Abandonment of the rules produces monsters; so does neglect of persons.1

This is an Essay about the ethics of lawyers and judges. In Part I, I examine the diverse moral orientations of practicing lawyers. In Part II, I present the familiar Biblical story of the wisdom of Solomon as a case study of these differing orientations. In Part III, I draw several lessons from this story for legal ethics and, by implication, for ethics in general.

I conclude that legal ethics should embody both a moral orientation that stresses rights and rules, and the contrasting yet complementary orientation that places greater value on preserving relationships and avoiding harm. The moral life of lawyers encompasses more than mere compliance with codes of professional conduct. Caring also matters.

I. THE ETHICS OF RIGHTS AND THE ETHICS OF CARE

In their book, Moral Vision and Professional Decisions,2 Rand and Dana Crowley Jack examined the moral orientations of practicing lawyers. Their interviews with several dozen lawyers revealed sharply divergent perspectives on what it means to act morally. Some lawyers follow an ethics of rights and others an ethics of care.3

The work of Jack and Jack builds upon an important distinction among developmental psychologists. One group, identified with Law-
rence Kohlberg, envisions moral development as a hierarchical progression culminating in a commitment to individual rights and impartial justice. A second group, associated with Carol Gilligan and her pioneering study, In a Different Voice, argues that Kohlberg is wrong to gauge moral maturity primarily in terms of adherence to impersonal rights and duties. Instead, Gilligan holds up the centrality of relationships and caring for the moral life. "This conception of morality as concerned with the activity of care centers moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules."

Instead of stressing competition, as does the ethics of rights, the ethics of care emphasizes cooperation; instead of rights, responsibilities; instead of formal and abstract thinking, contextual reasoning; instead of the fair resolution of disputes, the avoidance of harm. Gilligan goes on to argue that these contrasting moral orientations are linked at least in part to gender, with males more likely to adopt an ethics of rights and females an ethics of care.

A concise summary of the two orientations is provided by Naomi Cohn:

The rights orientation hypothesizes that the individual is a

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4. Kohlberg's main contribution to moral psychology lies in his claim that there is a culturally universal sequence of stages of moral development. Kohlberg identifies six stages, ranging from the "preconventional level," where ethics is a matter of responding to cultural rules of good and bad, to the "postconventional, autonomous, or principled level," where "right is defined by the decision of conscience in accordance with self-chosen ethical principles appealing to logical comprehensiveness, universality, and consistency." These self-chosen principles are abstract not concrete. L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE 19 (1981). Other important works are L. KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT (1984); Kohlberg, Stage and Sequence: The Cognitive-Developmental Approach to Socialization, in HANDBOOK OF SOCIALIZATION: THEORY AND RESEARCH 347-480 (D. Goslin, ed. 1969); Kohlberg & Kramer, Continuities and Discontinuities in Childhood and Adult Moral Development, 12 HUM. DEV. 93 (1969).


7. C. GILLIGAN, supra note 5, at 19.

8. R. JACK & D. JACK, supra note 2, at 11. A good overview of the differences in the two perspectives can be found in R. JACK & D. JACK, supra note 2, at 5-12. Following Jack and Jack, I will refer to rights- and care-orientations. See id. at 196 n.15. Gilligan herself prefers to speak of justice or fairness and care.
"moral" agent who "stands . . . against a ground of social relationships, judging the conflicting claims of self and others against a standard of equality," while the care perspective is "grounded in the assumption that self and other are interdependent . . . the self is by definition connected to others." The consequences of the rights paradigm lead to a framework in which decisions are made through a logical hierarchy of duties. The care paradigm might lead to balancing caring for oneself with caring for others, and managing conflict without hurting continuing relationships. For those who use a contextual analysis, moral problems arise from conflicting responsibilities rather than from competing rights. Their resolution requires a way of thinking that is contextual and narrative, not formal and abstract.9

Jack and Jack's work is an application of Carol Gilligan's theories to the practice of law. They discovered that while some lawyers conceive of ethics primarily as a matter of following the "rules of the game" embodied in the adversary system and the codes of professional responsibility,10 others are more concerned with minimizing harm and preserving relationships. Consistent with the work of Gilligan, they found that female lawyers were more likely than males to see their roles refracted through the prism of care and relationships.11

The contrast between the ethics of rights and ethics of care can best be understood by examining a concrete illustration from Jack and Jack's book. In their study, they asked lawyers to comment upon a series of hypothetical and real-life moral dilemmas. In one hypothetical case, the lawyers were asked to imagine that they were


11. R. JACK & D. JACK, supra note 2, app. II at 188-95. Jack and Jack found that twenty-three percent of male attorneys and sixty-four percent of females held a general care-orientation, while seventy-seven percent of males and thirty-six percent of females held a rights-orientation. Id. at 188. At the same time, the authors caution that "[a]lthough there is a significant likelihood that women will have a care orientation and men a rights orientation, these moral worlds are reversed for a number of men and women in our society. There are men who use primarily a care viewpoint and women who tend to see the world in terms favored by Kohlberg." Id. at 10.

For an examination of some of the ways that the legal profession might be transformed by the recent influx of female lawyers, see Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyer Process, 1 BERKELEY WOMEN'S L.J. 39 (1985).
representing a client in a divorce action. The client was seeking custody of the two children from the marriage. In the course of the representation, the attorney inadvertently discovers that the client presents a risk of serious bodily harm to the children. The information is not known and will not become apparent to the other side unless the attorney reveals it. If the information is not revealed, then the attorney's client will win the custody battle, while the other party will likely prevail if the information is revealed. In the attorney's own mind there is no doubt that the other party is a superior parent.

