THE ROLE OF EMPATHY IN THE LAWYER-CLIENT RELATIONSHIP

AN EXPLORATION OF HOW EMPATHY CAN SERVE TO ADDRESS THE ISSUES OF NEUTRAL PARTISANSHIP AND PATERNALISM

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Author’s Declaration

This thesis is the result of the author’s original research. It has been composed by the author and contains material that has been previously submitted for examination leading to the award of a degree at the University of Strathclyde in 2012.

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Abstract

Empathy's lack of definitional certainty has posed significant challenges in assessing its utility and value in the lawyer-client relationship. The author argues that the two main models of lawyering that seek to challenge the traditional model – the client-centred and collaborative models – fail to adequately address the issues of paternalism and neutral partisanship that arise within the relationship due to their adoption of an incomplete definition of empathy. The author concludes that it is imperative for lawyers to employ a conception of empathy that includes both affective and cognitive components, and in terms of cognition, the lawyer must reciprocally employ both self- and other-oriented perspective-taking in order to effectively empathically engage with their client. Ultimately, this thesis will conclude that when it adopts such a conception of empathy, and where it embraces a postmodern ethic of alterity, which encourages lawyers to attentively listen to, and appreciate, the narratives of the Other – particularly the subordinated Other, the ethic of care provides a superior basis from which to address the issues of paternalism and neutral partisanship.

Table of Contents

Acknowledgements vii

CHAPTER ONE INTRODUCTION 1

CHAPTER TWO EMPATHY 4
1. Introduction 4
2. History 4
3. Distinction Between Sympathy and Empathy 6
4. Definitions and Theories 7
4.1. Development of Empathy 10
4.1.1. Affect 10
4.1.1.1. Mimicry, Classical Conditioning and Direct Association 10
4.1.1.2. Affective Empathy: Degree of Matching 11
4.1.2. Understanding 12
4.1.2.1. Mediated Association 13
4.1.2.2. Role/ Perspective-Taking 14
4.1.2.2.1. Self-Oriented 14
4.1.2.2.2. Other-Oriented 16
4.1.2.2.3. Hybrid 17
4.1.2.3. Self/ Other Differentiation 18
4.2. Importance of Empathy 19
4.3. Summary 20

CHAPTER THREE EMPATHY AND ETHICS 21
1. Introduction 21
2. Deontic Ethics 21
3. Ethic of Care 23
4. Postmodernism 26
5. Summary 29

CHAPTER FOUR EMPATHY AND THE THREE MAIN MODELS OF LAWYERING 31
1. Introduction: Who's in Charge? 31
2. The Traditional Model 33
2.1.1. Paternalism 35
2.1.1.1. What is Paternalism? 35
2.1.1.2. Problems with Paternalism 37
2.1.1.3. Causes of Paternalistic Interference 38
2.1.1.4. Does Paternalism Produce Better Results? 39
2.1.2. Neutral Partisanship 40
2.1.2.1. Problems with Neutral Partisanship 42
2.1.2.2. Justifications for Neutral Partisanship 43
2.1.2.2.1. Institutions of Liberal Government 43
2.1.2.2.2. Promoting Dignity, Autonomy and Equality 45
2.1.2.2.3 Adversarial System 48
3. The Client-Centred Model 49
3.1. Critique of the Client-Centred Approach 51
3.1.1. Deficiencies with the Client-Centred Conception of Empathy 51
3.1.2. Problems with Empathy as Conceived by Client-Centred Lawyers 52
3.1.2.1. Hired Gun 54
4. The Collaborative Model 55
4.1. Critique of the Collaborative Model 56
5. The Locus of Control 58
5.1. Power in the Lawyer-Client Relationship 58
5.2. Choice of Lawyering Model: Power and Voice 60
6. Summary 63

CHAPTER FIVE THE ETHIC OF CARE 64
1. Introduction: An Alternative Approach Based on Connection 64
2. The Ethic of Care for Lawyers 64
2.1. Caring 65
2.2. Connection 67
2.2.1. Potential Issues with Connection 68
2.3. Empathy and the Ethic of Care 70

