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Essay

The Legal Ethics of Radical Individualism

Thomas L. Shaffer*

There's a magnifying glass all cracked and broken, and when you look at broken things through the lens you'd swear they'd turned whole again.¹

—Anne Tyler

Most of what American lawyers and law teachers call legal ethics is not ethics. Most of what is called legal ethics is similar to rules made by administrative agencies. It is regulatory. Its appeal is not to conscience, but to sanction. It seeks mandate rather than insight.² I argue here that

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1. A. TYLER, *THE ACCIDENTAL TOURIST* 278-79 (1985).

2. See G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 15 (1978) ("The typical professional code of ethics presupposes that the profession has exclusive or substantial control over the process by which professional competence is attained and verified. It presupposes . . . that professional reputation must be maintained by good practice as a matter of professional survival."). The intellectual roots of this type of "ethics" seem to be in the sociology of professions:

[Legal ethics is a] limited, bastardized version of ethics, an ethics culled from the ethos of professionalism. It is not the ethics known by philosophers and theologians, but . . . an ethics formed from the normative conventions and practices of those who do professional work. It is an ethics of work rather than an ethics of craft.

Elkins, *Ethics: Professionalism, Craft, and Failure*, 73 KY. L.J. 937, 946 (1984-1985); cf. Gewirth, *Professional Ethics: The Separatist Thesis*, 96 ETHICS 282, 300 (1986) (presenting an analysis of "ethics" in a professional-client relationship that confuses ethics with professionalism).

For an example of writing on "professional ethics," see *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* (G. Hazard & D. Rhode eds. 1985), an impressive collection of essays compiled for law students. The book identifies its purpose as an inquiry into "the legal profession as a serious academic subject," as opposed to the "formalist analysis, moralist polemics, and tepid apologia" of the past. *Id.* at 1. Consistent with that purpose, the book includes examinations of "the bar's social organization, . . . the premises underlying its regulatory efforts . . . [and] the social, economic, and ideological underpinnings of professional governance" from the perspective of "a variety of intellectual disciplines." *Id.* In the book, faith, religion, and theology are relevant, if at all, only as included in the discipline of history. Most of the "ethical" content of the book is regulatory, as distinguished from the philosophical ethics that interested, for example, Moses, Plato, Aristotle, Maimonides, Aquinas, Calvin, and Buber. Interestingly, the content is academically interdisciplinary from every point of view but the religious. The editors write and select as if none of their universities harbored schools of divinity, programs in theology, or departments of religious studies.

what remains and appropriately is called ethics has been distorted by the weaker side of an old issue in academic moral philosophy. This "weaker side" rests on two doctrines: first, that fact and value are separate; and second, that the moral agent acts alone; as W.H. Auden put it,³ each of us is alone on a moral planet tamed by terror.⁴ The influence of this philosophical position deprives legal ethics of truthfulness and of depth. As a principal example of the distortion, I use the case of lawyers employed by and for families, and by and for associations that use the metaphor of family to describe themselves.

Part I of the this Essay attempts to describe a different ethical theory, opposed to the separations of fact from value and of individuals

3. W.H. AUDEN, *THE AGE OF ANXIETY: A BAROQUE EPILOGUE* 17 (1947).

4. See A. MACINTYRE, *AFTER VIRTUE* 55-87, 107-20 (2d ed. 1984); REVISIONS 1, 16 (S. Hauerwas & A. MacIntyre eds. 1983); Wachbroit, *A Genealogy of Virtues* (Book Review), 92 *YALE L.J.* 564 (1983); Wachbroit, *Relativism and Virtue* (Book Review), 94 *YALE L.J.* 1559 (1985). The intellectual complaint is that the Scots and German Enlightenment, which enters our political and ethical thought through political institutions that ignore or neglect the religious tradition, caused moral philosophy to ignore, obviously, Moses and Jesus, and also, but not so obviously, Socrates and Aristotle. Clearly, though, Socrates' and Aristotle's ethics of character are as incompatible with the ethics of radical individualism as religious ethics. See Lehman, *Finding Our Way Back*, 29 *AM. J. JURIS.* 229, 232-33 (1984).

Legal ethics as an academic discipline has begun recently to notice moral philosophy; unfortunately, legal ethics also has begun to adopt moral philosophy's current biases. *THE GOOD LAWYER* (D. Luban ed. 1984), is an example. Luban's book is a set of essays balanced between those who accept and those who resist the distinction between fact and value and the individualism of the ethics of autonomy. As the editor poses the issues, however, the book emphasizes the conflict between the Kantian problem of universalism—something that MacIntyre finds unimportant, see generally A. MACINTYRE, *supra* (proposing a modern Aristotelian ethic)—and the sociological argument that a professional role entails special morality, *THE GOOD LAWYER, supra*, at 2-3; see also Elkins, *supra* note 2, at 937 ("In structuring and defining human experience, the professions play an integral role in the delineation of experience as good/bad, healthy/sick, or legal/illegal."); Gewirth, *supra* note 2, at 282-86 (describing the thesis that professional duties differ from moral duties). Luban's dominant concern as a moral philosopher who focuses on legal ethics is the difference between a *procedural* and an *agency* view of the lawyer's role. That distinction, however, does not take seriously the importance of organic communities, see *infra* note 8, particularly in that the Luban book discusses procedures as bearing only on individuals, and agents as agents only for individuals. Luban thus reveals himself as "an empiricist of a certain type, [for whom] the fundamental and basic condition is human isolation, and relationship is a *derivative* fact which comes about only through inference." Fackenheim, *Martin Buber: Universal and Jewish Aspects of the I-Thou Philosophy*, *MIDSTREAM*, May 1974, at 46, 50 (emphasis in original). Luban's bias is evident even in his discussion of Judge Cardozo's opinion in *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928) (holding that certain fiduciary relationships demand a higher loyalty than "the morals of the market place"). *THE GOOD LAWYER, supra*, at 8-14. Cardozo argued that the association of two business partners is organic, so that that *the law* will not allow a partner to keep a business opportunity to himself. *Id.* at 9.

Another important example of this focus on academic moral philosophy in "interdisciplinary" legal ethics is Stephen Pepper's essay, *The Lawyer's Amoral Role: A Defense, A Problem, and Some Possibilities* (Oct. 14, 1985) (unpublished manuscript), which was selected by academic judges in the Association of American Law Schools as the best paper submitted in a competitive call for papers for the Association's 1986 annual meeting. Cf. M. FREDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 31-57 (1975) (dealing with, among other subjects, the "epistemology of legal ethics"); A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 1-2 (1980) (discussing the necessity of special ethical norms in professional conduct).

Radical Individualism

from the community. Part II considers a bar association ethical quandary arising from what the modern ethics codes define as multiple-client employment. Part III first considers the same quandary under Rule 2.2 of the new *Model Rules of Professional Conduct*,⁵ describing the lawyer as intermediary, and then assesses the influences of moral philosophy on that new rule. Part IV considers the quandary as it might have been viewed in the practice of Louis D. Brandeis. Part V concludes the Essay with an assessment of the ethics of radical individualism in terms of the religious tradition's influence on legal ethics.

I. The Ethical Context

Ethics properly defined is thinking about morals. It is an intellectual activity and an appropriate academic discipline, but it is valid only to the extent that it truthfully describes what is going on.⁶ Those in contemporary ethics who concentrate on the importance of the truthful account argue first that fact and value are not separate—that stating the facts is, as Iris Murdoch put it, a moral act, a moral skill, and a moral art;⁷ and second, that organic communities⁸ of persons are prior in life

5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983).

6. J. FLETCHER, SITUATION ETHICS 84 (1966) (observing that ethics should put "a high premium on our knowing what's what when we act").

7. See Murdoch, *On "God and Good"*, in THE ANATOMY OF KNOWLEDGE 233, 243-45 (1969). "Stating the facts," however, is not a *prelude* to ethics; it *is* ethics. It requires discipline to eradicate from a description "the tissue of self-aggrandizing and consoling wishes and dreams which prevents one from seeing what there is outside one." *Id.* at 244.

8. The difference between a community and an organic community is a common theme in ethical writing, but the difference is suggested more often than it is defined. Maybe the distinction is better suited to illustration than to definition. Writers who describe or employ the distinction seem to have in mind three kinds of relationships among people that create *organic* communities.

First.—An organic community is created by people through the mutual practice of the virtues, and through mutual support in the pursuit of the good. For Aristotle, such associations are both the goal and the source of the virtue of friendship. ARISTOTLE, NICOMACHEAN ETHICS 271-72 (M. Ostwald trans. 1962). (Aristotle also makes the more problematical claim that political order rests on friendship, *id.* at 235-37, but that claim is not a claim about organic community.) Reinhold Niebuhr often spoke of Britain (he probably meant England) as organic in this way. See R. FOX, REINHOLD NIEBUHR 150, 170-74 (1985). Niebuhr also once attempted to define an "organic radicalism" for the Christian left in the United States. *Id.* at 172-73. In both cases, he seemed to associate "organic" with a communal practice of the virtues. An organic association also is possible among those who practice a craft or a profession. A. MACINTYRE, *supra* note 4, at 175-83. "Organic" in this sense is a metaphor, because the relationships it describes are constructed, not ordained or established, as a part of the constitution or structure of the community.

Second.—An organic community is created, sustained, and redeemed by God. An example is Israel, taken out of Egypt in the Exodus. See M. GOLDBERG, JEWS AND CHRISTIANS: GETTING OUR STORIES STRAIGHT 103-04 (1985). The church in Christian ecclesiology is another example. See *id.*; C. GREENHOUSE, PRAYING FOR JUSTICE: FAITH, ORDER, AND COMMUNITY IN AN AMERICAN TOWN 37-42 (1986); S. HAUERWAS, A COMMUNITY OF CHARACTER 59 (1981); Hauerwas, *The Church in a Divided World: The Interpretive Power of the Christian Story*, 8 J. RELIGIOUS ETHICS 55 (1980). "Organic" in this second sense sometimes is a metaphor (e.g., in New Testament

and in culture to individuals—in other words, that the moral agent is not alone.

