separately assess each situation for the agapeic response. 'The shift to relativism carries contemporary Christians away from code ethics, away from stern ironbound do's and don'ts, away from prescribed conduct and legalistic morality'.¹³⁰ Little imagination is needed to appreciate that, recast for lawyers, situation ethics will clash with the basic institution of the lawyer's craft—the law—and the lawyer's professional code.

In many respects, situation ethics and an ethics of care have parallel structures. At times, they even amount to the same thing. Like situation ethics,¹³¹ an ethics of care is more a moral method than a theory of morals. Further, theories like Shaffer's are remarkable in

¹²⁵ V Held, 'The Ethics of Care' in D Copp (ed), *The Oxford Handbook of Ethical Theory* (Oxford University Press, 2005) 537, 545; *Ethics of Care* (n 87) 42.

¹²⁶ J Fletcher, *Situation Ethics: The New Morality* (Westminster John Knox Press, 1966).

¹²⁷ *Ibid.*, 26.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, 27–28.

¹³⁰ *Ibid.*, 45.

¹³¹ *Ibid.*, 34.

determining the caring effect by a linear calculation to that end. Instead of an agapeic calculus, the caregiver is effectively understood as undertaking a caring calculus. Indeed, it is arguable that the difference lies only in that, according to Hauerwas's critique, instead of *care*, situation ethics suggests '(1) that *love* is the single norm that determines the right-making characteristics of moral action and judgment; and (2) that *love* is both a general attitude and criteria of actions that is sufficient as a guide for our actual moral behavior'.¹³² In some theories of care, traits of character, or principles and rules, which stand independently of the caregiver's assessment of the best response are, if significant at all, subordinate to the caring motive or effect. As all depends on context, a decision made in one setting is an inconclusive guide for the caring response in a similar situation. This is evidently a radical,¹³³ but not a singular, theory of care.¹³⁴ Significantly, the ethics of care that grounds Shaffer's parentalism expressly draws on Fletcher's situationalism.¹³⁵ Indeed, the lawyer in *The Unwanted Will* turns from being a lawyer for a client into 'a lawyer for the situation'.¹³⁶

For lawyers, other theorists have been prepared to temper the ethics of care with principles. The lawyer can show partiality for the client over others and, depending on the client, give more care to some clients than others. The lawyer, like Gilligan's 'Hilary', can care for herself. She can decide whether to represent a client by considering the client's caring, or uncaring, qualities and the way that they might affect the legal tasks in hand.¹³⁷ As in Shaffer's approach to *The Unwanted Will*, the commitment within an ethics of care to maintaining relationships means that there is a distinct reluctance to discontinue acting for a person, even if the law were to require that.¹³⁸ However, even with these broad patterns, there is a high probability that different lawyers will respond to the one situation in completely different ways. My objection is not that these theories of care direct no one right answer.¹³⁹ Many moral theories do not aspire to that kind of precision while still recognising that objective moral judgments can be made. Instead, it is that, circling around only one subjectively-assessed 'most basic moral value', the choices that are available and that can be justified by the theory are almost unbounded. So, as long as each lawyer approaches the task

¹³² *Vision and Virtue* (n 77) 111 (emphasis added).

¹³³ For this assessment of Shaffer's theory (including the invisibility of role discussed below), see M Weisberg, 'Integrating Personal and Professional Lives: An Essay on Thomas Shaffer's *On Being a Christian and a Lawyer*' (1983) 9 *Queen's Law Journal* 367, 368, 371–6.

¹³⁴ In particular, Noddings' approach has surprisingly similar structures to Fletcher's. For her relativism, see Noddings (n 81) 5, 47, 53, 55, 56.

¹³⁵ *Radical Individualism* (n 25) 980–1. Shaffer wrote that character was 'the unspoken claim' of *Situation Ethics; Gentleman* (n 38) 4. This is unlikely. Shaffer does not mention Fletcher's explicit relativism. Nor does he address its incompatibility with MacIntyre's conception of virtue or mention Hauerwas's attack on *Situation Ethics*: cf *Radical Individualism* (n 25) 980n71, 981n74. Noddings, recognising rules as 'economies of a sort', aims to be even less guided by Fletcher's 'illuminative maxims' than Fletcher is: Noddings (n 81) 46–47.

¹³⁶ *Radical Individualism* (n 25) 982.

¹³⁷ Ellmann (n 79) 2682, 2685; NL Cooney, 'Lawyer, Heal Thyself: Bringing Rational Expectations to the Law Firm Environment' (2001) 22 *Whittier Law Review* 967, 975–6.

¹³⁸ Ellmann (n 79) 2713.