When lawyers were asked to respond to the dilemma, some emphasized client rights and the lawyer's role in an adversary system of justice, while others emphasized care and concern for the children. For example, one male lawyer described the dilemma in the language of rights and duties:

Well, it's not a moral issue for me, it's a legal issue for me. . . . On the one hand I've got a client privilege to protect, and on the other hand, the law says that I've got the best interests of the child to protect. I mean it's not even a moral issue anymore. It becomes a legal issue about what to do in the circumstances. You've got two competing issues. . . . I guess most of the time that things are falling in favor of the fact that I have an ethical and legal responsibility to my client, and that's the position I take.

In contrast, a female lawyer responded using the language of the ethics of care:

Well, the moral issue is I don't want to participate in increasing the hazard to a child; the ethical issue is whether you perpetrate fraud on the court. And I find that I can resolve the two very well together. I mean, it's not money we're talking about here. We're talking about people, and you can't undo it. When you're talking about money and maybe it's damages, people will sort it out and pick it up and go on; they can redo. You can't undo an incidence of violence. You can't undo something like that for a child. You can't undo what's going to happen for the rest of their lives.

12. R. JACK & D. JACK, supra note 2, at 78.
13. The hypothetical is discussed in R. JACK & D. JACK, supra note 2, at 24-25, 78-88, 116-18, 124-25. For an illuminating discussion of the lawyer's responsibilities when the lawyer's client has special obligations to a third party, see Hazard, Triangular Lawyer Relationships: An Exploratory Analysis, 1 GEO. J. LEGAL ETHICS 15 (1987).
14. Id. at 82. The response of this attorney to the divorce hypothetical was indicative of males in general. Seventy-six percent of males expressed a rights-orientation and only twenty-four percent a care-orientation. Id. at 190 (Figure 4).
15. Id. at 82. Fifty percent of female attorneys expressed a care-orientation and fifty percent a rights-orientation. Id. at 190 (Figure 4).
The first attorney approaches the dilemma from the perspective of his role as a neutral partisan in an adversary system. Even though he admits that the best interests of the children are relevant, "his framing the situation as a legal issue frees him from the necessity of a moral response." He brings some objectivity to the problem, but fails to appreciate the context or the consequences for the children.

In contrast, the second attorney recognizes both her ethical duty to the court and her moral responsibility towards the children. The terrible consequences for the children provide a direction to her thinking. "Who will be harmed? How seriously? What will happen to relationships?" These are the questions she asks herself. Unlike the first attorney, her thinking is contextual: She "burrows into the specifics of the situation," and evinces a concern for the way in which her actions will affect the lives of the children.

Jack and Jack concede that "[n]early everyone combines some degree of rights- and care-oriented moral thinking." Rights and care are seen as points on a spectrum, with individual lawyers being inclined more to one orientation or the other. When confronted with a specific ethical problem, such as whether to breach client confidentiality to avoid harm to others, one or the other perspective usually dominates, but in other cases the two orientations may coexist or be integrated. Furthermore, "[t]he categories of rights and care

16. Id. at 82.
17. Id. at 82-83.
18. Id. at 82.
19. "She evaluates the central issue as one of lasting harm, and thus as necessitating a moral response." Id. Jack and Jack note that the ethics of care gives more attention to outcomes than does the ethics of rights. Id. at 8-9.
20. Id. at 8-9.
21. Id. at 82. For the important role that "contextual particularity" plays in an ethics of care, see C. GILLIGAN, supra note 5, at 100-01. For a discussion of the contextual approach in legal ethics, see Cahn, 4 GEO. J. LEGAL ETHICS at 23. See also Davis, Rich Cases: The Ethics of Thick Description, 21 HASTINGS CENTER REPORT 12, 15 (1991) (stating "we need thick descriptions to allow cases to remain open to differing interpretations over time, and also to enable cases to ground an ethics of care.").
22. Another example comes from Gilligan's own work. Hilary, one of the women in Gilligan's study, was a lawyer who faced an ethical problem when her opposing counsel overlooked a document that was critical to the opponent's case. Hilary found herself caught between her own strong care-orientation and the ethics of rights that dominates the legal system. Ultimately, Hilary decided not to tell the opposing counsel, but could not escape the feeling that she had failed to abide by her own moral ideals. She came to realize that the adversary system of justice "impedes not only the 'supposed search for truth' but also the expression of concern for the person on the other side." C. GILLIGAN, supra note 5, at 135-36.
23. R. JACK & D. JACK, supra note 2, at 10.
24. Id. at 85-86.
25. Id. In Part III, I argue that legal ethics needs to acknowledge the importance of both perspectives, and that lawyers need to integrate both orientations into their moral universe. See infra notes 74-113 and accompanying text.
themselves often overlap. Each incorporates elements of the other.\footnote{26}

Thus, it would be inaccurate to conceptualize these moral orientations as rigidly exclusive categories. At the same time we should acknowledge that different lawyers bring different ethical perspectives to their work. Rights-oriented lawyers perceive legal ethics primarily as a matter of following the rules of behavior promulgated by the profession, while care-oriented lawyers insist on the primacy of preserving relationships and avoiding or minimizing harm.\footnote{27} Each has something to contribute to legal ethics.\footnote{28}

To better appreciate these divergent orientations, and to understand more fully their strengths and limitations, and their relationship to each other, I propose to examine a familiar story of advocacy and arguments, the story of King Solomon and the two harlots.