Exemplifying this second view committed to truthfulness is Anne Tyler's kidnapped housewife, Charlotte, in the novel *Earthly Possessions*.⁹ When Charlotte reflects on her absent family, she understands and expresses to herself the truth about her individuality; she mixes fact and value, or rather, sees them correctly as mixed. She understands, through the moral art of seeing, that she does not face terror alone, even though she is alone: "I saw that all of us lived in a sort of web, criss-crossed by strings of love and need and worry. . . . It appeared that we were all taking care of each other, in ways an outsider might not notice."¹⁰ Charlotte understands that to describe a fact is to describe a value. She sees that, when the bell tolls, and she is one of those who can hear it, it tolls for her. Seeing and hearing are moral arts; when she is successful at these arts, she hears the bell that says she is not an island.

In the practice of estate planning, for example, the facts that are available for moral description are death and property: property seen in the context of mortality, death seen in the context of owning things.¹¹

references to the church as a body) and sometimes not (e.g., in references to the *people* Israel or to the church as the people of God).

Third.—An organic community is recognized by people who discover a psychological or biological commonality in one another. The term "organic" (or "organismic") has been used in this way by humanistic psychologists. See, e.g., A. MASLOW, TOWARD A PSYCHOLOGY OF BEING 189-214, 222 (2d ed. 1968) (characterizing this "belongingness" as an aspect of self-actualization). Reinhold Niebuhr also recognized this kind of community, noting in 1935 that the only "saving grace" of European fascism was its feeling for "the organic character of society," a feeling produced by "outraged truth avenging itself" on the excesses of individualism. R. FOX, *supra*, at 170. Individualistic psychologists apply the word "organism" to groups, e.g., C. ROGERS, CLIENT-CENTERED THERAPY 481-533 (1951), thus implying that groups may have an *organic* life. Lewis Thomas perceives this organic communal life as a matter even of biology. See L. THOMAS, THE LIVES OF A CELL 11-16, 81-87, 102-06 (1975). This sense of "organic" is metaphorical or not depending on the nature of the characteristic that produces the commonality.

Whether "organic" is a metaphor or not, the term highlights the distinction between a *collectivity* and a *community*. A collectivity is mechanical; a community is organic. The Roman state, for example, was in concept and operation "a mechanism wearing the mask of an organism, an organism wearing the mask of the spirit," M. BUBER, ON JUDAISM 124 (1967), and "a contraction of the strayed will to community," *id.* at 125. Judaism, by contrast, "rejects the 'We' of group egotism, of national conceit and party exclusiveness, but it postulates that 'We' which arises from the real relationships of its components and which maintains genuine relations with other groups, the 'We' that may say in truth: 'Our Father.'" *Id.* at 211 (emphasis in original). The collectivity (*i.e.*, chosen affiliations in an I-It world) is justified only as necessary to sustain an organic community of I-You relationships. M. BUBER, I AND THOU 124-26 (1970); see also *infra* note 48 (describing the relationship of "organic" in a religious focus).

9. A. TYLER, EARTHLY POSSESSIONS (1978).

10. *Id.* at 182. The critical fact is that Charlotte thinks of herself as *known*, and therefore not alone. Cf. *Psalms* 139:3-12 (praising God as One who knows the poet intimately); A. HESCHEL, BETWEEN GOD AND MAN: AN INTERPRETATION OF JUDAISM 57 (1959).

11. Death is a social, not only an individual, fact. Otherwise, the practice of estate planning would lose significance. Property is also a social fact. As a consequence, property laws reflect moral conclusions about the relationships among persons, and the importance of things for communities of

Radical Individualism

The way death is seen in estate planning is ownership—that is why we laugh at the cartoon that shows a fur-clad matron in the bank vault, the family safety deposit box empty in front of her, saying, “He took it with him!” The way ownership is seen in estate planning is in death—that is the paradox (if not the humor) in those old trust-administration cases in which the judges talk about long-dead settlors as people who own (present tense) the property and *can do* with it what they *want*.¹²

What reconciles death with the ownership of property is the family. The family is the lens through which we understand death as the death of an owner, and property as something owned by dead people. The family is the cracked magnifying glass that shows how things broken by discord and death are whole. The family is normally why people bother with estate planning—“normally” in the sense that, but for the family, estate planning would not be a legal subject.¹³ The family is the cultural focus for the realization that estate planning is a worthwhile thing for people to do, because it reflects the hope that none of us will die alone. The human fact that is prior to the moral agency of which moral philosophy usually speaks¹⁴ is the family; the moral art of description in the legal ethics of estate planning is the skill to describe a family.

This art applies as well to associations that account for themselves as if they were families. The skill for describing families holds moral promise beyond families for the human harmonies that describe themselves with family metaphors. I was, for example, thanked recently for patronizing “the Piedmont family,” an incorporated airline company. I was for years employed in “the Notre Dame family,” a not-for-profit Indiana corporation. I worship in what our pastor calls a parish family. I am affected, as all of us are, by aggregations of businesses that refer to themselves as families of companies. A lawyer for such an association is invited to take seriously his client’s use of the metaphor of family, and to share in the hope that the members of the “family” have for one another

persons, including families. For analyses of these underlying moral conclusions, see Shaffer, *The Lawyer as Will Maker*, in FAMILY SYSTEMS AND INHERITANCE PATTERNS 87 (1982); Shaffer, *Slipped Feet Aboard the African Queen*, 3 J.L. & RELIGION 193, 198-99 (1985) [hereinafter Shaffer, *Slipped Feet*]; Shaffer & Rodes, *Law for Those Who Are to Die*, in NEW MEANINGS OF DEATH 291 (H. Feifel ed. 1977).

12. *E.g.*, Colonial Trust Co. v. Brown, 105 Conn. 261, 270, 135 A. 555, 560 (1926); Broadway Nat’l Bank v. Adams, 133 Mass. 170, 173 (1882); *In re Pulitzer’s Estate*, 139 Misc. 575, 580, 249 N.Y.S. 87, 93, *supplemented*, 140 Misc. 572, 251 N.Y.S. 549 (N.Y. Sur. Ct. 1931), *aff’d*, 237 A.D. 808, 260 N.Y.S. 975 (1932); *Saunders v. Vautier*, 49 Eng. Rep. 282, 282 (1841).

13. See, for example, the titles of casebooks, such as O. BROWDER & R. WELLMAN, FAMILY PROPERTY SETTLEMENTS (1965); J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS (2d ed. 1978).

14. See, *e.g.*, S. HAUERWAS, CHARACTER AND THE CHRISTIAN LIFE 18-34 (1975) (discussing moral agency as the capacity to make choices that determine one’s character).

that none of us need die alone. In accepting or refusing this invitation, the lawyer likely will act as a member of a professional association that accounts for itself, as its clients try to do, with family metaphors.

II. The Case of the Unwanted Will

I use, in teaching legal ethics, a series of quandaries that were posed in the *American Bar Association Journal* in 1979.¹⁵ One of these quandaries describes John and Mary, a middle-aged couple with adult children. John and Mary want their wills drafted before beginning a vacation trip abroad. Based on John's instructions, the lawyer prepares a set of parallel wills, each leaving all property to the surviving spouse, or, if both are dead, to their children in equal shares. On a second visit to the law office, the lawyer presents the prepared wills to the couple, and John executes his:

[T]he lawyer [then] suggests to John that he would like to be alone with Mary before she signs. John withdraws to another office. The lawyer asks Mary if the will is as she would have made it had her husband not been present at the conference and if the will were to be secret from her husband. She says no, that the will as drawn contains several provisions that are contrary to her wishes, and that she would change if her husband were not to know the ultimate disposition of her estate. However, she says that she would not be willing to precipitate the domestic discord and confrontation that would occur if her husband were to learn that she had drawn a will contrary to his wishes and in accordance with her own desires.¹⁶

You could say that the problem¹⁷ never would have arisen had the lawyer not talked to Mary alone.¹⁸ That description, of course, trivializes the problem, but many law students, and some ponderers of legal ethics, pose the quandary and the solution in just those terms.¹⁹ From that

15. *The Case of the Unwanted Will*, 65 A.B.A. J. 484 (1979). I included an abridged version of these quandaries in my textbook. See T. SHAFFER, *AMERICAN LEGAL ETHICS* 313 (1985).

16. *The Case of the Unwanted Will*, *supra* note 15, at 484.

17. To describe *The Case of the Unwanted Will* as posing a moral problem or quandary is to make a moral judgment. See S. HAUERWAS, *VISION AND VIRTUE* 11-24 (1974); J. MCCLENDON, *BIOGRAPHY AS THEOLOGY* 13-38 (1974); T. SHAFFER, *FAITH AND THE PROFESSIONS* ch. 1 (1987); Pincoffs, *Quandary Ethics*, 80 *MIND* 552-55 (1971).

18. You also could say that the problem would have arisen differently had the lawyer felt it necessary in addition to talk to John, alone.

19. The comments of George W. Overton in the *A.B.A. Journal's* discussion illustrate this trivial analysis: "[T]he custom of separating spouses at execution of wills, although not uncommon, is an anachronism, based on the notion that one spouse, presumably the husband, could coerce the other into an unintended result . . ." *The Case of the Unwanted Will*, *supra* note 15, at 486. John C. Williams offered similar advice:

The root of the conflict is Mary's problem. She doesn't like the will that was discussed in her husband's presence, but she doesn't want to disclose to him her dissatisfaction with it.

viewpoint, the immediately noticeable premises for the two judgments that there is a problem present, and that the problem is moral, are four. First, a lawyer's proper employment is by or for an individual. Second, employment by or for more than one individual is exceptional. Third, as a consequence, multiple party employment is necessarily superficial. Finally, the means for protecting the superficiality (or, if you like, the means for protecting the principle that employment is ordinarily and properly by or for individuals) is ignorance of any facts known to one of the individuals but not to the other.²⁰

It follows from this typical analysis that the lawyer's moral mistake was in talking to Mary alone.²¹ Otherwise, Mary's secret intention never would have come to his attention; her thoughts would be hidden, and that is appropriate because John's thoughts are hidden. Now that the lawyer *has* talked to Mary alone, he is in an impossible situation: he cannot allow John to board the plane with the mistaken belief that Mary agreed with what "they" had decided.²² Nor, for the same reason, can he help Mary to make a different will.²³ And, of course, he cannot allow Mary to execute a will that does not do what she wants it to do.²⁴

This principled analysis of *The Case of the Unwanted Will* fails because of what is prior to analysis: the moral art of description. The failure is sad and, I think, corrupting. It is corrupting, first, because it rests on an untruthful account of what is going on. What is present in the law

This dilemma is Mary's and she should decide what to do about it. The lawyer, by meeting privately with Mary, has permitted her to transfer the problem to him.