¹³⁹ Cf *ibid*, 2717–20; see Curzer (n 77) 224.

by using the caring method, any action or inaction is morally justified. The dangers of that in practice are all too predictable.¹⁴⁰ Again, drawing on Hauerwas, we can see that our appeal to care instead of what is good or right suggests that the ‘best thing to do is to live with a kind of fundamental openness to others’. A sense of kindness to other people is put at the centre of moral thinking. And therefore care, like *agapē* love in situation ethics, ‘becomes a justification for our own arbitrary likes and desires’.¹⁴¹

2. *The Lawyer’s Role*

A second, and related, incompatibility with the MacIntyre-Hauerwas school is Shaffer’s disregard for the moral importance of the lawyer’s role as a lawyer.¹⁴² This is arguably difficult to reconcile with Shaffer’s emphasis on context for decision-making (as a lawyer’s retainer to do legal work must also be part of that context) and his appeal to other, biblically-defined roles as useful metaphors for lawyers’ ethics. Shaffer’s longstanding suspicion of the ethics of the lawyer’s role seems to be a reaction against the more extreme classical liberal claims that the lawyer *qua* lawyer has no moral responsibility for the outcomes of her work if it is done legally. Accordingly, in these extreme liberal approaches it is not possible to make moral judgments about the lawyer’s work.¹⁴³

The opposite positions held by Shaffer and the liberals on the significance of the lawyer’s role should both be avoided. Moral significance can (*contra* Shaffer) be given to the lawyer’s role as lawyer, while still allowing (*contra* the liberals) that trusts and commitments that otherwise arise simply because the lawyer is a rational and feeling person can be relevant for the moral judgments we make about the lawyer—even judgments made about what the lawyer does in legal practice. In her earlier work, Held argued for a more moderate approach (than Shaffer’s or the liberal’s) by which professional roles could be seen as ‘segments of moral concern’.¹⁴⁴ The role carries conditions that are absent outside it, and so different moral implications follow for those in the role.¹⁴⁵ It is not entirely clear whether Held was arguing for the moral world of the professional to differ in some way from general moral positions, or just to be a subset of them. The idea of segmentation, nevertheless, still has some resonance with the view of the Visitors of Gray’s Inn that a strong distinction should be made between professional and personal lives, and the Australian High Court’s assumption in *A Solicitor* that good qualities manifest in parenting had no relation to the practice of law.

¹⁴⁰ See Ellmann’s list of possible responses to the Lake Pleasant Bodies case that are (as he argues) all possibly caring, but mutually inconsistent. His preferred response is unlawful: Ellmann (n 79) 2715–19.

¹⁴¹ *Vision and Virtue* (n 77) 124.

¹⁴² See also *A Christian and a Lawyer* (n 27) 3–12, 21; *Faith and the Professions* (n 32) 93–99.

¹⁴³ Cf ML Schwartz, ‘The Professionalism and the Accountability of Lawyers’ (1978) 66 *California Law Review* 669, 673.

¹⁴⁴ *Rights and Goods* (n 114) 21.

¹⁴⁵ *Ibid.*, 29–31.

An even better approach, which still allows us to make contextualised judgments about the role of the lawyer as lawyer, is to accept that a role does not represent just a segment of the community's moral tradition. Rather, a role accentuates the significance of some qualities of that moral tradition over others. In MacIntyre's thought, there is one conception of the good life and one coherent scheme of the virtues, but, because the way we live differs from role to role, the expression of the good life will differ in our separate roles and social identities. These roles and identities include our relations as parents or children, our citizenship of this country or that, and our professions and occupations. The individual's role gives him his 'own moral particularity', and that includes the expectations and obligations that attach to it. However, these are not unrelated to the moral life that is expected distinctively of that role or social identity: 'what is good for me has to be the good for one who inhabits these roles'.¹⁴⁶ In fact, a man or woman of character is marked by the fusion of role and personality.¹⁴⁷ Since roles are important ways by which the moral life is embodied, the adequacy of the moral life in a given social role is also significant for judging the success or failure of a moral tradition.¹⁴⁸

The particular duties, responsibilities and obligations assumed in the lawyer's 'oath of office',¹⁴⁹ as the Court of Appeal put it in *A Solicitor*, therefore contextualise the expression of the good in legal practice.¹⁵⁰ But it would be rash to exclude the possible relevance of any general moral qualities from the lawyer's role—the Australian High Court's mistake in the appeal—because, like any other social institution, the patterns of behaviour that we might expect for a given role may shift without any loss of the role's distinctive identity. And if they do, so too will the moral qualities required in the role.

Borrowing from Fried, a possible way to describe the distinctive expressions of general moral qualities emerging in the lawyer's role is that the lawyer's parentalism in relation to the client is *in regard to the law*.¹⁵¹ The client has engaged the lawyer as a legal adviser and representative, and this function, together with the professional code, will refract the lawyer's particular moral commitments in particular ways. Indeed, if they are typical clients, having engaged an attorney to draw wills, the Smiths could well feel that they have been sold short

¹⁴⁶ *After Virtue* (n 30) 148, 220. See also A MacIntyre, *Dependent Rational Animals* (Open Court, 1999) 116–18 ('*Dependent Rational Animals*'); Curzer (n 77) 223.

¹⁴⁷ *After Virtue* (n 30) 29.

¹⁴⁸ *Three Rival Versions* (n 40) 80.

¹⁴⁹ *A Solicitor I* [2002] NSWCA 62, [118].

¹⁵⁰ The common use of the tag 'my station and its duties' or—as MacIntyre would have it—'my station and its virtues' in accounts of role morals is therefore entirely fitting, as its descent can be traced from the Anglican Catechism, where 'mine own living' and its special 'duty in that state of life' are positioned alongside role-neutral commitments like loving one's neighbour, obedience to church and state, temperance, sobriety and chastity. See A MacIntyre, 'My Station and Its Virtues' (1994) 19 *Journal of Philosophical Research* 1, 3. For the use of 'my station and its duties' in lawyers' and business ethics, see D Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) 106n; NE Bowie and RF Duska, *Business Ethics* (Prentice Hall, 2nd edn 1990) 1–16. For the descent of the phrase, see FH Bradley, *Ethical Studies* (Liberal Arts Press, 1951) 176–7; and *Book of Common Prayer* (Cambridge University Press, 2005) 354.