II. THE WISDOM OF SOLOMON\footnote{29}

The story of Solomon and the two harlots\footnote{30} presents in condensed form the paradigm of all litigation: two advocates arguing a
case before a single impartial judge. Indeed, the very structure of the story calls to mind a judicial proceeding. In the first part of the story, each woman presents her case, while in the second, Solomon issues a judgment that resolves the dispute. The courtroom-like atmosphere is accentuated by the narrative style of the story, which proceeds by dialogue rather than description. The story tells us little about the participants and nothing about their thoughts. All we know is what they tell us.

As the story opens, two unnamed harlots come before an unnamed king. Nothing about the women is revealed except their lowly occupation: they are prostitutes.

It is significant that none of the characters is named in the story. Their anonymity is a subtle clue to the moral orientation of the story. An ethics of rights demands that the actors be abstracted from their context and backgrounds. In order to assure equality and impartiality, the participants in legal proceedings are stripped of what makes them who they are, lest their character and personality—their uniqueness—cloud the judgment. In litigation, where the ethics of rights predominates, "[t]he human being is regarded as a skeleton with rights hanging from its limbs like ornaments from a Christmas tree." True justice is blind, the old adage

31. The structure of the story is examined in S. De Vries, supra note 29, at 57-59 and B. Long, supra note 29, at 67-70. De Vries explains, "The basic structure is strikingly simple: (1) dispute; (2) resolution." S. De Vries, supra note 29, at 58. Verses 16-22a treat the dispute, verses 22b-27 the resolution. Verse 28 serves as a conclusion. Id. at 57.

32. "The story is told with artistry and wit. It moves by means of dialogue rather than through a direct portrayal of events. Three speeches are made by the women (vv.17-22a), followed by Solomon's speech (vv.23-25), two more by the women (v.26), and then the king's judgment (v.27)." R. Nelson, supra note 29, at 37. See also B. Long, supra note 29, at 68.

33. Trible indicates that the use of the word "harlots" is meant as an identification rather than a condemnation. P. Trible, supra note 29, at 31.

34. The fact that Solomon is never named is one piece of evidence supporting the scholarly consensus that the story is a traditional folktale. There are many parallels between the story and folktales from other ancient cultures. J. Robinson, supra note 29, at 54 (stating "[i]t [the story] is very likely legendary; a stock example of judicial wisdom. Similar stories were told of other rulers of the period.") See also S. De Vries, supra note 29, at 57-58; G. Jones, supra note 29, at 130-31; B. Long, supra note 29, at 70.

35. Taylor, Toward a Biblical Theology of Litigation: A Law Professor Looks at I Cor. 6: 1-11, 2 Ex Auditu 105, 109 (1986). See generally J. Noonan, supra note 1 (ex-
The anonymity of the women and the king indicates that the ethics of rights will figure prominently in the story.

The first woman tells her story. "We share the same house," she says. "I gave birth to a child when this other woman was there. Three days later she too gave birth. During the night her child died because she laid on it. She got up in the middle of the night, took my baby from me, and put the dead child alongside me. When I got up in the morning to nurse my child, I found the corpse, but when I looked at him closely, I realized that it was not my child."\(^{37}\)

The first woman's speech provides the basic outline of the dispute, but gives no hint whether she is telling the truth or lying. We do learn something about her character. She is "verbose, even courtly in her plea to the king."\(^{38}\)

The second woman snaps back, "No, the dead child is yours. Mine is the living one."\(^{39}\) This woman is angry and itching for a fight. She is "brusque, energized more for confrontation than explanation."\(^{40}\)

The first woman counters. "No, the living child is mine and the dead child yours."\(^{41}\) The writer\(^{42}\) reports wryly that the two women went on and on arguing.

As Biblical scholar Burke Long notes, the effect of the women's alternating speeches is intended to be wearisome.\(^{44}\) It is "as though we are watching an intense struggle between children for a prized toy,"\(^{45}\) or a courtroom argument between opposing counsel. The argument bounces back and forth but goes nowhere. "[T]he women imprison themselves so that their end is their beginning. There is no movement beyond this dilemma and no possibility of judgment within it."\(^{46}\)

Only now does Solomon speak, but, as the Hebrew makes clear,
he speaks not to the two women but to himself or his advisors.\textsuperscript{47} The king makes no effort to relate to the parties on an individual level, to probe their stories or gauge their credibility. It is as if the women were not even present.\textsuperscript{48}

Solomon's problem is that no witnesses can be called to corroborate the testimony of the women. The normal procedures for resolving disputes cannot be followed.\textsuperscript{49} When he does speak, all he can do is repeat almost verbatim what each woman has said. "This woman says 'my son is alive and your son is dead.' But the other says, 'Your son is dead and my son alive,'"\textsuperscript{50} Solomon's restatement of the problem "amounts to a verbalized scratching of the head at the impossible conundrum."\textsuperscript{51} By repeating the women's words, he underscores the impossibility of reaching a solution through an assessment of their conflicting stories.\textsuperscript{52} The ethics of rights has reached a stalemate.