2.3.1. Self-Oriented Perspective-Taking 71
2.3.2. Other-Oriented Perspective-Taking 73
2.3.2.1. Problems with Other-Oriented Perspective-Taking 74
2.3.3. Empathy's Impossibility 75
2.3.4. Summary: Why Lawyers need to adopt a Self- Other Hybrid 77
3. The Ethic of Care and Paternalism 78
3.1. Reducing Paternalistic Intervention 78
3.2. Justifications for Paternalistic Interference and Manipulation 81
3.2.1. Clients' Lack of Relevant Information 83
3.2.2. Clients' Emotional Disabilities 84
3.3. Summary 84
4. The Ethic of Care v Neutral Partisanship 85
4.1. Alternative Conception of Neutral Partisanship 85
4.2. Summary 89

CHAPTER SIX CONCLUSION 91

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"Empathetic engagement suggests that empathy is not disposable or dispensable, like a tissue offered to a weeping client, but is instead a commitment to action – a living tissue of deeds."[1]

CHAPTER ONE

INTRODUCTION

Empathy is widely regarded as a significant human trait.[2] It enables someone to gain an insight into another person's thoughts and feelings,[3] empowering people to work together and look after each other.[4] Empathy can also impede someone from reacting aggressively and in a potentially manipulative manner[5] and enhances the empathiser's ability to respond to the other person, and their distress, in an ethical manner.[6]

Yet, despite having been studied by philosophers since the sixteenth century, and subsequently examined by a wide variety of academic disciplines, from philosophy to neuroscience to clinical and developmental psychology, there remains a lack of consensus as to the nature of the concept.[7] What has emerged from their scholarship is a series of distinct definitions, with corresponding measurements and assessments as to empathy's utility.[8] Despite these seemingly incompatible viewpoints, there is a general acknowledgement that these definitions are not as incongruent as they first appear.[9] Now, there is a widespread acceptance that empathy has two component

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[1] Margulies, Peter. 'Re-Framing Empathy in Clinical Legal Education.' *Clinical Law Review* 5.2. 1999, pp605-638, p607

[2] Chlopan, Bruce. E., Marianne L. McCain, Joyce L. Carbonell, & Richard L. Hagen, 'Empathy: Review of available measures'. *Journal of Personality and Social Psychology, 48*(3). 1985, pp635-653, p635

[3] Coplan, Amy and Peter Goldie (eds.) Introduction, *Empathy: Philosophical and Psychological Perspectives*. Oxford University Press, UK. 2011, pIX

[4] Decety, Jean and Jackson, Philip L. 'The Functional Architecture of Human Empathy.' *Behavioral and Cognitive Neuroscience Reviews*. 3:2. 2004, pp71-100, p73

[5] Hoffman, Martin L. *Empathy and Moral Development: Implications for Caring and Justice*, Cambridge University Press, Cambridge. 2000, p36

[6] Op.Cit. Note 3, Coplan and Goldie, pIX

[7] Op.Cit. Note 2, Chlopan, et al. p635

[8] Levenson, Robert W. and Anna M. Ruef, 'Empathy: A Physiological Substrate.' *Journal of Personality and Social Psychology*, 63.2. 1992, pp234-246, p234

[9] Op.Cit. Note 2, Chlopan, et al., p635

parts: an instinctive, involuntary, natural emotional response; and a cognitive element that involves adopting a different perspective.[10]

Within the realm of legal ethics, empathy has only recently been viewed as an important constituent part of the lawyer-client relationship, though it is often exalted as a virtue without being adequately defined or described.[11] The value placed on empathy has arisen against the backdrop of lawyers' historic domination of the relationship, whereby they were deemed to be in control of the majority of the key decisions relating to the client's case due to their knowledge, skills, and experience.[12] This traditional approach to lawyering, derived from a deontic tradition of ethics, is bereft of empathic considerations due to its promotion of impartiality and detachment, and raises two profoundly concerning ethical issues, namely those of paternalism[13] and neutral partisanship.

In light of these concerns, two main challenges to the traditional model arose in the form of the client-centred and collaborative models of lawyering. Each of these approaches have sought to promote empathic lawyering to varying degrees. The definitions employed by each model, however, have raised significant concerns.

The client-centred model defined empathy in neutral, cognitive-based terms, and was heralded "as a kind of universal value-free solvent for all clients."[14] Yet, this conception of empathy fails to acknowledge the importance of affect in the lawyer-client relationship and, like the collaborative model, fails to fully appreciate empathy's cognitive component.

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[10] Hoffman, Martin L. 'Empathy, Justice, and the Law.' In Coplan, Amy and Peter Goldie (eds.) *Empathy: Philosophical and Psychological Perspectives*. Oxford University Press, UK. 2011, pp230-254, p230

[11] Henderson, Lynne N. 'Legality and Empathy.' *Michigan Law Review*, 85.7. 1987, pp1574-1653, p1578: "Unfortunately, it is never defined or described - it is seemingly tossed in as a 'nice' word in opposition to something bad or undesirable."