Id. at 488. Mr. Williams also noted that the lawyer's conduct violated professional standards. *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101, 5-105, EC 5-1, 5-14 (1980)).

20. For example, Mr. Williams claimed,

It was a mistake for the lawyer to ask to meet privately with Mary before she signed her will. By doing so, he invited Mary to speak "confidentially" with him and opened the door to the dilemma that confronted him when Mary told him that she was dissatisfied with her will.

Id. In Mr. Williams' judgment, this conduct violated MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-14 (1980). *Id.*

21. Both commentators agreed. *See id.* at 486, 488.

22. That was Mr. Williams' view. *Id.* at 488 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980) which states, "The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising interests and loyalties."). Mr. Overton disagreed in part: "[T]he lawyer, if questioned by John, cannot lie to him, although I do not believe the lawyer has a duty to volunteer any information." *Id.* at 484.

23. *See supra* note 20. One of the commentators disagreed. Mr. Overton thought that the lawyer could help Mary make a new will, provided that he told John that he had done so. *The Case of the Unwanted Will, supra* note 15, at 486. Mr. Overton would not require the lawyer to disclose to John the contents of Mary's new will. *Id.* at 484. For Mr. Williams, though, Mr. Overton's solution did not provide "the full disclosure [to John] that the canons require." *Id.* at 488.

24. Both commentators agreed, although Mr. Overton would allow the execution of Mary's unwanted will if the lawyer first explained to her that the will "is unquestionably her will . . . and . . . [that] even if all their conversation were reproduced in court, it would not affect the validity of the will." *Id.* at 484.

office is a family, and this one-lawyer-for-each-person way of first seeing a moral quandary in this situation and then resolving the quandary with the ethics of autonomy (the ethics of aloneness) leaves the family out of the account.²⁵ The analysis looks on Mary as a collection of interests and rights that begin and end in radical individuality. Her affiliation with her husband, and with the children they have made and reared, is seen as a product of individuality(!), of contract and consent, of promises and the keeping of promises—all the consensual connections that lonely individuals use when they want circumstantial harmony. The employment of the lawyer is a result, then, of the links, the promises, the contract, the consent, and the need for circumstantial harmony. The family in the office is there only as the product of promise and consent. It is relevant to the legal business at hand only because the (radical) individuals, each in momentary and circumstantial harmony with one another, want it to be. The promise and the consent create the family.²⁶

This description is offered by the legal ethics of radical individualism. It is sad, corrupting, and untruthful. An alternative argument is that the *family* created the promises, the contract, the consent, and the circumstantial harmony—not the other way around. The family is not the harmony; it is where the harmony (and disharmony) comes from. A truthful description of *The Case of the Unwanted Will* is that the lawyer's employer is a family. I suspect that that proposition will sound unusual in legal ethics, but my argument would be ordinary in other contexts. It treats, sees, and describes the family the way families are treated, seen, and described in the stories we tell, in the television commercials we watch, in the comics, and in our religious tradition. In these ordinary ways of accounting to ourselves for ourselves, it is the family that causes

25. Mr. Overton's comment illustrates the untruthfulness of the account. It begins, "The first question to be asked in all problems involving professional responsibility or ethics is 'Who is the client?' . . . John probably presumes that the lawyer is *his* The lawyer probably accepted the notion without clarification. The problem is that . . . Mary is the client" *Id.* (emphasis in original). Mr. Overton's perception denies the presence of a family (they are both *the* client), and then creates a quandary (for the ethics of autonomy), out of his denial of the presence of a family.

26. Mr. Williams thus distinguishes between a "happily married husband and wife [who are interested] in the continuity and development of their marital relationship" (*i.e.*, a family), and "the outcome of a particularly legal negotiation." *The Case of the Unwanted Will*, *supra* note 15, at 486. The reconciliation of the two views of people in the law office—of continuity in the organic community on the one hand, and a "particularly legal negotiation" on the other—rests, in his view, on the outcome of the lawyer's probing for conflicts between the couple. The organic community (family) is the client only if there are no conflicts. Describing a family in that way is comical. Mr. Overton suggests that lawyers explicate the assumption "that each of you has given me your wishes" in the joint interview for wills of spouses, but he would permit separate interviews "at the first meeting or immediately thereafter." *Id.* That suggestion is not funny, but it also rests on the view that momentary harmony creates the family. Its anthropology, therefore, is one of radical individualism. It depends on the exercise of autonomous, individual decision-making power. *Cf. infra* note 35 (suggesting an alternative anthropology of the family).

Radical Individualism

individuals to make the promises that begin, develop, and continue families. The family causes people to seek human harmonies and, consequently, to create more families, as well as associations such as businesses, clubs, and professions, that account for themselves with family metaphors.

The view of the family as organic and as prior to individuality is ordinary in other parts of our culture. The Hebraic religious tradition,²⁷ for example, regards the family as the nursery of the people of God.²⁸ Anne Tyler's modern novels,²⁹ like Jane Austen's nineteenth-century ones,³⁰ tell deep and interesting stories about family and culture. The truth here, however, is told in other and more ordinary places, including stories of real and fictional lawyers³¹ and recent and popular novels that describe espionage as a family trade,³² burglary as a (three-generation) family business,³³ and organized crime as a family and a web of families.³⁴ And, because understanding others as members and constituents of families generates a sense of shared experience, the final account of racial justice in twentieth-century America might depend more than we

27. I use "Hebraic" where other writers use "Judeo-Christian." The single term implies that the dominant American religious tradition is a single tradition, rather than two traditions that are causally related to one another, or that happen to have something in common. See Shaffer, *Jurisprudence in the Light of the Hebraic Faith*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 77, 78 n.4 (1984).

28. The significance of the family is evident particularly in the Jewish "master story," see M. GOLDBERG, *supra* note 8, at 25-131 (the Jewish "master story" is in *Exodus*), in the social organization of Israel after the death of Moses, when Israel was led by Joshua into the Promised Land. See *Joshua* 41:7-17. God dealt with Israel family by family. At the end, when it came time to renew the covenant between God and Israel in the new land, Joshua, in Israel, declared his allegiance in this way: "I and my family, we will worship the Lord." *Joshua* 24:15 (New English Bible). Joshua "spoke not as leader to his people but, in the cultural context . . . to all present as families . . . He articulated the truth that the covenant with God exists directly between God and the most rudimentary social unit." McAlister, *Exodus and Community*, SOJOURNERS, Mar. 1986, at 36, 37.

Family physicians describe their patients and their power in communities in this Hebraic way; they care for families "in the larger sense." See Nemethy, *Doctor: A Profile of Contemporary Rural Practice*, VERMONT LIFE, Winter 1984, at 50, 53. See generally McPhee, *A Reporter at Large: Heirs of General Practice*, NEW YORKER, July 23, 1984, at 40 (presenting anecdotal evidence that doctors in rural communities counsel their patients as families, and as *in* families).

29. E.g., A. TYLER, *DINNER AT THE HOMESICK RESTAURANT* (1982); A. TYLER, *MORGAN'S PASSING* (1980); see also *supra* notes 1, 9 and accompanying text (describing other Tyler novels).

30. For a discussion of Austen's novels, see A. MACINTYRE, *supra* note 4, at 169-74; J. WHITE, *WHEN WORDS LOSE THEIR MEANING* 163-91 (1984).

31. See, e.g., T. SHAFFER, *supra* note 15 (discussing Harper Lee's Attieus Finch; Louis Auchincloss's Henry Knox and Mario Fabbri; Arthur Train's Ephraim Tutt; George V. Higgins's Jerry Kennedy; and others, and including biographies of Louis D. Brandeis, Farrington Reed Carpenter, Fanny Holtzmann, Justine Wise Polier, and others).

32. See, e.g., J. CARROLL, *FAMILY TRADE* (1982).

33. See, e.g., V. PATRICK, *FAMILY BUSINESS* (1985).

34. E.g., *Protecting the Family*, TIME, Feb. 10, 1986, at 52. According to that article, organized crime families excuse lawyers' bribery, destruction of physical evidence, and betrayal of clients, under an ethic of loyalty in which the metaphor of family is the organizing insight. Thus, "to do the right thing means to protect the family . . . It's a way of life." *Id.*

suppose on the black-family situation comedy on network television.³⁵

III. Lawyer as Intermediary

The recently adopted *Model Rules of Professional Conduct* describe situations in which the lawyer acts as an "intermediary."³⁶ This formulation is remarkably ambiguous for a case such as *The Case of the Unwanted Will*. The *Model Rules* can be read to support the perception I treat as inadequate, untruthful, and corrupting—that is, the perception based on radical individualism. They can also be read to support the argument for taking deeper account of the family as the creator, rather than the product, of the human harmonies that are presented to lawyers in estate planning, and in legal work for associations that account for themselves with family metaphors.