¹⁵¹ Cf C Fried, 'The Lawyer as Friend: The Moral Foundation of the Lawyer-Client Relation' (1976) 85 *Yale Law Journal* 1060, 1071.

when learning that he prefers to be a family therapist. As CS Lewis observed in his natural law essay *The Abolition of Man*: ‘A man might be annoyed if his son returned from the dentist with his teeth untouched and his head crammed with the dentist’s *obiter dicta* on bimetallicism or the Baconian theory.’¹⁵² Accepting that the lawyer’s role is in regard to the law does not mean that he should be more reluctant to take an holistic approach to the client and her problem. However, the lawyer who is drawn to Shaffer’s biblically-defined roles of intermediary,¹⁵³ minister,¹⁵⁴ and parent for the family, without recognising that these are limited by a professional responsibility to work for the client in regard to the law, may find that he has stepped outside the boundaries of the relationship that the client wanted.¹⁵⁵ In *The Unwanted Will*, this happens in two ways. First, the lawyer who refuses to withdraw must break a duty; probably the confidence owed to Mary. This can also be interpreted as the lawyer trying to assume even greater power in his relationship with the Smiths. Once the dilemma of Mary’s unwillingness to deal with the property on John’s terms arises, the lawyer knows things about John and Mary that even they do not know about each other. To act unilaterally by breaking the confidence, then, is to make even further use of that knowledge in a sensitive area of spousal relations. The lawyer has levered his way into a family counselling role, and one that the Smiths may be uncomfortable with.¹⁵⁶ This is not being parental. It is paternalistic, as commonly understood. And the assumption that, despite his conflicting duties or having failed a client, the lawyer will still be wanted, could itself be a delusion encouraged by conceit and professional power. It also denies the importance of reciprocation in the relationships that are so important in the ethics of care. Shaffer is rightly at pains to avoid using the language of equality in his accounts of lawyer-client relationships.¹⁵⁷ But what is overlooked is that the obligation to withdraw is meant to shield the client from the stronger position of the lawyer in the relationship.¹⁵⁸

Secondly, the lawyer may have a knack for family counselling. But it is more likely that he does not. He is only in this new role because of the power that his initial retention as lawyer for the Smiths gave him, and the mistakes he made there. Neither offers the likelihood that the Smiths would be open to trust him. For at least one of them—Mary—he did not offer the partiality that his role as a lawyer demanded.¹⁵⁹ Collett has again noted that, when cases like *The Unwanted Will* arise, breach of the duties implicated in this situation will

¹⁵² CS Lewis, *The Abolition of Man* (William Collins & Sons, 1978) 13.

¹⁵³ *Radical Individualism* (n 25) 972.

¹⁵⁴ *A Christian and a Lawyer* (n 27) 71.

¹⁵⁵ Cf *Rights and Goods* (n 114) 22.

¹⁵⁶ As Collett noted, ‘the attorney seems to be exercising greater power in the relationship than a lawyer’s role supports’: Collett (n 51) 740.

¹⁵⁷ M Failing, ‘Is Tom Shaffer a Covenantal Lawyer?’ (2002) 77 *Notre Dame Law Review* 705, 743.

¹⁵⁸ Indeed, Shaffer’s assumption that the lawyer is wanted by the clients could be an example of Marie Failing’s contention that adherents of the school of care can fail to respond to others’ real needs ‘by a self-deceptive dance about who really needs them and how much’: *ibid*, 745.

¹⁵⁹ For MacIntyre on the connection between being a trustworthy individual and the keeping of confidences, see *Dependent Rational Animals* (n 146) 111–12.

undermine any sense of genuine trust in the lawyer.¹⁶⁰ While dint of circumstance might mean that the Smiths cannot refuse the lawyer's help, a grudging reliance does not amount to trust. And of course, the exercise of moral trusts is among important qualities of the parental. '[W]e can earn that trust only by adequately protecting both parties.'¹⁶¹

In some ethics of care proposed for lawyers, the lawyer's station and its virtues are too casually dismissed as impediments to giving expression to the lawyer's caring motives in the situation. No doubt the threat of discipline bears more heavily on practitioners than on scholars of care,¹⁶² but some theorists too readily conclude that the caring thing to do involves a breach of professional conduct rules.¹⁶³ This is naturally easier if care is the 'most basic moral value'; more important than a conception of justice and grounded in a psychology that suppresses any opportunity for detachment. At times, certainly, a lawyer might deliberately have to engage in professional disobedience. Extreme circumstances may well demand this.¹⁶⁴ However, it is debatable whether a case like *The Unwanted Will* warrants it, especially since it is the lawyer's own mistake that has put him in a position of conflicting duties.¹⁶⁵ The legal gravity of this position is not accounted for in making a moral judgment of the lawyer's actions.