[12] Strauss, Marcy. 'Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy.' *North Carolina Law Review*, 65:2. 1987, pp315-349, p328

[13] Like Carrie Menkel-Meadow, "I use the more common phrase paternalism here ... but note the gendered aspect of this term." Menkel-Meadow, Carrie. 'Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candor.' *University of Pennsylvania Law Review*, Vol. 138. 1990, p768

[14] Op.Cit. Note 1. Margulies, p608

Accordingly, I consider that an alternative approach to lawyering is required, namely: the ethic of care. Such an approach requires an appreciation of empathy's affective *and* cognitive components, and in terms of cognition, requires lawyers to imagine both how they would feel in the client's situation *and* how the client may feel. By embracing a postmodern ethic of alterity, which encourages lawyers to listen to, and appreciate, clients' narratives and have regard to the "oppressed and subordinated Other,"[15] I consider that the ethic of care can provide a superior basis from which to address the issues of paternalism and neutral partisanship.

In terms of the structure, chapter two will explore how empathy has been defined and its value. The third chapter will examine three specific ethical approaches: deontic-based ethics, which includes Kantian deontology and utilitarianism; postmodernism; and the ethic of care. Consideration will be given to how empathy comports – or in the case of deontic ethics, fails to comport – with these ethical theories.

The fourth chapter will examine empathy's place in the three main models of lawyering: the traditional, client-centred, and collaborative approaches. The traditional model of lawyering and the issues of paternalism and neutral partisanship will be explored at the outset of this chapter, before the client-centred and collaborative models, including their analyses of empathy, are examined. Subsequently, consideration will be given to how the power dynamic of the relationship impacts the choice of lawyering model.

Finally, the fifth chapter will analyse the ethic of care as an alternative approach to lawyering. In doing so, consideration will be given to how an affective *and* cognitively-based definition of empathy, which combines self- and other-oriented perspective-taking, can positively impact the lawyer-client relationship through this model of lawyering. Additionally, I shall explore the challenges that such a conception of empathy can pose.

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[15] Cook, Anthony E. 'Foreword: Towards a Postmodern Ethics of Service.' *Georgetown Law Journal*. 8.7. 1993, pp2457-2472, p2472

CHAPTER TWO

EMPATHY

1. Introduction

Despite a lack of consensus as to the definition of empathy, there are a number of distinguishing characteristics upon which most theorists agree, and it is to those features which I shall turn. At the outset, however, in order to provide context, it is likely to be helpful to briefly consider the origins of the concept of empathy.

2. History

In *A Treatise of Human Nature,* renowned Scottish philosopher David Hume explored the concept of "sympathy," which he regarded as intrinsically valuable, particularly in terms of communicating and conveying emotion between people.[16] He assessed sympathy as a "natural and automatic process," which would in today's terms be interpreted as amounting to "low-level empathy or mirroring."[17] Hume contemplated that:

> No quality of human nature is more remarkable, both in itself and in its consequences, than that propensity we have to sympathise with others, and to receive by communication their inclinations and sentiments, however different from, or even contrary to our own.[18]

Subsequently, in *The Theory of Moral Sentiments*, Adam Smith built upon Hume's concept of sympathy and, notably, was the first person to consider that, in addition to an emotional, involuntary response, it also included a cerebral, "imaginative perspective-taking" component, which enabled a person to identify the feelings of

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[16] Hume, David. *A Treatise of Human Nature*. Oxford University Press, Oxford. 1739/1978, Book II, p317

[17] Op.Cit. Note 3, Coplan and Goldie, pX-XI. Mirroring is in reference to mirror neurons, identified by neuroscientists, underlining the biological processes that render low-level empathy automatic and involuntary. For further exploration, see: Preston, Stephanie D. and Frans B. M. De Waal. 'Empathy: Its Ultimate and Proximate Bases.' Behavioural and Brain Sciences, 25.1. 2002, pp1-71

[18] Op.Cit. Note 16. Hume, p317

another person without personally experiencing the other person's feelings.[19] Today, this would now be regarded as "high-level empathy":[20]

> By the imagination we place ourselves in his situation, we conceive ourselves enduring all the same torments, we enter as it were into his body, and become in some measure the same person with him, and thence form some idea of his sensations, and even feel something, which, though weaker in degree, is not altogether unlike them.[21]