The new rule offers a set of procedures for accepting employment from two or more individuals. The rule rests on the assumption that employment by individuals is the norm; it has to provide a behavioral checklist to make exceptional, multiple-client employment possible:

- (a) A lawyer may act as intermediary between clients if
 - (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;³⁷

35. My view of the family is therefore anthropological. It is not normative, in the sense in which modern moral philosophy usually separates the normative from the descriptive. The family is not, always and everywhere, good teleologically; nor is it always and everywhere good for its members. The family is part of the way people are. (When the family is seen as ordained by God, perhaps it is good in an *ontological* sense, in the way that government, according to St. Paul, is good. See *Romans* 13:1-7).

My view of the family follows the second of the three views about "organic community" enumerated *supra* note 8. To describe, for example, black Americans in families therefore expresses a common experience that helps white Americans to understand black people, and that perhaps helps black people to understand themselves, in the way Anne Tyler's white characters come to understand themselves in families. See *supra* note 29 and accompanying text. James Cone makes a similar argument, theologically, in reference to black churches in America. See J. CONE, *MY SOUL LOOKS BACK* 57 (1982).

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983). I am consulting this rule in two versions. The first is the form in which it originally was presented to the profession for comment: MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (Proposed Final Draft 1981) [hereinafter MODEL RULES (PROPOSED)]. The second is the form in which it finally was adopted by the House of Delegates of the American Bar Association: MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1983) [hereinafter MODEL RULES].

37. The 1981 draft read "discloses to each client the implications of . . . and the effect on attorney-client privileges." MODEL RULES (PROPOSED), *supra* note 36, Rule 2.2. The phrase "multiple clients" was favored in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, EC 5-15 to -19 (1985). Rule 2.2, however, favors "common representation," a choice that might support the argument that an organic community, or a "situation," can be a client. "Multiple client employment" is not a common Code phrase, but it seems to express the notions that (1) prototypical lawyer employment is employment by an individual and (2) employment for more than one person on the same matter is, in some sense, employment by each of them. See *generally supra* note 25 (quoting

Radical Individualism

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant to making them, so that each client can make adequately informed decisions.³⁸

(c) The lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.³⁹

The *Model Rules*, unlike predecessor codes, canons, essays, and resolutions, eschew descriptions of morals. The authors and advocates of the rules have rooted out both the language and the discipline of ethical reasoning; these rules are not ethics but instead a set of regulatory mandates and prohibitions. As a consequence, the proposed rule on the lawyer as intermediary need not reveal its lonely-individual premise, if it has one. I think that Rule 2.2 does have a lonely individual premise, the premise of modern moral philosophy. The Rule's authors did assume that the normal employment of a lawyer is employment by a single individual,⁴⁰ and that, therefore, the profession needs a rule for the exceptional case in which a lawyer is employed by or for a group of individuals.⁴¹

one lawyer's assertion that the first issue in legal representation is determining who is the individual client).

38. The 1981 draft read "shall explain fully to each client the decisions to be made," rather than "shall consult with each client concerning the decisions." MODEL RULES (PROPOSED), *supra* note 36, Rule 2.2.

39. MODEL RULES, *supra* note 36, Rule 2.2. The 1981 draft read, "if the conditions stated in paragraph (a) cannot be met or if in the light of subsequent events the lawyer reasonably should know that a mutually advantageous resolution cannot be achieved." MODEL RULES (PROPOSED), *supra* note 36, Rule 2.2. This circumstantial test for commonality is radically different in moral implication from the test that gives any member of the group the power to end the group's common character as client.

40. MODEL RULES, *supra* note 36, Rule 2.2. The 1981 draft also prohibited the lawyer from continuing to represent one of the clients "unless doing so is clearly compatible with the lawyer's responsibilities to the other client or clients." MODEL RULES (PROPOSED), *supra* note 36, Rule 2.2.

41. Geoffrey Hazard describes this image of the lawyer in a lonely, individualistic, tamed-by-terror world:

The picture of the lawyer . . . is that of a lone practitioner who must judge for himself what is right while engaged in intense competition The controls on his conduct . . . are almost entirely those of self-governance At the same time his vocational situation

It seems unlikely, for example, that the people who drafted and adopted the *Model Rules* would encourage a lawyer to exert herself to keep a client group together. The safer recourse, should fissures appear in the human harmony that first allowed the lawyer to be lawyer for the group, is to stand back, let things fall apart, and then take professional refuge from the falling debris by withdrawing from the representation. If the Rule had been invoked in *The Case of the Unwanted Will*, the lawyer would at any rate have learned, as he protected himself from the debris, not to focus attention on a will-making wife in the absence of her husband.

The comment to Model Rule 2.2 is more encouraging to those who might want to invoke the Rule for the proposition that families are prior to individuals, and, invoking it, to suggest that a lawyer should exert herself to describe the family and maybe to keep it together. When a lawyer follows the rule, she seeks "to establish or adjust a *relationship* between clients on an amicable and mutually advantageous basis."⁴² None of the relationships given as examples is explicitly a family, or even a couple, married or not. Nevertheless, mediation is one of the professional skills mentioned; the development of mutual interests is one of the goals mentioned; the avoidance of complication is one of the benefits claimed for the employment; and situations "where the *clients'* interests are substantially though not entirely compatible" are given as prototypes of justified multiple-client employment.⁴³

The comment can be read to describe families as we know them from our stories. If the comment to the Rule were invoked in *The Case of the Unwanted Will*, I see the possibility of an argument that the lawyer is lawyer for the family, and that what the Rule does is provide for the representation not of lonely individuals in circumstantial harmony, but of the harmony itself, or even of the communal source of the harmony.⁴⁴

The moral premise of the regulatory rule with its behavioral check-

. . . is one of dependency and vulnerability. Control of client misconduct will result, it is assumed, because conscience will surmount circumstance.

Hazard, *Conscience and Circumstance in Legal Ethics*, 1 SOC. RESP.: JOURNALISM L. MED. 36, 44-45 (1975). He is quoted in the business press as equating law-firm corruption with the loss of skepticism toward clients. See *A Question of Integrity at Blue-Chip Law Firms*, BUSINESS WEEK, Apr. 7, 1986, at 76, 80.

42. MODEL RULES, *supra* note 36, Rule 2.2 comment (emphasis added).

43. *Id.* (emphasis added). This language is cautious and regulatory. Compare Martin Buber's description of a marriage: "The You that is I for neither of them." M. BUBER, *supra* note 8, at 95. The husband or wife thus *is* an other—not a mirror.

44. Undermining the usefulness of the comment to Model Rule 2.2 is the statement in the preamble to the *Model Rules* that the comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." MODEL RULES, *supra* note 36, scope. The comments provide *regulatory*, not moral, guidance. Nevertheless, courts previously have given coercive effect to moral admonitions such as the Ethical Considerations of the *Model Code of Profes-*

Radical Individualism

list is, I think, that the truly important and deep things in human life are individual and singular; they are matters of *autonomy*.⁴⁵ To put it another way, the highest good I can seek for a person on whom I focus my beneficence is that he be free—and free here means self-ruling and radically *not* committed.⁴⁶ The things that people share under this logic are relatively superficial; they are the harmonies that radically autonomous individuals *choose* to have. Employment by a group of persons is possible only if the lawyer stays with chosen harmonies. The employment is imperiled if the lawyer intrudes on these individualistic choices. If the employment will necessarily intrude on these choices, then the radically individualistic nature of the persons who are client(s) requires separate lawyers for each individual.

The competing premise—perhaps supported by the comment to the Rule—is that human harmonies do *not* rest on the choices of autonomous individuals; they rest instead on communities. Human harmonies are not chosen but given. As Abraham Joshua Heschel put it,

[T]he self is a monstrous deceit . . . something transcendent in disguise I am endowed with a will but the will is not mine; I am endowed with freedom, but it is a freedom imposed on the will. Life is something that visits my body The essence of what I am is not mine.⁴⁷

Organic⁴⁸ communities such as families are prior to individuals.

sional Responsibility. See R. ARONSON & D. WECKSTEIN, PROFESSIONAL RESPONSIBILITY 27-29 (1980). Courts eventually may give the same weight to the comments to the *Model Rules*.

45. See M. FREEDMAN, *supra* note 4, ch. 1; A. GOLDMAN, *supra* note 4.

46. See Dworkin, *Moral Autonomy*, in MORALS, SCIENCE, AND SOCIALITY 156 (1978) (exploring six meanings for the proposition, “A person is morally autonomous if and only if his moral principles are his own”); see also *infra* note 62 (detailing Dworkin’s criticism of that proposition on the grounds that it is either trivial or objectively false).

47. A. HESCHEL, *supra* note 10, at 62. The ethical consequence of Heschel’s statement is a truer regard for personhood, as opposed, perhaps, to individuality. The influential and even trendy enterprise described as “alternative dispute resolution” is one institution that depends on the denial of aloneness—that is, on the *fact* that a dispute is a fractured commonality, that the commonality is stronger than, and prior to, the fracture. See McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664 (1985). The denial (or, perhaps, the overcoming) of aloneness is a matter of imagination—the ability to see another life as analogous. See P. ROSE, PARALLEL LIVES: FIVE VICTORIAN MARRIAGES 237 (1983) (quoting from George Eliot’s memorial stone in Poet’s Corner in Westminster Abbey: “The first condition of human goodness is something to love; the second something to reverence.”).

48. Without denying my anthropological argument, see *supra* note 35, it is fairly clear that focus on the organic often, if not necessarily, is a focus from the religious tradition, see *supra* note 8. Looking at professional ethics from the religious tradition does not necessarily imply, though, consideration of God or ethical propositions in a way that academic categories identify narrowly as theological. Philosophy, from Plato through Kant, also considers God. The difference that focus on the organic can make is not the difference between philosophy and theology but the difference between seeing God as subject rather than an object. The religious tradition “does not understand [knowledge of God] as a noetic relation of a thinking subject to a neutral object of thought, but rather as . . . the genuinely reciprocal meeting in the fullness of life between one active existence and another.” M. BUBER, ECLIPSE OF GOD 32-33 (1952). In the Hebraic tradition, “genuinely recipro-

The lawyer in *The Case of the Unwanted Will*, for example, did not err in turning his attention to Mary, in John's absence. (Nor would it have been a mistake to turn his attention to John, in Mary's absence; if evenhandedness is important, it would have been more evenhanded to talk privately with each of them.) The deep things to be found out about John and Mary, in particular the deep things involved in their will making, are family things.⁴⁹ Inquiring into deep family things is not only tolerated, but it is required by common representation, because *the client is the family*. Any other description is incomplete and, thus, untruthful and corrupting.⁵⁰ If an adequate account of what is going on in the family (to the extent that it has to do with their will making) requires talking to either or both parents alone, then talking to them alone is appropriate. If the family is well represented, it (that is, each person in it) will learn how to take Mary's purposes into account, because Mary is in the family.