3. Towards Character

There could be any number of reasons why, despite his evident regard for MacIntyre's and Hauerwas's virtue ethics, Shaffer adopts Fletcher's relativism and disregards the moral significance of role. For one, Shaffer does not like to be classified and is openly syncretic in his ethical method.¹⁶⁶ For another, it may be that Shaffer over-read the significance of context in MacIntyre's account of tradition, practices and the virtues, incorrectly assuming that contextualism in ethics means situationalism.¹⁶⁷ Further, the later Shaffer may have simply drifted from his earlier endorsement of philosophies of virtue, even if that was to drift back to a moral theology more typical of the 1960s—Fletcher's *Situation Ethics* and Bishop Robinson's *Honest to God*.¹⁶⁸ Finally, the place of justice—especially legal justice—in Shaffer's scheme of a lawyer's moral commitments gives an additional reason for the relativism that emerges in his theory. Justice to Shaffer is not only subordinate to considerations of care. It is itself situational. He gives equal validity to a range of potentially 'just' but contradictory

¹⁶⁰ Collett (n 51) 762.

¹⁶¹ *Ibid.*

¹⁶² As in the example of Gilligan's lawyer, Hilary: see text at n 116.

¹⁶³ See the suggestion in *Different Voice* (n 80) 135–6; Menkel-Meadow (n 83) 52–54; Ellmann (n 79) 2715–19.

¹⁶⁴ See Shaffer's example of US Immigration forms that were designed to expose applicants for residence to deportation, no matter how they were completed: *Signing Up* (n 32) 911–13.

¹⁶⁵ This situation could get worse. If the duties are conflicting, the retainer is frustrated. Any attempt to charge fees for work done can be a disciplinary matter: *Legal Services Commissioner v Baker* [2006] QCA 145, [28]–[30].

¹⁶⁶ See Failinger (n 157) 709.

¹⁶⁷ Eg see *Radical Individualism* (n 25) 980n; cf Curzer (n 77) 224.

¹⁶⁸ JAT Robinson, *Honest to God* (SCM Press, 1963) 116–19.

outcomes.¹⁶⁹ And, at times, Shaffer's understanding of biblical justice rests on the most comprehensively pessimistic view of the role of law that is found in the Christian New Testament: the Beast of Revelation 13.¹⁷⁰ It is therefore little wonder that, even for the purposes of a lawyer's moral reasoning, Shaffer does not invest either law or the lawyer's code with any particular moral strength.¹⁷¹

This criticism does not discount the important contribution that Shaffer has made to lawyers' ethics: identifying the parental commitments that a lawyer should have; pioneering the importance of care in a lawyer's moral reasoning (even before feminist theorists did); and courageously and unapologetically presenting a Christian ethics for the professional life. These must be stressed. The qualification I make is that the situationalism of his account of the parental, and of his theory of care, are insufficient as moral ground for the ethics of lawyers. To adopt Hauerwas's critique, in this ethics of care moral judgments are taken as discrete and individual responses. It requires only isolated acts of care, which have no necessary relation to earlier or later acts of caring for others. Accordingly, it either denies, or at best underrates, the significance of *continuity* in the moral life of the man or woman. In fact, this means that it even underrates the possibility of a moral *life*.

This view—that an ethics of care can be too riddled with discontinuities—has certainly been challenged by others. For instance, Noddings, who aspires to a relativism with fewer moorings than even Joseph Fletcher's,¹⁷² poses a rhetorical question:¹⁷³

Is the one-caring, then, a capricious and unprincipled character who is swayed this way and that by intensity, proximity, and the conditions of the moment? As our picture unfolds more completely, we shall see that moral life based on caring is coherent, although it may defy description in terms of systematic consistency.

The claim is therefore that moral coherence lies in a consistent caring motive, and can be unrelated to observable behaviour. It is the same as saying: 'Although no one else can see anything consistent in my behaviour, my life is a moral one as long as I think that what I do has caring effects.'

This is unconvincing. Noddings is right in claiming that her position is 'enormously tricky',¹⁷⁴ but I suggest that its consistency lies only in its thoroughgoing relativism. Here, only a person's thoughts have moral significance. Whether we describe it as 'motive', 'intent', 'sincerity' or 'inwardness', the interior life is undoubtedly a critical object of moral evaluation.

¹⁶⁹ Eg *Signing Up* (n 32) 908, 916. Paralleling his approach to ethics, Shaffer's ideas of biblical justice are themselves a pastiche of different ideas, including Anabaptist anarchy and Marxist liberation theology: *Subversion* (n 32) 1091, 1095, 1098.

¹⁷⁰ *Signing Up* (n 32) 904; *Subversion* (n 32) 1089, 1093, 1097.

¹⁷¹ A Christian ethics of legal practice in western countries need not be so gloomy. It can be more nuanced in recognising how, within a legal system, law can teeter between being 'the minister of God ... for good' (Romans 13:4) and the evil agent of Revelation 13—an exceptional condition.

¹⁷² Noddings (n 81) 46–47.

¹⁷³ *Ibid.*, 56.

¹⁷⁴ *Ibid.*

But without reference to the outer world of actions, it rests on a partial and unreal assumption of what it is to be human.¹⁷⁵ For this reason alone, Shaffer's and Noddings' ethics of care cannot be comprehensive accounts of a moral life. Furthermore, if this ethics defies external observation it is certainly incapable of doing the moral work needed to evaluate lawyers in the outer world of legal practice.