In their analyses, both Hume and Smith viewed "sympathy" as more likely to occur between people who were close with each other: relationally, for example between family and friends; and also in terms of distance, though, Smith specifically considered the necessity for the sympathiser to have an awareness of the circumstances that caused the other person's emotional response.[22]

The word empathy was only introduced into the English language in the early twentieth century by Edward Titchner in *Elementary Psychology of Thought Processes* as a translation of the German word "Einfuehlung," which literally means "feeling into".[23] His work built upon existing scholarship, and was influenced particularly by Theodor Lipps, who had used "Einfuehlung" to describe the process by which people become aware of other peoples' feelings.[24]

Towards the end of the 20th century, phenomenologists Edmund Husserl[25] and Edith Stein[26] critically evaluated Lipps' conception of "Einfuehlung," which they re-

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[19] Smith, Adam. *The Theory of Moral Sentiments.* K. Haakonssen (ed.) Cambridge University Press, Cambridge, 1795/2002, p11
[20] Op.Cit. Note 3. Coplan and Goldie, pXI
[21] Op.Cit. Note 19. Smith, p9
[22] Ibid., p11
[23] Titchener, Edward. *Lectures on the Experimental Psychology of the Thought Processes*, Macmillan. 1909, p21
[24] Lipps, Theodor. *Empathy, Inner Imitation, and Sense Feelings*, 1903. Trans. Max Schertel and Melvin Rader. In *A Modern Book of Esthetics: An Anthology.* Fifth Edition. Edited by Melvin Rader. Holt, New York, 1979, pp371-78
[25] Edmund Husserl. *Ideas Pertaining to a Pure Phenomenology and a Phenomenological Philosophy.* Trans. R Rojcewicz and A. Schuwer. In *Second Book: Studies in the Phenomenology of Constitution.* Kluwer, Dordrecht, 1989.
[26] Stein, Edith. *On the Problem of Empathy.* Trans. Waltraut Stein. In *The Collected Works of Edith Stein*, Third Revised Edition, ICS Publications, Washington DC, 1989.

formulated, and importantly distinguished between empathy as the process of "feeling into"; not "feeling one with," which they viewed Lipps' as advocating.[27] This lack of distinction has caused considerable confusion in terms of distinguishing between empathy and sympathy. Therefore, at this stage, it is perhaps helpful to differentiate between two oft confused concepts.

3. Distinction Between Sympathy and Empathy

Some theorists have adopted broad definitions of empathy that include sympathy as a component part.[28] Eisenberg and her contemporaries, however, have made significant efforts to distinguish empathy from these associated concepts.

Perhaps unsurprisingly, like empathy, the notion of sympathy has proven equally difficult to define. There are multiple definitions of sympathy in existence, though, Wispé's definition is generally regarded as representative of its modern accepted characterisation:

> The heightened awareness of the suffering of another person as something to be alleviated… sympathy intensifies both the representation and the internal reaction to the other's predicament.[29]

Sympathy means feeling sorry for another person. As Eisenberg and Strayer note, sympathy may arise as a result of someone empathising with another person, though is distinct in that the object of sympathy is to promote the other's well-being.[30] Sympathy is "[t]o know what it would be like to *be* that person" as opposed to empathy which enables the empathiser to understand what it would feel like *for* the other person. Instead of increasing self-awareness through empathy, the goal of sympathy is to

[27] Ibid., p5

[28] Op.Cit. Note 17. Preston and De Waal, p4: "our definition focuses on the process. A process model makes empathy a superordinate category that includes all sub-classes of phenomena that share the same mechanism. This includes emotional contagion, sympathy, cognitive empathy, helping behavio[u]r, and so on… These phenomena all share aspects of their underlying process and cannot be totally disentangled."

[29] Wispé, Lauren. 'The distinction between sympathy and empathy: To call forth a concept, a word is needed.' *Journal* of *Personality and Social Psychology: 50.* 1986, pp314-321, p318.

[30] Eisenberg, Nancy and Janet Strayer (eds.) 'Critical Issues in the Study of Empathy.' *Empathy and Its Development*, Cambridge University Press, Cambridge, 1990, p6

identify as completely as possible with the other person – to become metaphorically one with them, which reduces the sympathiser's self-awareness.[31]

Instead, Stein articulated that empathy enables a person to directly experience, and gain an insight into, others peoples' thoughts and feelings, without losing their own identity in the process.[32] Stein's analysis of empathy serves to highlight a number of its vital components, which will now be examined in detail.