Then the king calls for a sword, saying "Cut the child in two and give half to one woman and half to the other."\textsuperscript{53} Apparently, Solomon can conceive of no way to break the deadlock except by resorting to the brute power of his office. Reason seems to have given way to violence.\textsuperscript{54}

Solomon's call for a sword brings to mind the work of the late law professor Robert Cover, who proclaimed the unpleasant truth that the legal system is "played out on the field of pain and death."\textsuperscript{55} Cover insisted that the most important thing about judges is "not...what the judges say, but...what they do. The judges deal pain and death."\textsuperscript{56} Justified pain, often; justified death, perhaps. But whatever the justification, violence and coercion underlie any legal system. As Cover says:

A judge articulates her understanding of a text, and as a result, someone loses his freedom, his property, his children,
even his life. Interpretations in law also constitute justification for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. 57

From such a perspective, Solomon's resort to the sword might appear to be almost a gross caricature of the violence latent in all legal interpretation. Such a reading, however, would be inconsistent with the theological objectives of the writer of First Kings, who sought to portray Solomon as the wisest of all kings, and who included this story to illustrate Solomon's God-given wisdom in action. 58

A different reading of Solomon's actions is more plausible. As biblical theologian Phyllis Trible explains, this is a story of two women locked in a terrible struggle for power, lacking the means to free themselves from their dilemma. 59 Solomon takes neither woman's side in their struggle for power. Instead, by calling for a sword, "the king moves to break this egoistic and dualistic thinking—mine versus yours—by showing its inevitable absurdity." 60

Solomon's call for a sword drives home the insanity of envisioning justice only as legal rights and duties divorced from the context of real persons with real interests and concerns. Half the child to one woman and half to the other—such is the ultimate dead end of "mine versus yours" thinking.

Now, in the moment of crisis, the women reveal their true character by their response to Solomon's command. There is no longer any need for the king to judge the two women, for "[a]s they respond to the command, the women judge themselves." 61

The first woman cries out, "[p]lease, my lord, let her have the baby—do not kill it!" 62 In the English translation, we read that "her heart yearned for her son," 63 or she was "moved with love for her child." 64 In the Hebrew, the words read literally "her bowels grew hot (or, were fermented) for her child," 65 which graphically ex-

57. Id. at 1601.
58. See supra note 34.
59. P. TRIBLE, supra note 29, at 31-32.
60. Id. at 32.
61. Id.
62. 1 Kings 3:26a.
63. 1 Kings 3:26a (Revised Standard Version).
64. 1 Kings 3:26a (New English Bible).
65. J. GRAY, supra note 29, at 125 (stating that "[t]he phrase means literally 'her bowels were in a ferment,' i.e. she was moved with pity"); G. JONES, supra note 29, at 132.
presses the woman's qualities of love and mercy. Motivated by compassion, she is willing to surrender her claim to impersonal justice in order to save the child's life. Love overrides self-interest. As Carol Gilligan observes, this is a woman who understands that an ethics of rights must be tempered by a concern for persons lest it degenerate into a "blind willingness to sacrifice people to truth." The woman "verifies her motherhood by relinquishing truth in order to save the life of her child."68

Not so the other woman. She insists, "It shall be neither mine nor yours. Divide it in two!"69 She demands mathematical "fairness" even though the result would be monstrously unfair. She wants her share heedless of the cost in human life: half a child is better than none. So intent is she on vindication that she will accept no other result, even after her adversary has surrendered all claims to the child.70

Only now does Solomon render judgment. By forcing the legal dispute to its absurd and deadly end, Solomon has evoked from the first woman a loving compassion that transcends a self-interested concern for rights and fairness. Now, for the first time in the story the word "mother" can appear.71 "Give the first woman the child," the king says, "do not kill it, for she is his mother."72 Love evokes truth. As the story ends, Solomon turns the baby over to the true mother and all Israel marvels at his wisdom.73

66. P. TRIBLE, supra note 29, at 33. The Hebrews thought of the bowels as the seat of the emotions. J. ROBINSON, supra note 29, at 55.

67. C. GILLIGAN, supra note 5, at 104-05. Gilligan contrasts the woman to Gandhi and the Biblical patriarch Abraham, both of whom were willing to sacrifice others to their single-minded pursuit of abstract values like truth and faith. Id.

68. Id.

69. 1 Kings 3:26b. Long notes that the woman's words carry a "singularly vindictive tone." B. LONG, supra note 29, at 69.

70. "Even when she has won the baby by the compassionate woman's capitulation, she still insists on the fifty-fifty split which would be objectively 'fair' (Exod. 21:35) but morally monstrous." R. NELSON, supra note 29, at 38.

Exodus 21:35 declares that when an ox kills another ox, the offending animal is to be killed and sold, and the proceeds and the dead animal divided equally. Perhaps in the second woman's eyes the living child is like an ox to be divided equally between the disputants.

71. "Throughout, the two women have been called harlots, women, or this one and the other. Finally, when their own words identify them, the king is able to call one a mother (v.27). According to the story, the presence of a love that knows not the demands of ego, possessiveness, or even of justice reveals motherhood." P. TRIBLE, supra note 29, at 33.

72. 1 Kings 3:27.

73. 1 Kings 3:28. As Nelson notes, we cannot be absolutely certain "that the compassionate woman is the biological mother, only that she is more fit to be a parent." R. NELSON, supra note 29, at 38-39.
III. INTEGRATING THE ETHICS OF RIGHTS AND THE ETHICS OF CARE

The story of Soloman and the two harlots does not announce a simple moral lesson; rather it displays the differing moral orientations of the characters.74 Only the reader can decide the import of the story for his or her life. With that caution in mind, I want to suggest one reading of the story. For practicing attorneys, the story is a reminder that a commitment to rights, no matter how laudable an end, can degenerate into a cruel legalism unless balanced by a concern for preserving relationships and avoiding or minimizing harm.