The problem therefore begins to show how a conception of character provides a better way of thinking about ethics, and a more adequate way of thinking about lawyers' ethics. For when we need to consider the very heart of lawyers' ethics—the qualities that a person needs to be a lawyer—a judgment about the present moral orientation of the individual in question has to be made. That is effectively only important as a guide to how that person is likely *to be* in the future. The courts in *A Solicitor* were engaged in this kind of exercise: making an assessment of the present moral orientation of the lawyer in order to decide whether the public can trust him with the practice of law in the future. Still, we can only judge the present moral orientation of the lawyer by his moral history. The past is therefore morally significant as it gives us as good a guide for the future as we have available.¹⁷⁶ Apart from the continuity of the individual's moral practice over time, we can also assume that his moral orientation evidenced in one social setting can be a guide to his moral orientation in another—the very point that the Australian High Court refused to recognise. This reinforces the assumption made in the very exercise of judging the qualities of the lawyer-to-be in admission proceedings or, once someone has become a lawyer, undertaking discipline. It assumes continuity in the person's moral life over time and across roles and, therefore, a conception of *character*.¹⁷⁷ And it would be unworkable if it were to depend on any kind of situation ethics, including an ethics of care as Shaffer or Noddings has presented it.

III. A PARENTAL CHARACTER

A. Locating Care and Sympathy in the Virtues

The central, and perhaps defining, quality of the affective commitments implied in the parental metaphor for lawyers' ethics is sympathy, although it does not exhaust the scope of the parental. Undoubtedly, the ethics of care has improved our understanding of the importance of sympathy for moral reasoning, but a conception of character suggests that it must be located within an account of the virtues that can do moral work for lawyers. However, the affective commitments that Anderson saw in the parental have been positioned in different ways in these virtue-based theories. In the first place are theories that care is itself a virtue. These include the idea that care is *the* basic virtue to which all others must

¹⁷⁵ Williams (n 31) 241, 263, 264.

¹⁷⁶ S Hauerwas, *Character and the Christian Life: A Study in Theological Ethics* (University of Notre Dame Press, 1975) 215.

¹⁷⁷ *After Virtue* (n 30) 29.

answer.¹⁷⁸ Extravagant suggestions have therefore been made that the ethics of care and the ethics of virtue may eventually integrate.¹⁷⁹ Gilligan has even been classified as a virtue ethicist.¹⁸⁰ However, it seems that this would only be possible if one school or the other were to abandon distinctive features of its position. Specifically, the schools will remain distinctive while an ethics of care makes care the ‘most basic moral value’ that defines the objects, motives and standards of moral reasoning, and while the primacy of character in virtue ethics gives an overall unity to a *scheme* of virtues—and not just to one. Perhaps a more genuine virtue-based account, then, is that care is one of a number of roughly equal virtues.¹⁸¹ Here, care certainly imports sympathy, within ‘a cluster of emotions, desires and feelings’ that also incorporate love, compassion, empathy, openness, and the desires to help and to be with others.¹⁸²

A second view is that care, and even an ethics of care, can be found inside Aristotle’s virtue of friendship.¹⁸³ As the Aristotelian idea of friendship itself includes parent–child relationships, the moral significance of the parental metaphor would also be elevated in this approach. However, a third and more developed account of the place of care and its affective commitments in the virtues is Kronman’s account of sympathy within the cardinal virtue of *phronēsis*—which we also call prudence, practical wisdom or judgment.

B. Sympathy in Judgment

Never an easy word to render accurately in English, *phronēsis*, according to Aristotle, is the ability to deliberate rightly about what will help live the good life.¹⁸⁴ As deliberation is only needed when things are variable, it demands a developed personal capacity to order goods ‘in a way that does full justice to all of them’.¹⁸⁵ Indeed, in relation to problems like *The Unwanted Will* we might see *phronēsis* in its cardinal role—the prudent lawyer being able to do ‘full justice’ to his craft as an estate planning lawyer and, coupled with that, to considerations of care and justice.

For Kronman, traditional legal practice is peculiarly well situated for encouraging the development of *phronēsis*. It gives the lawyer an unusual opportunity to become a prudent person, and so virtuous.¹⁸⁶ Kronman has no doubt that sympathy is an important structural consideration in the development and exercise of *phronēsis*. In dealing with the choices that the client confronts, ‘it is necessary to put oneself imaginatively in the position of the person

¹⁷⁸ M Slote, ‘The Justice of Caring’ in EF Paul, F Miller and J Paul (eds), *Virtue and Vice* (Cambridge University Press, 1998) 173.

¹⁷⁹ D Statman, *Virtue Ethics* (Edinburgh University Press, 1997) 17.

¹⁸⁰ O’Neill, ‘Duties and Virtues’ in A Phillips Griffiths (ed), *Ethics* (Cambridge University Press, 1993) 107, 109.

¹⁸¹ R Halwani, *Virtuous Liaisons: Care, Love, Sex, and Virtue Ethics* (Open Court, 2003).

¹⁸² *Ibid.*, 65.

¹⁸³ Curzer (n 77) 222, 239.

¹⁸⁴ *Nicomachean Ethics* (n 110) 1800 (1140a25–31).

¹⁸⁵ M Pakaluk, *Aristotle’s Nicomachean Ethics* (Cambridge University Press, 2005) 215.