4. Definitions and Theories

There are numerous definitions of empathy, with each author proposing their own distinct formulation, however, most theorists now agree that empathy has two constituent elements, namely: cognitive empathy and affective empathy. Cognitive empathy is broadly described as "an awareness of another's feelings," [33] including a perspective-taking component enabling the observer (empathiser) to see things from another point of view in order to understand the other (target's) perspective. Affective empathy, the emotional component of empathy, is alternatively considered in terms of "feeling what another feels," and is regarded as the ability to be moved emotionally by another person's emotional state. [34]

Different theorists have emphasised the importance of each component differently in constructing their definitions of empathy. Mead, for example, emphasised the cognitive component of empathy over the emotional, viewing empathy as the "capacity to take the role of the other and to adopt alternative perspectives vis- a-vis oneself."[35] Similarly, Wispé defined empathy as: "the attempt by one self-aware self to comprehend judgmentally the positive and negative experiences of another self."[36]

[31] Wispé, Lauren. *The Psychology of Sympathy*, Plenum Press, New York. 1991, p79-80.
[32] Op.Cit. Note 26. Stein, p23
[33] Op.Cit. Note 10. Hoffman, p230
[34] Ibid, p230
[35] Mead, George H, and Charles W. Morris. *Mind, Self and Society from the Standpoint of a Social Behaviorist*. University of Chicago Press, Chicago. 1934.
[36] Op.Cit. Note 29. Wispé, p318

One of the most prominent advocates of cognitive empathy was psychologist Carl Rogers. Rogers' considered that people seek to become self-actualised, i.e. to achieve their full potential,[37] and in order to facilitate this, to create therapeutic change, the therapist required three essential components: empathy, genuineness, and unconditional positive regard.[38] Rogers' in developing his client-centred model defined empathy in purely cognitive terms, whereby the therapist experienced the client's feelings "as if" they were the therapist's own.[39]

Rogers' concluded that empathy was essential in order to: empower the client to explore their own thoughts and feelings; enable the therapist to obtain information about the client's subjective, personal feelings and experience; and also to create an atmosphere conducive to the client being open to the suggestions offered by the therapist.[40] Further, as noted by Bohart and Greenberg, empathy in a therapeutic context is viewed as important in order to facilitate clients' examination of their own thoughts and feelings, and so that they can view themselves as having a sense of control in their circumstances.[41] Rogers' emphasised the importance of the therapist maintaining a clear boundary between themselves and the client to avoid the potential for the therapist to lose their sense of self and over-identify with the client; and to avoid projection of their own feelings and experiences on to the client as part of the identification process.[42]

Within the therapeutic relationship, empathy can be conveyed in numerous ways, including through the therapist responding empathically, posing empathic questions, and clarifying and exploring experiences empathically.[43] There are considered to be

[37] Rogers, Carl R. *Client-centered Therapy: Its Current Practice, Implications, and Theory*. Houghton Mifflin Co, Boston. 1951, p487

[38] Rogers, Carl R. *On Becoming a Person: A Therapist's View of Psychotherapy*. 1961, pp61-62

[39] Rogers, Carl R. 'A theory of therapy, personality and interpersonal relationships as developed in the client-centered framework.' In S. Koch (ed.) *Psychology: A study of science.* Volume 3. McGraw Hill, New York. 1959, pp184-256, pp210-211

[40] Rogers, Carl R. 'Empathic: An unappreciated way of being.' *The Counseling Psychologist, 5*(2). 1975, pp2-10, p4

[41] Bohart, Arthur C. and Leslie S. Greenberg. 'Empathy and psychotherapy: An introductory overview.' In A. C. Bohart & L. S. Greenberg (eds.) *Empathy reconsidered: New directions in psychotherapy,* American Psychological Association, Washington D.C. 1997, pp3-31.