This is not to deny the important role that rights-thinking should play in legal ethics. To the contrary, a commitment to rights and principles is an inevitable hallmark of the adversary system of justice. The very language we customarily use to express the goals of the system highlight this rights-orientation—we demand “equal justice,” follow “due process of law,” and insist that ours is a system of “laws not of men.”75 As Jack and Jack note, “the premises of the legal system closely parallel those of the morality of rights. Both share concern for fairness, equality, procedural regularity, integrity of rules, and the duty to prevent interference with autonomous others.”76

Such rights-oriented thinking underlies the search for clear and explicit standards of lawyer behavior. In an analogous context, Professor Robert Vincent Johnson has argued that absent such “clear and certain standards to guide the rendition of legal services, clients are robbed of the comfort of a reasonable expectation that their attorneys will conform to at least a minimal level of professional performance, and attorneys are forced to make often difficult ethical judgments without the benefit of standards representing the consensus of their peers.”77 At their best, the codes of professional responsibility make it possible for lawyers and clients to have reasonably

74. Professor Thomas Shaffer has explained that he uses stories to teach legal ethics because “[s]tories display morals more than announce them. They involve quandaries, but they put quandaries in a narrative, human context. The context cuts the quandary down to size. A story helps give the quandary an appropriate amount of weight, that is, the weight it has in life.” T. SHAFFER, AMERICAN LEGAL ETHICS xxix (1985). See also T. SHAFFER, FAITH AND PROFESSIONS 14 (1987) (stating that “[s]tories bring moral notions to light.”).
76. R. JACK & D. JACK, supra note 2, at 126. Thus, it is no surprise that lawyers with a strong rights-orientation identify more comfortably with their role than do lawyers with a care-orientation. “Like a hand in a glove, rights-oriented lawyers fit snugly into professional role.” Id.
77. Johnson, 3 GEO. J. LEGAL ETHICS at 345.
certain standards about what is and is not expected, required, and prohibited of lawyers. Without such guidelines, accountability vanishes.

While the benefits of a rights-orientation are obvious—its respect for the basic equality of persons, allegiance to procedural fairness, and commitment to furnishing clear guidance to lawyers confronting ethical problems—there remains the risk that rights-thinking will ignore other essential dimensions of the moral life. Those who stress rights and rules can easily forget that it is not abstractions but real people who are often helped but sometimes hurt by the law and its agents. People lose their homes, exhaust their bank accounts, sometimes end up in jail or even dead, because of the work of lawyers. Yet, too often lawyers are so imbued with rights-thinking that they come to view their work from the detached stance of the “uninvolved spectator,” thereby ignoring the tragic consequences of their actions. They become “amoral technicians” unconcerned with the morality of the ends they seek or the means they employ. The metaphor of the “hired gun” who shoots first and asks no questions comes to dominate the lawyer’s self-image.

The Solomon story is a salutary reminder that the pursuit of clear and objective guidelines must be complemented by a concern for the context and the consequences of one’s actions. On such a reading, the second woman illustrates the inhumanity that can result when the demand for impersonal rights and mathematical fairness is not tempered by compassion for persons. She symbolizes the result of living by an ethic that exalts principles over relationships.

In sharp contrast, the first woman exemplifies a commitment to

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78. Postema, Moral Responsibility in Professional Ethics, 55 N.Y.U. L. Rev. 63, 79-80 (1980). According to Professor Postema, partisanship and neutrality characterize the standard conception of the lawyer’s role in our system. First, the “lawyer’s sole allegiance is to the client. . . . Within, but all the way up to, the limits of the law, the lawyer is committed to the aggressive and single-minded pursuit of the client’s objectives.” Second, once the lawyer has accepted the case, she must pursue the client’s objectives despite her own moral scruples, but as long as she does so she need not consider and will not be held responsible for the consequences of her actions. Id. at 73-74. It is this commitment to neutrality that causes the deadening of moral sensibilities. Id. at 79-80.


preserving relationships and avoiding harm. She will not sacrifice a person for the sake of a principle. She is interested less in abstractions such as "truth" or "fairness" than in the concrete costs of her actions. Determining the real mother is important to her but it is not the most important thing. It is more important that the baby live than that it live with its true mother. This woman embodies an ethics of care that places limits on the self-interested pursuit of rights.

Finally, there is Solomon, the most ambiguous of the characters, a man who barely acknowledges the women in front of him. He evinces no compassion for the women in their predicament. Faced with an insolvable dilemma, he turns to violence, calling for a sword. Yet as we have seen, it is Solomon's call for a sword that reveals the absurdity of an unqualified devotion to rights at the expense of relationships. Only a madman or a monster would wield a sword against a baby. But a person of uncommon wisdom might call for a sword to force the moment to its crisis, confident that in that moment the legal masks would slip away and the naked character of the litigants stand revealed. Despite his aloof and dispassionate demeanor, Solomon succeeds in evoking from the true mother the love for her child that was always there but was obscured by the judicial proceedings.

In my reading of the story, Solomon is possessed of the wisdom of God not so much because his fertile mind concocts a clever trick to resolve an impossible dilemma, but because beneath his veneer of detachment he has maintained the capacity to inspire the heartfelt pleas of the real mother.