Giles Milhaven demonstrates my point in an analysis of Bernard Malamud's novel *Dubin's Lives*.⁵¹ In part, *Dubin's Lives* is the story of a man who has to choose between his wife and his mistress, and chooses his wife. He chooses not because he loves his wife rather than his mistress; he loves both. Rather, as Milhaven says, he loves a *life*. In "the Jewish matchmaking tradition, a man and woman . . . will in marriage . . . come to know and love each other's *lives*. Leaving father and mother, they will become one flesh . . . in their spontaneous, enduring desire to keep sharing *lives*."⁵² Dubin's story denies "the assumption

cal meeting" is prototypically the meeting of God and community. See E. BERKOVITS, MAJOR THEMES IN MODERN PHILOSOPHIES OF JUDAISM 111 (1974); M. GOLDBERG, *supra* note 8, at 103-04.

The other side of the difference I mean to identify in this Essay tends away from community. The (modern) philosophical viewpoint "is the product of a consciousness which conceives of itself as autonomous and strives to become so." M. BUBER, *supra*, at 32. The religious tradition not only teaches something else, it also announces a moral objection to the striving for autonomy, on both religious and philosophical grounds, as idolatrous, as "the *worship* of freedom for its own sake," *id.* at 119-20, and as "[p]ower without faithfulness"—that is, the immoral use of persons as means to an end. M. FRIEDMAN, MARTIN BUBER: THE LIFE OF DIALOGUE 119 (1955). Thus Buber said that the price the West paid for the political consequences of the Enlightenment was the decay of *organic* forms of life such as family, village, and union in work. See *id.* at 123. We are left with the alienated world described by Franz Kafka. See M. BUBER, ON JUDAISM, *supra* note 8, at 131-32.

49. If will making is an example of "family things," then that fact also binds lawyers. The object of professional life is the goodness, not the freedom, of clients. Freedom is a necessary condition for goodness, but it is not the object of the enterprise. See Shaffer, *The Legal Ethics of Servanthood*, 8 SOC. RESP.: JOURNALISM L. MED. 34, 44 (1982); White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 873 (1983).

50. See M. GOLDBERG, *supra* note 8, at 103 ("[A]ny description of human existence that denies or underestimates the full repercussions of the community's life for the life of an individual offers an account which is in the last analysis no more than a fairy tale.").

51. B. MALAMUD, *DUBIN'S LIVES* (1979).

52. Milhaven, *An Experienced Value of Marital Faithfulness in Dubin's Lives*, 12 J. RELIGIOUS ETHICS 82, 94-96 (1984) (emphasis added); see *supra* note 43.

Radical Individualism

that morality is something we create through individual choice rather than the shaping of our lives through the disciplined discovery of the good."⁵³

To illustrate this shaping of lives in a disciplined discovery of the good, suppose in *The Case of the Unwanted Will* some further facts about Mary's purposes.⁵⁴ One of the couple's sons, Henry, was married for ten years to, and is now divorced from, a woman named Susan. Henry and Susan had children who now live with Susan, and Henry lives alone. John and Mary, however, remain fond of Susan and, despite the divorce, continue to be friendly with her. The lawyer's questions to John and Mary have brought this affection to the surface, but John, as is typical,⁵⁵ thinks of property and family together, and Susan no longer is in the family. During the joint interview, Mary sits silent while John says that they want "Henry's share" to go to Henry and, if Henry is dead, to his children. In the cases of the other children of John and Mary, says John, the child's share is to go to the child's spouse. What Mary says to the lawyer when they are alone, however, is that she wants her will to provide for Susan. Mary wants some of her family's property to be available for Susan, after Mary dies, when what is left of Mary will be in her fam-

53. S. Hauerwas, *How Christian Universities Contribute to the Corruption of Youth: Church and University in a Confused Age*, (Feb. 1986) (unpublished manuscript). Buber echoes the point:

[I]nstitutions of . . . personal life cannot be reformed by a free feeling (although this is also required). Marriage can never be renewed except by that which is always the source of all true marriage: that two human beings reveal the You to one another. It is of this that the You that is I for neither of them builds a marriage.

M. BUBER, *I AND THOU*, *supra* note 8, at 95.

54. It is important to hypothesize *something* about Mary's purposes. (The *A.B.A. Journal's* discussion did not.) Otherwise, she is a problem rather than a person. One could suppose, for example, a Gilbert-and-Sullivan plot, in which Mary has borne a child early in life, before she met John. The child has been adopted or is otherwise being cared for by others (and is therefore in another family). Mary nevertheless wants to provide for him in her will.

A friend of mine who is in full time law practice suggests another possibility:

I had a case where each spouse had children by a prior marriage. All of the children were adults. I prepared a rough draft of their wills in which they were treating each other's children equally with their own. One of the wife's two children then died. This had very unsettling effects and must have caused both of them to reexamine a lot of things. I am not sure of the thought process that took place, but each person then individually came to see me about the finalization of each person's will. In his will he disinherited two of his three children, leaving his estate to one child and the remaining child of his wife. The wife was not present when the husband made these decisions. The wife came to see me at a later time. Her husband had shown her his copy of his will. In her will, she left property to her child, the surviving spouse of her dead child, and her grandchild. In addition she also left property to her husband's children equally (including the two children her husband had disinherited). She also included a trust so that upon her death, her husband would be provided for, but would not have control over the assets She was not going to show him a copy. Perhaps she was looking through the cracked magnifying glass, seeing his and her family as a whole.

55. See Shaffer, *Slipped Feet*, *supra* note 11, at 196.

ily. Mary will be there, not because of a fictional notion about ownership, but because Mary did not die alone.

It is interesting to note how the narrative force of that statement about Mary's property changes as the case is described differently. Does Mary dispose of *her* property, *her family's* property, *her husband's* property, or *her children's* property? The point is that seeing and saying are moral and legal acts, and moral and legal arts.⁵⁶ The law is a language;⁵⁷ legal authority will support any one of these ways of speaking of this property, and any of the statements is a moral judgment, as, indeed, the word "property" is a moral judgment.⁵⁸

Mary's conception of the family includes Susan, both now and after Mary dies. Mary sees her death and her property together; the lawyer's questions have caused her to do that. The lawyer's skill includes the moral art of seeing, of "knowing what's what when we act,"⁵⁹ and of training his client in that moral art.⁶⁰ Mary looks at her property and her death through the broken magnifying glass of her family, and now she sees Susan *in* her family. The lawyer has caused her to remember to see in this way through the broken magnifying glass that is her family.⁶¹ The inquiry by the lawyer turned up this more truthful description of the family. Consequently, the lawyer's inquiry was a moral act, and the exercise of a moral art. To the extent that the quandary calls for a judgment about what the lawyer has already done, my argument is that he has begun to do a good thing. It is a good thing because it is a more truthful description of the reality that is the goal of the lawyer's work.⁶²

56. See *supra* notes 7 and 12.

57. See J. WHITE, *supra* note 30, at 231-74.

58. See *id.* at 263-71; White, *The Conversational Process of the Law*, LAW QUADRANGLE NOTES, Summer 1985, at 26, 30, 31.

59. See *supra* note 6 and accompanying text.

60. See *supra* note 4. White, in a similar argument, says Jane Austen trains her readers in kindness. See J. WHITE, *supra* note 30, at 190-91.

61. This is not "the outcome of a particularly legal negotiation," see *supra* note 26, but an exercise in description, or the product of a vision of reality, see *supra* note 17.

62. To see Mary as self-ruling (autonomous) and essentially alone is untruthful. Dworkin argues that the formulation of the principle of moral autonomy is either trivial or false. See Dworkin, *supra* note 46, at 57-58. The principle of autonomy also is paradoxical:

Consider the statement that moral agents ought to be autonomous. Either that statement is an objectively true statement or it is not. If it is, then there is at least one moral assertion whose claim to validity does not rest on its being accepted by a moral agent. If it is not, then no criticism can be made of a moral agent who refuses to accept it.

Id. at 161-62. Further, it is ahistorical and a false anthropology:

From the temporal perspective the commitments of my earlier self must bind (to some degree) my later self. It cannot always be open for the later self to renounce the commitments of the earlier self. This implies that even self-imposed obligations create a world of "otherness"—a world which is independent of my (current) will and which is not subject to my choices and decisions. The distance between my earlier and later selves is only quantitatively different from that between myself and others.

Id. at 164-65. It is unfactual, leaving culture out of account: "That I have obligations of gratitude to

Radical Individualism

It is more interesting, though, if *The Case of the Unwanted Will* must be seen as a quandary, to make it a quandary about what the lawyer should do now that the exercise of this moral art of seeing has described reality in such a way that the employment itself is a problem. Either multiple-client employment is no longer possible, or we must change our rule about when multiple-client employment is possible. The estate planning issue, therefore, is whether this family is equal to the truth of what it is. The legal ethics issue is whether this lawyer, employed by this family (which is now seen in this broken-magnifying-glass way), is to continue to have anything to do with the truth of what this family is.