[42] Op.Cit. Note 38. Rogers, p284

[43] Elliott, Robert, Arthur C. Bohart, Jeanne C. Watson, and Leslie S. Greenberg. 'Empathy.' *Psychotherapy: Theory, Research, Practice & Training, 48.* 2011, pp43-49, p43

three specific modes of expressing empathy, namely: "empathic rapport," where the therapist compassionately conveys understanding in order to build a therapeutic relationship; "communicative attunement," whereby the therapist maintains an effective live link with the client as they convey their circumstances; and "person empathy," which consists of the therapist continually striving to understand the contextual factors that influence the client's present circumstances.[44] These modes can be used simultaneously, with a view to enabling the client to explore how their circumstances and/ or feelings have resulted in them viewing, experiencing, considering, or doing something in a particular way.[45]

More recently, however, academics such as Hoffman have tended to focus more on the emotional, affective element of empathy, whilst acknowledging the importance of cognition and that both elements do not operate in isolation. As a developmental psychologist exploring empathy's role in moral behaviour and motivation, Hoffman defined empathy as "an affective response more appropriate to another situation than one's own," with his definition focusing on the response of the target as opposed to the process.[46]

Batson defines empathy as: "[a]n other oriented emotional response elicited by and congruent with the perceived welfare of someone else."[47] Likewise, Eisenberg and Strayer define empathy in both cognitive and affective terms as an: "[e]motional response that stems from another's emotional state or condition and that is congruent with the other's emotional state or situation."[48] They consider empathy as a "vicarious affective reaction" that could arise as a result of clear visible indicators demonstrative of the target's emotional state, for example, from their voice, or as a result of inferences to be drawn from indirect signals, for example, from their circumstances.[49]

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[44] Ibid, p43
[45] Ibid, p43
[46] Op.Cit. Note 5. Hoffman, p4
[47] Batson, C. Daniel, Tricia R. Klein, Lori Highberger and Laura L. Shaw. 'Immorality from Empathy-induced Altruism: When Compassion and Justice Conflict'. *Journal of Personality and Social Psychology*, 68(6). 1995, pp1042-1054, p1042.
[48] Op.Cit. Note 30. Eisenberg and Strayer, p5
[49] Ibid, p5

4.1. Development of Empathy

I prefer Hoffman and Eisenberg's definitions, which focus on affective empathy because they provide a fuller conception of the phenomenon of empathy. Hoffman posits that there are five types of "empathic arousal": *mimicry*, *conditioning*, and *direct association*, which are instinctive and naturally occurring, and affective in nature; and *mediated association*, and *role – or perspective-taking*, which are more advanced cognitive modes. Each of these five modes will now be considered.

4.1.1. Affect

4.1.1.1. Mimicry, Classical Conditioning and Direct Association

The first of the three affective modes described by Hoffman is mimicry. Described in detail by Lipps,[50] mimicry was seen as a bipartite process, which firstly consisted of "objective motor mimicry" whereby the observer imitated variations in the target's "facial expression, voice, and posture"; followed by "afferent feedback", which yields matching of the observer's feelings with those of the target.[51]

Second, Hoffman considers that empathic responses can also be conditioned as a result of an observer witnessing the target in distress and feeling personally distressed.[52] Third, they can be aroused through direct association, which occurs where the target's feelings result in the observer recalling comparable feelings from their past, which arouses a feeling of distress in them linked to the target's current circumstances.[53] In other words, when the target exhibits indicators of their distress (e.g. crying), this reminds the observer of similar feelings they have previously experienced, which results in them empathising with the target. The key difference between conditioning and association is the fact that direct association does not entail the observer having felt personally distressed at the same time as they are witnessing distress cues in the target.[54]

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[50] Lipps, Theodor. 'Das Wissen von Fremden Ichen.' *Psychologische Untersuchungen*, Volume 1. 1907, pp694–722
[51] Op.Cit. Note 5. Hoffman, p37
[52] Ibid., p45
[53] Ibid., p47
[54] Ibid., p47

These three affective elements occur in children before the development of speech. Hoffman holds that they enable anyone to instantaneously, instinctively, and subconsciously respond to indicators of distress when they arise and, in fact, compel them to do so.[55] Additionally, these elements operate interchangeably, with the capacity to elicit perspective-taking.[56]

Coplan further elucidates that affective empathy cannot be induced by "emotional contagion," where emotion is spread from one person to another, which Lauren Wispé defines as a process that "involves an involuntary spread of feelings without any conscious awareness of where it stared in the first place."[57] As there is no imaginative component, and emotions are simply caught, Coplan notes that whilst it may hasten it, it does not amount to empathy.[58]

4.1.1.2. Affective Empathy: Degree of Matching

Despite the majority of researchers concluding that empathy has an affective component, researchers do not all agree how it is constituted. Some theorists, such as Coplan, argue that the empathiser's ('observer's') affective state must be identical to that of the person they are empathising with (the 'target'); that their psychological state must be "qualitatively the same" as the person with whom they are trying to match.[59]