In short, the story of Solomon teaches that relationships and consequences are important, and that the avoidance of harm is as much a part of the moral life as the administration of impersonal rules and

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81. "Rather than focusing on rights and duties, the morality of care inquires about outcome. Who will be harmed? How seriously? What will happen to relationships?" R. JACK & D. JACK, supra note 2, at 8-9.
82. See supra notes 53-61 and accompanying text.
83. Law professor Carl Schneider notes that Solomon's decision is an example of "khadi-discretion," in which a wise decisionmaker settles a dispute without recourse to legal principles, relying instead on personal knowledge and a "feel" for the parties. "King Solomon's child-custody decision exemplifies khadi-justice. The litigants cite no law to Solomon, and he does not appear to consult any rules, procedural or substantive. The principle of decision he relied on cannot be reliably determined even after the decision: Did he award the child to its natural mother, to the woman who most loved the child, or to the woman with the best moral character? What impressed all Israel about the decision was not that Solomon understood the law, but 'that the wisdom of God was in him, to do judgment.'" Schneider, Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard, 89 MICH. L. REV. 2215, 2242-43 (1991).
It says to lawyers that they too are moral agents who are accountable for their actions and who cannot abdicate their moral responsibility by insisting, “I was only doing my job,” or “I was only following the code.”

More profoundly, the story challenges the tendency of rights-oriented lawyers to envision ethics primarily as a matter of resolving legal or moral quandaries. Rights-oriented lawyers confronting an ethical problem turn to the codes and to the adversary system to answer the question “what should I do?” By doing so, they often fail to appreciate how difficult it is even to ask the question “what should I do?” without some sense of “who do I want to be?” More profoundly, the story challenges the tendency of rights-oriented lawyers to envision ethics primarily as a matter of resolving legal or moral quandaries. Rights-oriented lawyers confronting an ethical problem turn to the codes and to the adversary system to answer the question “what should I do?” By doing so, they often fail to appreciate how difficult it is even to ask the question “what should I do?” without some sense of “who do I want to be?”

As theologian Stanley Hauerwas observes, “the kind of quandaries we confront depend on the kind of people we are and the way we have learned to construe the world through our language, habits, and feelings. . . . The question of what I ought to do is actually about what I am or ought to be.”

Thus the first harlot, the true mother, did not carefully balance her rights and duties. She did not calculate the costs and benefits of her options. She did not put her trust in due process or in the adversary system of justice. She did not find her answers in a code or a lawbook. No, “her heart yearned for her son.” She acted instinctively, without rational calculation, because she was a certain kind of person, a person of a distinct character, who could not let a baby die to vindicate her rights under the law. Her character provided the context in which her split-second decision could be made. She could

84. There has long been a debate between philosophers who perceive ethics as concerned primarily with judgments of behavior (what should I do?), and those who are more concerned with judgments of character or virtue (who should I be?). See T. Beauchamp, Philosophical Ethics 149 (1982). I am suggesting that the division between rights-oriented and care-oriented lawyers roughly parallels this split between an action-ethics and a virtue-ethics. Rights-oriented lawyers are more apt to ask, “what should I do?” while care-oriented lawyers are more likely to reflect upon “who am I?” or “what kind of person do I want to be?” See R. Feezell & C. Hancock, supra note 6, at 204 (stating that Gilligan’s ethics of care fits within the virtue tradition).

85. S. Hauerwas, The Peaceable Kingdom 117 (1983). Hauerwas explains: I have argued that the question “What ought I to be?” precedes the question “What ought I to do?” If we begin our ethical reflection with the latter question we stand the risk of misunderstanding how practical reason should work as well as the moral life itself. For the question “What ought I to do?” tempts us to assume that moral situations are abstracted from the kind of people and history we have come to be. But that simply is not the case. The “situations” we confront are such only because we are first a certain kind of people. In fact, the very idea that ethics should be primarily concerned with “quandaries” and the kind of decisions we ought to make about them reflects our current understanding of ourselves as a people without a history. “Situations” are not “out there” waiting to be seen but are created by the kind of people we are.

Id. at 116.

86. 1 Kings 3:26 (Revised Standard Version).
not have chosen otherwise and been the person she was.  

Many of the choices lawyers make are more a matter of character than of deliberate and reasoned analysis. Our course of action depends more on who we are than on what we decide to do. Speaking of Thomas More, Hauerwas explains:

Once we resist the temptation to abstract “situations” and “cases” from their narrative context, we can begin to appreciate the testimony of many, both Christians and non-Christians, that in matters of significance even involving the “hardest choices” there was no “decision” to be made. Rather, the decision makes itself if we know who we are and what is required of us. Thomas More did not choose to die at the hands of Henry. He did everything he could to avoid having Henry put him to death, not only for his own sake but also because he wished to spare Henry from that task. But he could not take the oath of succession and as a result he had to die. He did not understand that he had thereby made a “decision” needing justification, deontologically or consequentially. He simply did what he had to do.

A recognition of the importance of character can dispell the lawyerly delusion that the codes of professional responsibility can resolve all the problems of professional life. Codes can tell lawyers what they already know—do not lie or threaten or manufacture false evidence. They can provide the groundrules for the trade of lawyering—what a law firm can be called, and what can appear in an advertisement. But too much reliance on codes can degenerate into a least-common-denominator minimalism where legality is confused with morality.

87. S. HAUERWAS, supra note 85, at 128-29.
90. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102, 7-105 (1980); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3, 3.4, 4.1 (1983).
93. In his critique of the legalism and minimalism of law school legal ethics courses, James Elkins observes: “By focusing on such a ‘bottom line,’ one is likely to
While codes can establish legal minimums, they cannot speak to the heart of the individual lawyer. They cannot empower a lawyer to be caring or courageous. They cannot identify the circumstances when zealous partisanship should give way to reconciliation. They cannot explain how to balance a client's interests against the harm done to others. They cannot decide when a litigation tactic that may be employed should not be employed. They cannot tell a lawyer who her clients should be. And they cannot provide guidance for a lawyer when she confronts questions that the codes themselves ignore.