I understand the objection that my way of describing the family, as the client, is patriarchal and therefore untruthful or unfair to married women. It is undoubtedly the case that much of conventional legal ethics is sexist. It is important nevertheless to identify the roots of the sexism, and to describe an ethic that is adequate to deal with sexism without being untruthful. I argue that the roots of sexism in legal ethics do not have to do with the family, or with the view of organic community that I urge here, but instead with the tellers of our stories. Fairness requires not stories that describe women outside of families, because our stories already say that that sort of story would be false,⁶³ but *women's* stories about families. With all our patriarchal self-deception, we property lawyers do seem able to accept the truth when it is described well. To know the truth, we need the stories told by Jane Austen, George Eliot, Anne Tyler, and family biographers such as Phyllis Rose⁶⁴ and Lis Harris⁶⁵—not as a substitute for family stories told by Trollope and Faulkner, but in addition to and in enlargement of their stories.

IV. The Communal Context

A. *The Lawyer for the Situation*

The proposed ABA rule on the lawyer as intermediary apparently

my aged parents, of aid to the stranger attacked by thieves, of obedience to the laws of a democratic and just state, of rectification to those treated unjustly by my ancestors or nation are matters that are independent of my voluntary commitments." *Id.* at 165. Dworkin concludes his criticism: "It is only through a more adequate understanding of notions of tradition, authority, commitment, and loyalty, and of the forms of human community in which these have their roots, that we shall be able to develop a conception of autonomy free from paradox and worthy of admiration." *Id.* at 170. Stephen Pepper is attempting this "more adequate understanding" in legal ethics. See Pepper, *supra* note 4.

63. See Hauerwas, *supra* note 8, at 63.

64. P. ROSE, *supra* note 47.

65. L. HARRIS, *HOLY DAYS: THE WORLD OF A HASIDIC FAMILY* (1985); see also M. GOLDBERG, *THEOLOGY AND NARRATIVE*, 13-15 (discussing C. CHRIST, *DIVING DEEP AND SURFACING* 137 (1980)); Gilbert, *From Our Mothers' Libraries—Women Who Created the Novel*, N.Y. Times, May 4, 1986, § 7 (Book Review), at 30.

derives from Geoffrey Hazard's description of stories from the private law practice of Louis D. Brandeis.⁶⁶ Brandeis, however, did not say lawyer "as intermediary"; he said lawyer "for the situation."⁶⁷ Brandeis first used the singular word "situation" to describe a bankruptcy case involving a family business. This pattern of thought (and of practice), no doubt, was evident also in Brandeis' estate planning and probate and trust work for the Warren family. If his work is divided according to the norm that a lawyer is employed by the individuals in a family rather than by a family as a whole, then at one time or another Brandeis was lawyer for the senior Mr. Warren (founder of the family business), for Mr. Warren's wife, for Mr. Warren's estate, for the testamentary trust established in Mr. Warren's will, for temporary entities created (through Brandeis' work) to manage the family business, and for individual members of the family in the second generation.⁶⁸ Brandeis first used the word "situation" in the Senate hearings on his nomination to the Supreme Court, when he was defending himself against the charge that his representation during the bankruptcy of a family business demonstrated that he did not know who his client was.⁶⁹ In other words, Brandeis had violated the norm that a lawyer represents only individuals, except on extraordinary and necessarily superficial facts. He was asked who (singular) his client was. And, in answer, he chose the word "*situation*."

Joseph Fletcher later used the word "situation" to advocate a modern version of contextual religious ethics,⁷⁰ an ethics that puts particular stress on being truthful about what is going on, and that bases moral judgment on the context described in this truthful way.⁷¹ The key point of distinction for present purposes is that contextual ethics denies the distinction between fact and value. When Brandeis used the word that Fletcher would use later—*situation*—he accomplished several things. He

66. G. HAZARD, *supra* note 2, at 58-68.

67. See Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965).

68. See *id.* at 699-703, 708-09.

69. *Hearings Before the Subcomm. of the Senate Comm. on the Judiciary on the Nomination of Louis D. Brandeis to Be an Associate Justice of the Supreme Court of the United States*, 64th Cong., 1st Sess. 287 (1916).

70. See J. FLETCHER, *supra* note 6, at 26-37.

71. See *supra* note 4. Fletcher made his argument within a modern school of ethics that exerts almost as much influence over religious ethics as Immanuel Kant's ethics of autonomy exerts over academic philosophical ethics. I mean the "school" (now in at least its fifth intellectual generation) of H. Richard Niebuhr of the Yale Divinity School, which is often identified as one part of a modern "ethics of responsibility." See A. JONSEN, *RESPONSIBILITY IN MODERN RELIGIOUS ETHICS* 140-46 (1968). See generally H.R. NIEBUHR, *THE RESPONSIBLE SELF* (1963). Fletcher, Hauerwas, and McClendon, see *supra* note 17, belong to that school, as does Goldberg, see *supra* notes 8, 65. The Niebuhr school's influence is manifest more in religious ethics than in academic moral philosophy, although the moral philosophers Pincoffs, see *supra* note 17, Murdoch, see *supra* note 7, and MacIntyre, see *supra* note 4, sympathize with much of it.

Radical Individualism

made a moral judgment about what was going on in the Senate hearings concerning a moral judgment he had made years earlier when confronted with the fact that the human harmony he had perceived or created was falling apart. Brandeis had decided originally that the human harmony was sufficient to be his client, and might have been (as the Warren family was) something prior even to the people he met when he decided that, together and not alone, they could be his client.

Brandeis thus looked at what he had done through a broken magnifying glass such as the Warren family, and he approved of it. The hounding senators failed in the attempt to make him ashamed of himself.⁷² He rejected their implicit argument that a lawyer should be employed only by individuals. No doubt he considered, in rejecting the implicit argument, that the harmonies people create often become inharmonious, but he nonetheless decided that his initial hope for their harmony was justified. This hope, I take it, inspired Hazard to suggest a legal ethic to accommodate the harmony.⁷³ The harmony assumed importance because it rested in part on a common reality prior to the individuals with whom Brandeis dealt—the same individuals who later quarreled and used the law against one another—and in part on a hope for this common reality.⁷⁴

Hazard understood from the Brandeis stories a coherent ethical argument about lawyers who are employed by groups, prototypically families. I infer that, in Hazard's opinion, the argument from the Brandeis stories was coherent enough to justify a new regulatory rule and a reasoned justification for the rule; the bar association politicians took it

72. Hazard suggests that one reason for the collapse of this attack on Brandeis was "concessions from other reputable lawyers that they had often done exactly as Brandeis." G. HAZARD, *supra* note 2, at 61. If Brandeis was wrong about "lawyering for the situation," then he certainly violated the rules of professional conduct. "But if Brandeis was right, and the record of good practitioners testifies to that conclusion, then what is required is not interdiction of 'lawyering for the situation' but reexamination of what is meant by loyalty to the client." *Id.* at 64.

73. *See id.* at 65 ("When a relationship between the clients is amenable to 'situation' treatment, giving it that treatment is perhaps the best service a lawyer can render to anyone.").

74. Lawyering for the situation is thus different from lawyering for an individual client. It provides no "structure of goals and constraints imposed from outside. The lawyer and the clients must create that structure for themselves, with the lawyer being an active participant." *Id.* at 66. This assertion is overstated to the extent that it fails to recognize that culture and tradition provide a structure of goals and constraints. My argument here is not sentimental; it is anthropological. *See supra* note 35. One of Iris Murdoch's fictional characters (Bradley Pearson) notices the structure of culture and tradition in a doleful, almost Calvinist way.

The wicked regard time as discontinuous, the wicked dull their sense of natural causality. The good feel being as a total dense mesh of tiny interconnections. My lightest whim can affect the whole future. Because I smoke a cigarette and smile over an unworthy thought another man may die in torment.

I. MURDOCH, *THE BLACK PRINCE* 98 (1973).

from there.⁷⁵ If the result is ambiguous, as I think it is, it is not because the stories from Brandeis' life are ambiguous. Brandeis did not regret being a family lawyer. Nor did he regret the hope he had for families. He was, after all, by the time of the Senate hearings actively aware of his Jewish heritage, and, in Israel, "[t]he family is the nursery of the race."⁷⁶ He also was involved then in the Zionist movement, and in the American labor movement.⁷⁷ Both are things of families and of family metaphors.

Estate planning cases such as *The Case of the Unwanted Will* benefit more from Brandeis' understanding that a lawyer can be, and often is, a lawyer for the situation, than from the ABA's new regulatory rule, a pale vestige of Brandeis' understanding. We can transfer our insights from Brandeis' practice, and from what he said about it in retrospect, to the story of John and Mary in the law office. If John's and Mary's circumstances constitute a problem or a quandary, then the solution suggested by the Brandeis story is that Mary's secret purpose belongs *in* the family. Being a family means taking purposes and secrets into account, because being in a family means primarily that a person is *known*, even before she knows. (Susan is known; that fact presents the issue in the case.) The job of the lawyer for the family properly includes the description, in the language that is the law, of what a family knows, of what a family is, of what *this* family is. The job involves skills the lawyer, when young, may not have thought about—skills, though, that older lawyers use and teach to the young.

In *The Case of the Unwanted Will*, the most *irresponsible* thing a lawyer could do is to send either of these people to another lawyer, or both of them to two other lawyers. If that is the command of our professional ethics, or even the easiest available "solution" to the case from our regulatory rules, then our ethics and our rules are corrupting. They corrupt the family in general, and *this* family in particular. A lawyer following the rules is irresponsible because in fact, the family is the lawyer's client. The lawyer who sends the family away is not able to respond to his client. He is disabled by a false ethic and, in trying to protect himself, he harms his client. My argument rests on the conviction that a family is something worth representing; the conviction is shown in, and is the product of, the stories we tell about ourselves, including deep and complex stories such as Anne Tyler's, and shallow and simple stories such as those we see on television.

75. Hazard, the reporter to the A.B.A. Commission on Evaluation of Professional Standards, was, I think, the principal intellectual force behind the early drafts.