Other academics, such as Hoffman, hold that the affective states of the observer and the target do not require to be the same due to the various modes of empathic arousal. Similar to Preston and de Waal, he requires only "affective congruence," that is, for each person's affective state to be sufficiently similar.[60]

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[55] Ibid., p5
[56] Ibid., p60
[57] Wispé, Lauren. 'History of the Concept of Empathy.' In Eisenberg, Nancy and Janet Strayer (eds.) *Empathy and Its Development*. Cambridge University Press, Cambridge. 1990, pp76-7
[58] Coplan, Amy. 'Understanding Empathy: Its Features and Effects.' In Coplan, Amy and Peter Goldie (eds.) *Empathy: Philosophical and Psychological Perspectives.* Oxford University Press, UK. 2011, pp1-18, pp8-9
[59] Ibid, p7
[60] Ibid, p7. See: Note 5. Hoffman; and Note 17. Preston & de Waal.

Alternatively, academics such as Davis take an even less stringent approach, concluding that the affective element can be achieved without affective matching, and is capable of being achieved through "reactive affects."[61] In other words, someone's view of another's emotional state can prompt a reaction that demonstrates empathy, without them both sharing the same affective state. A classic example of this comes in the form of "empathic anger," whereby one person witnesses an injustice and becomes angry as a result, despite the other not themselves being angry. Coplan argues that this is insufficient to constitute the affective matching required to constitute empathy because it does not precisely represent the other's psychological state.[62]

I disagree with Coplan's assessment; instead, I agree with Hoffman's analysis that since empathy is a response influenced by multiple variables and can be aroused in multiple ways (by distress signals directly from the target or indirectly through their circumstances), an exact match between the observer and target's affect is not always necessary; the multiple arousal types ensure that there is a sufficient match between their emotional states.[63] Hoffman concludes that the three affective arousal types result in sufficient affective matching even where the observer and target are from different cultures and backgrounds. This is due to the fact that mimicry ensures similarity where the observer and target are directly facing each other; and classical conditioning and direct association ensure congruence because everyone processes information similarly and consequently reacts to comparable situations with broadly analogous feelings.[64]

4.1.2. Understanding

Hoffman considers affective empathy to be enhanced by cognitive processes, as it increases the extent to which the observer can empathise with others and, importantly, allows them to empathise with targets who are not in their presence.[65] Ultimately, he

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[61] Ibid., p7. See Davis, Mark H. *Empathy: A Social Psychological Approach,* Westview Press, Boulder, Colorado. 1996
[62] Op.Cit. Note 58. Coplan, p6
[63] Op.Cit. Note 5. Hoffman, pp5-6
[64] Ibid., pp5-6
[65] Ibid., p5

considers that "as an individual's cognitive sophistication and general experience increase, she becomes capable of more and more impressive 'feats' of empathy."[66]

Hoffman also notes that higher level cognitive processes play a particularly important role where the empathiser obtains information about the circumstances of the target's life that does not line up with their current emotional cues.[67] An affective match is not required in such circumstances as the higher order cognitive arousal states are centrally utilised, in that the empathiser is likely to be as influenced, if not more so, by the circumstances of the target's life than by the target's current conduct.[68] The first mode of cognitive empathy to be considered is that of mediated association.

4.1.2.1. Mediated Association

With verbal mediation, the target's distress is conveyed to the observer via the meaning of their language. Language, as Hoffman articulates, "is the mediator or link between the model's feeling and the observer's experience," where messages are "semantically processed and decoded," and may convey either feelings and experiences, or both.[69] Due to this link, association can subsequently arouse empathetic affect via conditioning, association and/ or mimicry and, due to the semantic processing and decoding of messages, psychological distance is created between the observer and the target. [70]

The target instils feelings into their words; however, the words cannot replicate exactly how the target feels.[71] As a result, the observer requires to undertake a process by which they try to unpack the feelings linked to the words and, during this process, mistakes can inevitably be made, particularly due to difficulties in translating these words into feelings.[72] Yet, as Hoffman notes, the frequency of errors occurring can be

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[66] Slote, Michael. *The Ethics of Care and Empathy*, Routledge Taylor and Francis Group, Oxon. 2007, p15
[67] Op.Cit. Note 5. Hoffman, p7
[68] Ibid., p7
[69] Ibid., p49
[70] Ibid., p50
[71] Ibid., p50
[72] Ibid., p50

significantly diminished where observers have a close relationship with the target, and the target is adept at articulating their feelings.[73]

4.1.2.2. Role/ Perspective-Taking

Perspective-taking is another fundamental element of empathy, which arises where the observer imagines how the target, or how another person, would feel in the target's position. It is important at this stage to distinguish between two important types of perspective-taking: self-oriented and other-oriented.