In contrast, the ethics of care—with its concern for persons, relationships, and context—summons lawyers to move beyond the codes and ponder the more fundamental questions of "who am I?" and "who do I want to be?" This does not mean, however, that the ethics of care embraces the entire moral universe of lawyers. As I have suggested, those who see ethics primarily as a matter of caring, with the emphasis on relationships rather than rights, run the risk of leaving lawyers without objective guidance and clients without the means to hold their lawyers accountable.

Furthermore, those who espouse an ethics of care are tempted to forget that caring, like other human virtues, is not distributed equally throughout the population. The demand for rights and rules is as much an admission of human sinfulness as it is an expression of our innate capacity for goodness. Although it would be wrong—

94. "[C]odes have limited effect because they are set within the current horizons of law and medicine. These horizons are assumed to be normative and the codes address only issues concerning how a person, practicing within one of the already established professions, should conduct him or herself. What is missing is any attempt to address the adequacy of the structures and values of the existing professions. No attempt is made to address critical questions such as: What are the goals of the profession?; What definitions of health or justice should be used to evaluate the effectiveness of professional activity?; How should the professions function if they are to be socially responsive? The failure to entertain these broader questions means that the codes have little value in making the professions responsive to client and social need." Kammer, Vocation and the Professions, in ANNUAL OF THE SOCIETY OF CHRISTIAN ETHICS 153, 167-68 (C. Ogletree ed. 1981).

95. See infra note 84.

96. See supra note 75-77 and accompanying text.

97. On the pervasiveness of sin, the words of theologian Reinhold Niebuhr are apt: "The doctrine of original sin is the only empirically verifiable doctrine of the
idolatrous, the theologians would say—to place our ultimate loyalty in legal rights and rules, it would be naive to ignore the critical role they can play as a partial bulwark against the oppression of the weak by the strong. This was understood by the Reformers, who recognized that one of the uses of the law is to restrain sin and evil-doing.\textsuperscript{98}

It must also be conceded that caring is no guarantee of wisdom. Caring can be as destructive of human lives and dignity as is the mindless pursuit of abstract rules and rights. Religious ethicist Margaret Farley makes the point well:

\begin{quote}
We need some criteria for \textit{just loving}, or \textit{just caring}. After all, some forms of caring are very destructive. Lots of people do what they think are caring things, and they end up harming people. Why? Because they haven't been reflective enough about what that caring is, whether they are women or men. This is a problem even in some ways of thinking about Christian \textit{agape}—"I do this out of love," or "I do the loving thing." That may count as compassion, but it just isn't enough. We have to ask, But is it really something that affirms, that helps, that takes account of what is really needed by the other? . . . Caring, like loving, needs criteria for it to be helpful caring, just caring, truthful caring, not destructive caring. So principles of justice and affective ways of caring need to go together.\textsuperscript{99}
\end{quote}

Thus the moral universe of lawyers must embrace both a commitment to rules and rights and a concern for relationships and the avoidance of harm. If my reading of the Solomon story has stressed the need to incorporate the care-orientation into legal ethics, that is because the rights-orientation is already firmly entrenched in the adversary system and its codes of professional responsibility.

Indeed, I believe that it would be misleading to read the Solomon story simply as a lawyer's brief championing the ethics of care. The story actually endorses the integration of the rights- and care-orientations. In it "principles of justice and affective ways of relating . . . go together."\textsuperscript{100}

If the first harlot was committed solely to an ethics of care, with-

\begin{footnotes}
\item\textsuperscript{98} R. NIEBUHR, \textsc{Man's Nature and His Communities} 24 (1965) (quoting the London Times Literary Supplement). The relevance of Reinhold Niebuhr's theology for legal ethics is explored in Floyd, \textit{supra} note 6. See also Jorstad, \textsc{Litigation Ethics: A Niebuhrian View of the Adversarial Legal System}, 99 \textsc{Yale L.J.} 1089 (1990).
\item\textsuperscript{100} Farley, \textit{Love, Justice, and Discernment: An Interview with Margaret A. Farley}, 17 \textsc{Second Opinion} 80, 88 (1991).
\end{footnotes}
out any concern for her rights under the law, she would never have come before the king to plead her case. She would have acquiesced in her housemate's claim that the child was hers. If instead she was possessed solely of the ethics of rights, concerned only for her own interests under the law, she might have become the moral monster that the second harlot revealed herself to be. She too might have claimed that "half a child is better than none." In her commitment both to rights and to the avoidance of harm, the first woman embodies both perspectives. She knows when to assert her rights, and when to let go of them. Both procedures and outcomes are important to her.

There is a final sense in which the Solomon story exemplifies the integration of rights- and care-orientations. If the story is read against the backdrop of the entire Hebrew Scriptures, then it illuminates a concept of justice that is richer and more-encompassing than many contemporary notions. It may be a modern truism that love and justice are distinct, and even antithetical, but in the Hebrew Scriptures love is always associated with justice. As the Roman Catholic bishops of the United States have explained:

Biblical justice is more comprehensive than subsequent philosophical definitions. It is not concerned with a strict definition of rights and duties, but with the rightness of the human condition before God and within society. Nor is justice opposed to love; rather, it is both a manifestation of love and a condition for love to grow. Because God loves Israel, [God] rescues them from oppression and summons them to be a people that "does justice" and loves kindness. The quest for justice arises from loving gratitude for the saving acts of God and manifests itself in whole-hearted love of God and neighbor.