76. S. COHON, *JUDAISM: A WAY OF LIFE* 166 (1948).

77. See A. VORSPAN, *GIANTS OF JUSTICE* 26 (1960).

Radical Individualism

In estate planning, and in much of business planning and corporate representation (to mention only a few examples), lawyers are invited to consider the changes that arise because members of families own things, gather wealth from things, and then grow old and die. If the social order is threatened by a disappearing moral consensus, or because our philosophers have so ravaged our language that we no longer can describe our moral consensus,⁷⁸ and if our organic communities are made fragile by the illusory promises of democratic liberalism, the result is not a world of lonely individuals, but a world in which groups like families are on cultural desert islands. As Robert N. Bellah and his colleagues describe this perception, "the family is no longer an integral part of a larger moral ecology tying the individual to community, church, and nation. The family is the core of the private sphere, whose aim is not to link individuals to the public world but to avoid it as far as possible."⁷⁹

Anne Tyler's most recent novel, *Accidental Tourist*,⁸⁰ demonstrates Bellah's point. Macon's wife Sarah says to him: "If you could live any way you wanted, I suppose you'd end up on a desert island with no other human beings." Macon says that is not so: "I'd have you, and Ethan [his son], and my sister and brothers." And Sarah says, "But no people. I mean people there just by chance."⁸¹ Sarah was not looking through the broken magnifying glass; Macon was. He knew he was not alone.

Collective isolation probably is not good politically, nor is it an adequate premise for a professional ethic that ignores the realities of the communities that we, in our communal isolations, have. These communities are what we present to our lawyers. Lawyers who are invited into such (to use Brandeis' word) situations are invited into sacred places. They are all the more sacred to the extent that these human harmonies somehow survive in a commonwealth of strangers. The moral principle, if we still need a principle after we see the reality, is that lawyers should endeavor in such places not to make things worse.

I confess that this view of the world seems to disturb law students;⁸² it is, however, a view of things that brings nods of approval from the older lawyers I meet in professional gatherings—lawyers who have more experience than I or my students in ordinary, county-seat, Wednesday-afternoon law practice. It is possible—although this is boasting—that

78. See, e.g., A. MACINTYRE, *supra* note 4, at 1-5; J. WHITE, *supra* note 30, at 278-85; REVISIONS, *supra* note 4, at 2-15.

79. R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWINDLER & S. TIPTON, *HABITS OF THE HEART* 112 (1985) [hereinafter R. BELLAH].

80. A. TYLER, *supra* note 1.

81. *Id.* at 48-49.

82. See T. SHAFFER, *TEACHER'S GUIDE TO AMERICAN LEGAL ETHICS* 81-84 (1985).

the reason this perspective disturbs students is that it has moral substance for professional ethics, a subject that often has no substance except as a branch of administrative or criminal law. It is also possible that what is uncomfortable, in the family perspective on cases like *The Case of the Unwanted Will*, is the realization that the issues we identify as we discuss the morals of lawyers are sticky and uncertain. It is much easier for a lawyer to behave as if he were a clerk in a driver's-license office than to behave as someone who invites trust from families and then charges by the hour for accepting it.

What perhaps makes a family perspective on the law office appealing is not its ideology, but its truthfulness.⁸³ In estate planning, the family-lawyer perspective on will making (and on corporate practice) is relatively truthful because it takes account of the shared reality of death seen with property, and property seen with death; that shared reality is thus not a private fate or even an experience we need to talk about in the singular. We cannot take it with us, but we need not die alone.

B. *Values Destroyed by Death*

I have used in my teaching of wills and trusts a remarkable article from research psychology called *Values Destroyed by Death*.⁸⁴ Diggory and Rothman, the authors, asked several thousand people to choose from among seven consequences of dying the one that seems most distasteful.

The consequence of my own death that seems to me most distasteful is:

- A. I could no longer have any experience.
- B. I am uncertain as to what might happen to me if there is a life after death.
- C. I am afraid of what might happen to my body after death.
- D. I could no longer care for my dependents.
- E. My death would cause grief to my relatives and friends.
- F. All my plans and projects would come to an end.
- G. The process of dying might be painful.⁸⁵

83. Cf. *supra* text following note 62 (discussing the consequences of a society's acceptance of the untruthful ethics of autonomy). Bellah and his colleagues do not argue that Americans try to regulate their lives according to the ethics of autonomy or even that they accept the suppositions that lie behind liberal democratic political theory. See R. BELLAH, *supra* note 79. Instead, the connection between our traditions and the way we live our lives has faded, taking with it our power to explain what we do. As a consequence, we can use only sappy words such as "lifestyle," and fatuous words such as "autonomy," to try to account for ourselves. These attempts at self-description and self-justification fail because we do not know what we are doing.

84. Diggory & Rothman, *Values Destroyed by Death*, 63 J. ABNORMAL & SOC. PSYCHOLOGY 205 (1961).

85. *Id.* at 205. I invite the reader to participate in this exercise. First, answer the question as if you had been casually stopped on the street. Then answer the question again as if you were a client talking to a lawyer about estate planning.

Radical Individualism

Diggory and Rothman reported that, when stopped on the street, people most often chose one of two answers:

- A. I could no longer have any experience; and
- E. My death would cause grief to my relatives and friends.⁸⁶

In talking with will clients and with the lawyers who work with them I have found that there is a difference in answers to the question when it is put to persons involved in estate planning. According to my unscientific replication of the study, when people were thinking about estate planning the top answers were:

- D. I could no longer care for my dependents; and
- F. All my plans and projects would come to an end.⁸⁷

I conclude that this disparity is evidence of two shifts. First, the concern about experiences becomes a concern for projects; the perspective changes from such things as “the Aspen ski experience” to working. Second, the concern for causing grief becomes a concern for the protection of families through wills, trusts, and life insurance.

In both cases, working at estate planning is a way to look at death and at property. The death of a property owner is not a private matter or a matter of survival through things. It is, rather, a matter of survival through those who are supported by work—usually (normally *and* normatively) through a family. The “situation” that Brandeis discussed,⁸⁸ when seen in cases like *The Case of the Unwanted Will*, is a reality as much as the people themselves. In fact, the family is the deepest and most pervasive reality in social life.⁸⁹

86. *Id.* at 206-09.

87. See T. SHAFFER, DEATH, PROPERTY, AND LAWYERS 71-106 (1970).

88. See *supra* subpart IV(A).

89. The importance of the family even in modern social life is apparent in S. STOFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES (1963). Stouffer attempted to determine whether there was in America a national anxiety over communism, using an elaborate polling procedure that involved thousands of respondents and hundreds of interviewers. See *id.* at 15-19. The study found little anxiety about communism, even in the days of Senator Joseph McCarthy's anticommunist enterprise and the activities of the House Un-American Activities Committee. *Id.* at 54-55. Less than 1% of a sampling of Americans in several categories mentioned communism. *Id.* at 59, 68-70. The greatest aggregation of worry was, as Anne Tyler would have predicted, about the family. *Id.* at 59. 43% of the subjects said they were worried about personal matters that had to do with the family, with family matters collectively described, or with family businesses. *Id.* at 60. The family predominated in the responses that Stouffer quoted verbatim, even in those examples that were identified as personal (*i.e.*, individual) by Stouffer. See *id.* at 60-65 (most of the responses he classified as personal were related to support of dependents). Only 8% of Stouffer's respondents mentioned world affairs, and of those, most of the answers reflected or included concern about what would happen to members of the family in war. *Id.* at 81-82.

Stouffer's interview questions initially were open-ended, and then narrowed into the categories that had provoked the study. Here are examples of Stouffer's questions:

3. What kinds of things do you worry most about?

....

V. The Influence of the Religious Tradition

A. Paternalism

There are trends in both popular and scholarly views of families. The popular trends are evident, for example, in the movement over the last generation to television situation comedies about black families and away from series about doctors and lawyers, which in turn had replaced series about towering pine trees and cowboys in saloons. Fashion and change in fashion are evident among ethics scholars too—prominently with regard to what has been said about paternalism.⁹⁰

Paternalism, in most writing on the professions, is a bad word. But *pater* (father) is not a bad word. The Hebraic religious tradition chose and retains the word, if only as metaphor, to describe God, despite the difficulty of a theology of patriarchy.⁹¹ The description approximates with a family metaphor the understanding of the Hebrew prophets that the God of Israel is a God with feelings—the “divine pathos,” as Abraham Joshua Heschel called it.⁹² God’s pathos means that He feels as a

5. Are there other problems you worry or are concerned about, especially political or world problems?

.....

7.

B. Were there other things? For example, did you talk about any dangers facing people in the United States?

8. Here is a list of topics which have been discussed in the papers recently.

A. Which ones do you remember talking about with your friends in the last week or so?

1. Atom or hydrogen bombs
2. Communists in the United States
3. Crime and juvenile delinquency
4. Danger of World War III
5. Farm prices
6. High prices of things you buy
7. High taxes
8. Negro-white problems
9. Possibility of another depression
- X. Threats to freedom in the United States
- Y. None of these, don't know

B. Which one on that whole list seems most important to you?—whether you talked about it or not.

C. Which one seems next most important?

Id. at 250.

Stouffer’s study uncovered truths we do not see when we adopt the language of radical individualism. See R. BELLAH, *supra* note 79, at 84 (“We find ourselves not independently of other people and institutions but through them. We never get to the bottom of our selves on our own. We discover who we are face to face and side by side with others in work, love, and learning.”).

90. For sources evaluating paternalism in health care, see J. CHILDRESS, WHO SHOULD DECIDE? PATERNALISM IN HEALTH CARE (1982); W. MAY, THE PHYSICIAN’S COVENANT: IMAGES OF THE HEALER IN MEDICAL ETHICS (1981).

91. See, e.g., E. SCHUSSLER FIORENZA, IN MEMORY OF HER: A FEMINIST THEOLOGICAL RECONSTRUCTION OF CHRISTIAN ORIGINS 53-56 (1985); Wire, *Economics and Early Christian Voices*, 19 PAC. THEOLOGICAL REV. 15, 41-42 (1985).

92. A. HESCHEL, *supra* note 10, at 51 (“The ultimate is not a law but a judge, not a power but a father.”).

Radical Individualism

father feels; the prophetic response to God is thus *sympathy*.⁹³ Father, consequently, is not a bad word; it cannot be. Writers on professionalism erred in thinking otherwise.