¹⁸⁶ A Kronman, ‘Living in the Law’ (1987) 54 *University of Chicago Law Review* 835, 848 (‘Living’).

who has chosen and make an effort to comprehend his or her experience from an internal point of view.¹⁸⁷ To make sense of the other's experience, 'one must mimic in imagination the evaluative outlook of the person whose choice one is attempting to understand'.¹⁸⁸ And 'this mimicking demands, first, a certain measure of sympathy or compassion, in the literal sense of "feeling with"'.¹⁸⁹ The lawyer therefore goes well beyond mere observation of the problem, or empathy with the client. This is but a 'first step'. The power and value of the choice that the other confronts must be experienced, although this does not require endorsement or acceptance of the good of the client's choice. 'It is possible to entertain a point of view without making it one's own.'¹⁹⁰ Kronman's extended consideration of the importance of the lawyer's emotive affinity with the client's perspective and concerns¹⁹¹ is difficult to reconcile with critical presentations that his ideas privilege 'the mind and character of elite white, male, large-firm private lawyers'.¹⁹² Other criticisms that Kronman's approach to prudence understates the importance of relationalism are also unfounded.¹⁹³ To the contrary, strong relations with the client and participatory approaches to decision-making are important for the exercise of *phronēsis*. Kronman suggests that it will often be difficult to feel with others, especially when, as is common in legal practice, goods that pull the client one way run strongly against those that the lawyer personally desires. He has no immediate answer to this,¹⁹⁴ but the closer engagement of the client in the lawyer's decision-making, the mutual exchange of information between lawyer and client, and a moral conversation with the client about the goods and values that she wants to pursue will all help to enhance the lawyer's capacity to identify emotionally with the client and her situation.¹⁹⁵ Although it has also been claimed that he gives no place to the client's judgments or ideas of the good,¹⁹⁶ Kronman does strongly recommend deliberating with the client, and discussing what her ends and goals happen to be.¹⁹⁷ True, he discusses this in the context of an impetuous client or one who has ambiguous or conflicting purposes that the lawyer needs to help clarify.¹⁹⁸ But Kronman claims that it is *only* 'cooperative deliberation',¹⁹⁹ or 'joint deliberation', 'for and with their clients', which enables lawyers to deal sympathetically with

¹⁸⁷ *Lost Lawyer* (n 73) 69.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*, 70.

¹⁹⁰ *Ibid.*, 71.

¹⁹¹ *Ibid.*, 70. See also *Practical Wisdom* (n 73) 213–16; *Living* (n 186) 853.

¹⁹² AV Alfieri, 'Legal Education and Practice: Denaturalizing the Lawyer-Statesman' (1995) 93 *Michigan Law Review* 1204, 1230.

¹⁹³ A Gutman, 'Can Virtue be Taught to Lawyers?' (1993) 45 *Stanford Law Review* 1759, 1767–9; DB Wilkins, 'Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics' (1994) 108 *Harvard Law Review* 458, 470–1.

¹⁹⁴ *Lost Lawyer* (n 73) 70.

¹⁹⁵ Gutman (n 193) 1768–9.

¹⁹⁶ *Ibid.*, 1768.

¹⁹⁷ *Lost Lawyer* (n 73) 133.

¹⁹⁸ *Ibid.*, 132–3.

¹⁹⁹ *Ibid.*, 131.

the usual situation where the client's purposes are just vague or doubtful.²⁰⁰ Further, this is important to ensure that the kind of advice given or work done is not just technical or instrumental, but addresses the client's broader concerns and ends.²⁰¹

Where Kronman departs radically from the care theorists is the equal emphasis he gives in the exercise of a lawyer's judgment to *detachment*, an emotional distance from the problem. And it is from this detached perspective, where the lawyer 'holds something in reserve' from the client (and in contentious work the opponent as well), that it is possible 'to survey the alternatives from a vantage point different from any of their own internal points of view'.²⁰² The detached perspective puts a brake on the power of sympathy, which by itself can sweep decision-making along 'by the tide of feeling'.²⁰³ Like care theorists, Kronman recognises that sympathy (with its feeling and partiality) and detachment (with its 'coolness and reserve' and an attempt to see things impartially) push against each other.²⁰⁴ However, where Gilligan could only resolve the bifurcation of the two traits by having care, or sympathy, override detached perspectives, Kronman argues that it is simultaneously holding the two together that makes *phronēsis*. '[I]t is difficult to be sympathetic, and difficult to be detached, but what is most difficult of all is to be both at once'.²⁰⁵ Legal practice nevertheless requires both at once. It is not something that comes naturally, but is developed through education²⁰⁷ and traditional forms of lawyers' work.²⁰⁶ As a consequence the lawyer's role is one that requires *phronēsis* as sympathetic detachment, and assists in its development. In other words, legal practice trains the lawyer in virtue and, in turn, virtue is needed to be a good lawyer.²⁰⁸ Nothing in this need undermine the understanding of care theorists that the caregiver is relational and that moral judgments are contextual. Much suggests that this is actually what virtuous legal practice demands. Kronman's structure of *phronēsis* therefore aims to do 'full justice' to the affective commitments of the parental, as well as to the detached perspectives of legal justice.