This intimate relation between love and justice is particularly evident in the writings of the Hebrew prophets. The prophet Hosea says "Sow for yourselves justice, reap the fruit of steadfast love." The prophet Micah proclaims, "[God] has showed you, O man [and woman], what is good; and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your

101. Likewise, Solomon can be seen as a person who while committed to an ethics of rights was aware of its limitations as well, and so he called for a sword to evoke the care and compassion of the true mother. See supra notes 82-83 and accompanying text.
104. S. Mott, supra note 102 at 63 (translating Hos. 10:12).
God's people are directed to do justice as an expression of the love that has been shown to them and the love they owe each other. "[God] executes justice for the fatherless and the widow, and loves the sojourner, giving [the sojourner] food and clothing. Love the sojourner therefore; for you were sojourners in the land of Egypt." 

In the Hebrew Scriptures, then, justice is the instrument of love, and love is the root of justice. They cannot be separated: justice without love is dangerous; love without justice is ineffectual. Solomon combines the two. His is a justice that goes beyond rules and principles to uphold and nourish life.

Similarly, Judge John Noonan has argued for an expansive view of justice that transcends a narrow concern for rights and procedures to take account of persons:

That like cases should be treated alike, that equality of treatment excludes bribery or bias—these are axioms of justice. Yet there is no reason to suppose that justice is the only virtue required of a lawyer, legislator, or judge. If they are not to cease to be human, they must cultivate the other virtues of humanity. Justice to persons, Augustine reminds us, may be identified with love—an active service to another, who is loved. 

In contrast to this Biblical notion of justice, modern lawyers are too often infected with a moral blindness that causes them to see only a part of the moral landscape. Justice is identified with

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105. Mic. 6:8 (Revised Standard Version).
106. S. MOTT, supra note 102, at 64.
107. Deut. 10:18-19 (Revised Standard Version). In the Bible, the just society is the loving society. "This rich biblical understanding portrays just society as one marked by the fullness of love, compassion, holiness, and peace." NATIONAL CONFERENCE OF CATHOLIC BISHOPS, supra note 103, at 35.
108. S. MOTT, supra note 102, at 63-64. See also T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 137 (1981) (stating that “[j]ustice is how we describe loving relationships, and the model for loving relationships is the love of God for his people. That is a Jewish and Christian idea.”).
109. "[The justice he declares is life-sustaining—'Give her the living child, and in no way slay it' (3:27)." THE LITERARY GUIDE TO THE BIBLE 156 (R. Alter and F. Kermode eds. 1987).
110. J. NOONAN, supra note 1, at 18.
111. It is interesting to contrast the contemporary saying that “justice is blind”
rights, rules, and procedures. In some ways this half-vision has proven as debilitating as no vision, for it has allowed the ethics of rights to masquerade as the whole of the moral life. “The danger of having partial vision for a long time is that we cease to see that we cannot see.”

The only cure for this blindness is to remove the blinders. The ethics of care must be accorded a place in legal ethics and legal practice complementary to the prevailing ethics of rights, so that lawyers may begin the uncertain and challenging task of integrating both perspectives into their practice of law and their dealings with courts, clients, and others. Only then will lawyers come to know the wisdom of the Israelites, that true justice is more than blind justice, that rules are not enough, that people also matter, that caring also counts.

with the Biblical idea of justice. It is customary for us to picture justice as a blind woman with scales. The idea is that justice is procedural, impersonal, neutral. In Deuteronomy 16:18-20, however, God tells the Israelites to appoint judges from among their people:

You shall appoint judges and officials throughout your tribes to administer true justice for the people in all the communities which the Lord, your God, is giving you. You shall not distort justice; you must be impartial. You shall not take a bribe; for a bribe blinds the eyes even of the just. Justice and justice alone shall be your aim, that you may have life and may possess the land which the Lord, your God, is giving you.

Judges are not to take bribes, because a bribe blinds the eyes. Here blind justice is failed justice. A judge who takes a bribe can no longer render justice because she cannot see the real-life persons who stand before her awaiting judgment.

Mott comments upon this text, “The judges were not to be impartial in the sense of being neutral. They were not to be detached from the issue at hand, but active to see that the law was used for good and not for oppression.” S. MOTT, supra note 102, at 72.

112. R. JACK & D. JACK, supra note 2, at 168. Judge John Noonan has made a similar point. “The central problem, I think, of the legal enterprise is the relation of love to power. We can often apply force to those we do not see, but we cannot, I think, love them.” J. NOONAN, supra note 1, at xii. Judge Noonan’s comment about the relationship of love to power brings to mind the work of the great psychologist C.G. Jung, who wrote, “Where love stops, power begins, and violence, and terror.” C. JUNG, The Undiscovered Self, in THE ESSENTIAL JUNG 400 (A.Storr ed. 1983).

113. Jack and Jack discovered that some lawyers have begun to integrate the rights- and care-orientations into their legal practice. R. JACK & D. JACK, supra note 2, at 110-20. They concede that the consequences for lawyers are both negative and positive:

Wider moral vision may cause an attorney to experience irreconcilable conflicts which lead to internal distress. With blinders removed, a lawyer may perceive damage to other people or to the integrity of principles that otherwise could have been ignored. On the positive side, breakdown of tunnel vision means that a richer mix of moral facilities are vital and active. The enlarged vantage point of a dual perspective increases the range of available considerations. An attorney will be able to feel more psychologically complete and see beyond immediate client demands to broader questions of social impact.

Id. at 111.