It is not a moral condemnation of standards of professional conduct, then, to call them “fatherly” (paternalistic); nor would it be a moral condemnation to call them “motherly” (maternalistic) or even parent-like (parentalistic). If we take our theological metaphors seriously, to analogize behavior to the parental is to fit it to our traditions. The retreat from parental metaphors in modern writing on professionalism is subject to two criticisms. First, the analysis has not proceeded deeply enough; writing on professionalism has been duped into announcing a moral principle when it should have been concerned with description—truthfulness—in the comparison of a professional person and a parent, and of the virtues of good parents and the failures of bad parents. Writing on professionalism should describe the moral reasons that we use family metaphors, in theology and in professional life and it then should turn those reasons into doctrine. Second, the condemnation of paternalism (parentalism) in modern writing on ethics in the professions is the product of the lonely-individual doctrine in philosophical ethics, and of the philosophical distinction between fact and value, particularly in its disposition to turn the parental metaphor into a moral principle.⁹⁴

Radical individualism is the philosophy of an adolescent who wishes he had no parents. The school of moral philosophy that posits a parentless moral agent duped us into accepting an untruthful description of the world. I notice that untruthful description in *The Case of the Unwanted Will*, when legal-ethics commentators describe the woman making the will as a radical individual rather than as a wife, a mother, and a member of a family. The alternative is to understand enough about oneself and one’s client to know that family words describe more than a set of social roles that a woman puts on as she might put on a hat.

The argument I make here is an argument from the Hebraic religious tradition. In Judaism, the family is not merely fundamental; it is ordained. God dealt with the family; He made a covenant with it. Israel is a family of families.⁹⁵ This “master story”⁹⁶ has innumerable implications, some obvious and some subtle, for Hebraic norms on sex, raising children, business and property, and inheritance. These implications

93. See *id.* at 116-24.

94. Paternalism in a narrow sense is consistent with the ethics of autonomy. See J. CHILDRESS, *supra* note 90, at 8-10 (giving the example of a father who respects his children). The ethics of autonomy speaks of these relationships in terms of freedom of choice.

95. See *supra* note 28.

96. See M. GOLDBERG, *supra* note 8; *supra* note 28.

turn on the moral teaching that a person alone is not complete; as the Midrash says, "He who lives without a wife lives without blessing, without life, without joy, without help, without good, and without peace."⁹⁷

In Christianity, marriage is, in the Hebraic ethics of Jesus, so fundamental that it is sinful to dissolve it.⁹⁸ St. Paul's metaphors equate family and church, and speak of the church as the body of Christ.⁹⁹ The early Christian church was a patriarchy that tried to be open to notions of equality and partnership *within* the metaphor of family.¹⁰⁰ That aspiration was fundamentally Judaic: "[U]nity is a task . . . to endure means to be *one*."¹⁰¹

There are two ways to take account of the religious tradition in American legal ethics. One way is to note that the cultural deposits of most American lawyers include the religious tradition. Failing to take account of the tradition therefore is failing to be truthful. As Peter Berger put it, "The very least that a knowledge of religious traditions has to offer is a catalogue of heresies for possible home use."¹⁰² That is, the religious tradition, when we are conscious of it, helps to keep us from repeating obvious moral mistakes and, more profoundly, it influences our behavior when we are not conscious of it. Berger thought that these influences were appropriate: "[I]n everyday life it is just as important that some things can silently be taken for granted as that some things are reaffirmed in so many words."¹⁰³ In that sense, law-office behavior probably rests on religious tradition in an ordinary and everyday way. The risk in Berger's reassurance, as Robert Bellah and his colleagues recently demonstrated, is that we will lose or distort influences that we do not bring into the light and make sense of.¹⁰⁴ The work of bringing moral influences into the light and making sense of them is the purpose of the discipline of ethics.

Muddled thinking about conflicts of interest in estate planning and in legal work for associations that account for themselves with the metaphor of family illustrates Bellah's point. This muddled thinking is like Gerald Dworkin's analysis of Sartre's World War II French patriot.¹⁰⁵ The patriot had to choose (as Sartre saw it) whether to stay at home in a

97. OUR MASTERS TAUGHT: RABBINIC STORIES AND SAYINGS 87 (J. Petuchowski trans. & ed. 1982) (quoting *Midrash Tehillim* LIX).

98. See 1 *Corinthians* 7:10-11.

99. See *Ephesians* 5:21-33.

100. See Norquist, *Family Dynamics in the Bible*, SEASONS, Summer 1984, at 3, 3.

101. A. HESCHEL, *supra* note 10, at 102-03.

102. P. BERGER, *A RUMOR OF ANGELS* 78 (1969).

103. *Id.* at 36.

104. See *supra* note 83.

105. Dworkin, *supra* note 46, at 159-60.

Radical Individualism

country occupied by the German army to care for his aged mother, or to join the Free French abroad. Sartre saw the story as posing a prototypical dilemma in the ethics of autonomy; he argued that the patriot had to choose what to do, and that the morals governing choice were morals because the patriot chose them.¹⁰⁶ Dworkin said that the dilemma existed only because of deeper moral realities: the family, and a nation that demanded patriotism.¹⁰⁷ To dispose of either of those realities is to dispose of the dilemma.

In *The Case of the Unwanted Will*, to dispose of the family in the will client's life, so that her relationship with her former daughter-in-law is a human harmony that stands independent of a larger harmony, is to eliminate the dilemma. She then will make her will alone; indeed she will probably not visit the office with her husband in the first place. To dispose of her continuing attachment to this other woman who in the law is no longer her daughter, is to say that she will accept the will that has been drafted for her. In either of those situations it would not occur to anybody that the law-office routine had anything moral about it. But, of course, and in *any* case, it does have something moral about it. Bellah's point is that we will lose the force of that reality if we lose the words to make ourselves aware of it. And as we lose the force of the reality of our harmonies, we lose the skill for seeing them in extraordinary cases, in, as Brandeis and Fletcher said, situations.¹⁰⁸

The second way to take account of the religious tradition in legal ethics is not as a contribution to liberal democracy or a corrective to radical individualism, but as a radical alternative. As Stanley Hauerwas put it in reference to Christians, Christians should

be the sort of people and community that can become a real option and provide for real confrontation for others. Unless such a community exists, then no real option exists. The manner of providing such an option, moreover, entails that Christians go to every land and every people in the hope that they can elicit a real confrontation on matters that matter.¹⁰⁹

An interesting and parallel statement about Judaism could be made here, one that would show how Jews also provide an alternative to the world,¹¹⁰ and how the Christian witness and evangelism to which

106. J. SARTRE, *Existentialism*, in *EXISTENTIALISM AND HUMAN EMOTIONS* 24 (1957).

107. Dworkin, *supra* note 46, at 160.

108. See *supra* Part IV(A).

109. S. HAUERWAS, *supra* note 8, at 105.

110. See M. BUBER, ON JUDAISM, *supra* note 8, at 124-25, 211; see also L. HARRIS, *supra* note 65 (Harris' narrative account of the religious lifestyle of a Hasidic family from Brooklyn, New York, presenting one example of a Jewish alternative in the world).

Hauerwas alludes to its roots in Israel, and in Jesus of Nazareth's life and death in a Jewish family.

Either account of the religious tradition's influence in legal ethics affirms the reality of the family metaphor: God is not a premise; He is the Father.¹¹¹

I do not argue that one of these ways is as useful for legal ethics as the other. If I were to compare them, I would argue that only the latter view, the religious tradition explicated not as a corrective but as a radical alternative in the world of lawyers, is adequate. But either view identifies the religious tradition in ordinary, Wednesday-afternoon law practice.¹¹² Both ways show the fundamental importance of family to an adequate legal ethic in the culture of modern American lawyers.

The example I have used is an estate planning example. Estate planning is seen as family based rather more easily than personal injury claims or securities registration; in fact the irony of most writing about ethics in estate planning is that it describes family situations (as *The Case of the Unwanted Will* does), or encounters an association that wants to think of itself as a family, and then resolves them without reference to the family they claim and come from and go back to. Putting the family back into ethical discussion—*finding* it where it is or where it claims it wants to be—among lawyers would be, even in the most modest catalogue-of-heresies use of the religious tradition, a matter of describing what goes on. A radical use of Hebraic religious tradition would cut more deeply, affect more globally, and disturb profoundly. For that reason, even we believers do not like to think about it.

B. *A Biblical Estate Planning Story*

Judah was under siege by the powerful armies of Babylon. God told the prophet Jeremiah, and Jeremiah told Judah, that Jerusalem would fall and be destroyed and its people taken away in captivity. Jeremiah's countrymen imprisoned him for telling them about the fate of Judah. God then ordered Jeremiah to buy a piece of land—or, rather, to exercise his legal right to redeem land that had belonged to his uncle. Jeremiah obeyed: He paid for the land, obtained the deed from his cousin, and had the deed witnessed by his fellow inmates. Jeremiah then ordered his secretary, Baruch, to

111. See H. THELICKE, *BETWEEN GOD AND SATAN* 40 (1958); see also M. BUBER, *I AND THOU*, *supra* note 8, at 129 (“[W]hat confronts us immediately and first and always . . . can only be addressed, not asserted.”).

112. See, e.g., Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 *VILL. L. REV.* 957, 975 (1978).

Radical Individualism

take these copies of the deed of purchase, the sealed and the unsealed, and deposit them in an earthenware jar so that they may be preserved for a long time. For these are the words of the Lord of Hosts the God of Israel: The time will come when houses, fields, and vineyards will again be bought and sold in this land.¹¹³

In this story, the symbol of the covenant that God will renew with His people, when He will “plant them in this land,” is a Wednesday-afternoon legal transaction within a family. The transaction will lay proved in an earthenware jar until the family—the *family*, not the parties, who will all be dead by then—will come back to Jerusalem.

113. *Jeremiah* 32:1-25 (New English Bible).