3. A Sympathetic Character

It is now evident how far these virtue-based accounts of character are from the Australian High Court's insulated, shallow conception of the morals of the lawyer's role in *A Solicitor*. The trusts and commitments that are seen in the parental are analogous to those aspects of personal character that not only typify legal practice, but that also make it a morally worthy life commitment. It is possible to see the central affective commitment of the parental—

²⁰⁰ *Ibid*, 133–4.

²⁰¹ *Ibid*, 131–3.

²⁰² *Ibid*, 72.

²⁰³ *Ibid*.

²⁰⁴ *Ibid*.

²⁰⁵ *Ibid*.

²⁰⁶ *Ibid*, 75, 113–16.

²⁰⁷ *Ibid*, 128–62.

²⁰⁸ *Ibid*, 132; *Living* (n 186) 862–3.

sympathy—as a trait found in the virtues of care, friendship and *phronēsis*. But precisely where care, sympathy and qualities that are parental fall within a scheme of virtues is secondary. It should be expected that they will all emerge as important or essential traits in a number of different virtues. The important point is that they are qualities found in women and men of character, and that they inform and are informed by other qualities that make up good character.

The focus of moral evaluation in an ethics of virtue therefore becomes the lawyer of character. The significance given to the agent in virtue-based theory does not, however, inevitably lead to a single-minded concern with motives or the interior life.²⁰⁹ Over time, virtues of truth, care, justice and, even, judgment in the individual of character can be observed in the world of performance. In *The Unwanted Will*, this probably leads us to think more seriously about whether the lawyer should continue to act. It can be expected that a lawyer of the best judgment might not have got this far. He is more likely to have sympathised with Mary when first retained, and to have been ready for her possible disagreement with John. Still, even the best lawyers make mistakes, and these can rightly be called ‘out of character’.²¹⁰ This mistake having been made, the lawyer has now become entangled in an intricate web of competing commitments, whether he agrees with the law of conflicting duties or not. His retainer is unlawful. He risks discipline if he charges for the work. At that point, two considerations arise. First, we may ask whether it is still possible to be sympathetic while acting in accordance with the law. It may not be possible, as the disclosure of the conflicting duties themselves may be unlawful if Mary does not want her secret revealed. If this can be overcome, then he can act if his clients give full consent to that. In any case, it is only if they want him that he can hope to maintain a caring relationship that is not self-delusional. Secondly, there is the lawyer’s role. He is only to act parentally in a metaphorical sense, as a parent *in regard to the law*. He is a lawyer instructed to draw wills, and one may ask whether he is equipped to mediate within a family, and whether the Smiths genuinely think he can help.

IV. CONCLUSION

For decades now, Charles Fried’s metaphor of the lawyer as a friend,²¹¹ of which Shaffer has made an influential adaptation, has been a challenging description of the role of the lawyer in relation to her client. The account of the parental in lawyers’ ethics given in this article, though, suggests that the lawyer as parent, while sharing some of the shortcomings of Fried’s friendship metaphor,²¹² presents the lawyer–client relationship in clearer focus. As with any

²⁰⁹ Cf Slote (n 122) 5–9.

²¹⁰ X’s claim in *A Solicitor I* [2002] NSWCA 61, [92].

²¹¹ Fried (n 151).

²¹² For Aristotle, the parent–child relationship was a friendship: *Nicomachean Ethics* (n 110) 1071–2. However, Fried’s idea of the lawyer as ‘a limited purpose friend’ does not seem to include the Aristotelian idea of parent as friend (n 151) 1071–2.

metaphor, it should not be asked to do too much. There is the partly disturbing implication of the lawyer as parent that the client is ‘but a child’, and I do not wish the analogy to be pressed to that point. The mistake the care theorists made in squeezing too much into the rubric of care should be avoided for the parental as well. Further, neither friendship nor parenting copes well with the commercial quality of the lawyer’s retainer.²¹³ As both metaphors describe other social roles, neither can suggest the limitations inherent in the lawyer’s role of acting for the client in regard to the law—even if we understand that in an holistic way. However, as Gilligan put it, ‘experiences of inequality and interconnection’ are ‘inherent in the relation of parent and child’,²¹⁴ and it is precisely this coupling of power and control with intimate and selfless protection in the ‘paradigm relationship’²¹⁵ of parent and child that makes the parental a better match for the lawyer–client relationship.

There are at least five respects in which this is the case. First, the parental accommodates the imbalances of knowledge, expertise and power that, despite being bound together in a common cause of mutual benefit, typify the lawyer’s relationship with the client. Friends are normally equals. Secondly, and somewhat related, the parental deals better with the lack of reciprocity in the lawyer–client relationship. The lawyer should be engrossed in the client’s situation. The client rarely shows any concern about the lawyer’s interests, and need not. Friendships are not so lop-sided.²¹⁶ However, parent–child relationships do have this imbalance. Aged parents may be profoundly dependent on their adult children, but the ‘paradigm relationship’ is generally typified by the child’s dependence on the parent. The Aristotelian view is that, in virtuous family relationships, the parent’s commitment to the child tends to be stronger and last longer (because it begins earlier) than a child’s commitment to a parent (which progresses with the child’s development). And, as with the lawyer–client relationship, the benefits that parent and child give to each other differ.²¹⁷

Thirdly, the commitments and trusts that Anderson ascribed to the parental usually arise with some immediacy, when the parent first becomes conscious of the child’s conception or, at latest, its birth (and I am not getting into that debate). Friendships usually grow slowly, and often without any consciousness that this is happening.²¹⁸ There are exceptions to both, of course. The way in which solicitor X’s paternal identity and obligations arose in the circumstances of *A Solicitor* is an example of a man growing into the parental role in a way that is more akin to the development of friendship. The value of the parental metaphor, however, rests in the features of the ‘paradigm relationship’. In the usual case, it might be as easy to point to the time a person became a parent as it is to identify when a lawyer is retained by a client.

²¹³ Freedman (n 99) 198.

²¹⁴ *Different Voice* (n 82) 62–63.

²¹⁵ Curzer (n 77) 231.

²¹⁶ *Lost Lawyer* (n 73) 132.

²¹⁷ *Nicomachean Ethics* (n 110) 1835–6 (1161b17–27); Aristotle, *Politics* in Barnes (n 110) 1998 (1259b10–12), 2000 (1260b9–12); cf Curzer (n 77) 239.

²¹⁸ Freedman (n 99) 198.

Fourthly, someone's responsibilities to his child arise simply because he is the child's parent, and they cannot be abandoned at will or, as in Mrs Jellyby's case, by getting busier with other commitments; whereas, in many respects, the obligations between friends *are* the friendship. To quote CS Lewis again, this is its 'exquisite arbitrariness and irresponsibility'. 'I have no duty to be anyone's Friend, and no man in the world has a duty to be mine.'²¹⁹ It might not be easy to unravel or break a friendship once it is formed, but it can be escaped. With it, we also escape the more intimate commitments that were made to the other. In this respect the parental serves as a much closer description of the lawyer–client relationship, where the obligations flow from the relationship and where, further, they cannot be avoided by the lawyer unless the difficult contractual mechanisms of ending the retainer are properly invoked. Even then, there are trusts and commitments, like maintaining confidences, which continue.

And finally, the parental better accommodates the neutrality of the lawyer in questions of a client's guilt or innocence, or the worthiness of the client's projects. One of Fried's weaker claims for the friendship metaphor was that, as moral judgments cannot be made about someone's choice of a friend, they cannot be made about the way that the lawyer uses her discretion when choosing a client.²²⁰ Here, the metaphor (which Fried only partly used to justify the lawyer's neutrality) does not work. Moral judgments *are* commonly made about an individual because of the friends she makes. Indeed, the quality of a friend is potentially character-forming or character-breaking.²²¹ There are, though, fewer grounds for disputing the analogy of the partisan, neutral lawyer with the parental metaphor. A parent can often, but not always, be blamed for a child's poor character. Even so, the importance of the parent's commitments to the child regardless of his character or his projects is understood, and frequently applauded. It is no Mrs Jellyby who models this privileging of the parent's commitment to the child, but rather *Bleak House's* Mrs Rouncewell. Not knowing the true innocence of her rediscovered and imprisoned son, Mr George, Mrs Rouncewell nevertheless commits to him and gives him the good advice he had until then been resisting.²²² Indeed Dickens' use of the Parable of the Prodigal Son in his narrative of the reunion of a mother and son is explicit;²²³ perhaps exemplifying a point at which, despite my earlier reservations,²²⁴ a Christian ethic has become part of the 'cultural deposit' of the broader western moral tradition.

The Australian High Court justices' belief that the nature of parental trust was 'so remote from anything to do with professional practice'²²⁵ has validity only if care, and particularly the sympathy for another that it imports, has no place in the ethics of lawyers. It rests on a

²¹⁹ CS Lewis, *The Four Loves* (William Collins & Sons, 1960) 67; cf Curzer (n 77) 239.

²²⁰ Fried (n 151) 1061–2, 1077–8.

²²¹ Curzer (n 77) 226.

²²² Dickens (n 112) 748–52.

²²³ *Ibid.*, 751; St Luke 15: 11–31.

²²⁴ See text at nn 33–43.

²²⁵ *A Solicitor II* (2004) 216 CLR 253, 274.

thin and mechanical understanding of legal practice; denying the idea that a socially developed professional role gives ‘moral particularity’ to the good life that all can aspire to.²²⁶ Further, it also seems to show no appreciation of the importance of moral continuity across a person’s different social settings and identities: good character’s fusion of role and personality.²²⁷ Indeed, it is doubtful that any professional role, defined by a commercial contract, could be maintained for long unless it were embedded in more foundational affective relationships—such as those in which care and sympathy are shown.²²⁸ This is not to say that solicitor X’s breaking of parental trusts should have necessarily led to discipline being imposed; rather that it should not be excluded as something irrelevant to the professional role. The High Court in *A Solicitor* was mistaken. There is more in the lawyer’s professional commitment of who he *is* as an integrated rational, reliable and feeling person if the law is to be practised well, and in accordance with social expectations of the role. Again, I do not wish to press the parental metaphor too far. But, by alluding to solicitor X’s paternal role in the disciplinary charges it brought in *A Solicitor*, the New South Wales Law Society revived an important understanding of both the emotional qualities that are needed in the best legal practice and the trusts that clients can rightly expect of their lawyers.

²²⁶ *After Virtue* (n 30) 220.

²²⁷ *Ibid*, 29.

²²⁸ *Dependent Rational Animals* (n 146) 117–18.