4.1.2.2.1. Self-Oriented

Self-oriented is perhaps the classic conception of perspective-taking in terms of placing yourself in someone else's shoes and imagining how you would feel in their position. This variant of perspective-taking, as Coplan highlights, may be sufficient in situations where the self and the other are sufficiently similar in terms of their perspective.[74] Where such circumstances arise, however, she proposes that self-oriented perspective-taking should only be utilised in combination with other-oriented perspective-taking.[75] Her reasoning is that such self-oriented perspective-taking results in egocentric bias, which arises due to our propensity to overestimate similarities between ourselves and others.[76]

Coplan notes that our susceptibility to being affected by our personal beliefs and values causes us to misunderstand other people, or to understand them in a manner that lacks nuance. She asserts that this leads to "errors in prediction, misattributions, and personal distress," which are in direct contravention with our understanding of "genuine empathy."[77] She emphasises that while self-oriented perspective-taking may be valuable in numerous regards, and can improve our understanding of another person, it does not *produce* empathy. It does not enable someone to understand another

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[73] Ibid., p50
[74] Op.Cit. Note 58. Coplan, p9
[75] Ibid., p10
[76] Ibid., p10
[77] Ibid., pp10-11

person's feelings; rather, it results in the person attempting to empathise focussing on *themselves*, neglecting the target's experience.[78]

Further, she highlights that self-oriented perspective-taking leaves the empathiser vulnerable to being negatively affected by the other's personal distress.[79] When the empathiser witnesses someone in distress, they themselves can become distressed to the point where the empathiser's focus shifts from the other to themselves and the mitigation of their own pain. Researchers have identified that this can lead to over-arousal,[80] with the empathiser often feeling overwhelmed, resulting in the observer removing themselves from the distressing situation, with the likelihood that they display a lack of regard for the person experiencing the distress.[81] Empathic distress can lead the observer to "harden" themselves to the other's pain, adopting emotional and mental approaches in order to mitigate the effects of the distress, or indeed eradicate it completely.[82]

Hoffman terms this problematic empathic "disconnection caused by the intensity of the empathic link 'egoistic drift'" and persuasively highlights that the observer's focus shifting to themselves no longer amounts to empathy.[83] He notes that highly empathetic people are most susceptible to empathic over-arousal, though where the empathiser is able to help the other person, and manage their own feelings and anxieties, their susceptibility to empathic over-arousal is reduced.[84] Hoffman further cogently argues that where empathy is rooted in moral principles, which enable it to "gain structure and stability from the principle's cognitive dimensions," the limitations of empathic-over-arousal can be mitigated.[85]

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[78] Ibid., pp10-11
[79] Davis defines personal distress as the: "tendency to experience distress or discomfort in response to extreme distress in others:" In Davis, Mark H. *Empathy: A Social Psychological Approach.* WCB Brown and Benchmark, Madison, Wisconsin. 1994, p57
[80] Op.Cit. Note 5. Hoffman, p198: Hoffman defines empathic over-arousal as: "an involuntary process that occurs when an observer's empathic distress becomes so painful and intolerable that it is transformed into an intense feeling of empathic distress, which may move the person out of the empathic mode entirely:"
[81] Op.Cit. Note 58. Coplan, p12
[82] Op.Cit. Note 5. Hoffman, p202
[83] Ibid., pp56-7
[84] Ibid., p203
[85] Ibid., p14

4.1.2.2.2. Other-Oriented

Other-oriented perspective-taking, on the other hand, enables the empathiser to imagine having the *other person's* thoughts and feelings. The empathiser simulates what it would be like for the target to experience something and in doing so requires them to temper the degree of their affective arousal and restrict reference to their own personal viewpoint.[86]

In other-oriented perspective-taking, the empathiser needs information about the person they are empathising with, the amount of which relies upon the context.[87] The more knowledge the observer has regarding the target's nature, the current circumstances of the target's life, and previous conduct in comparable situations, which serve to provide additional context, along with experience as to how others in similar circumstances feel, the more effective the empathic connection. Thus, empathic understanding can be achieved even without the target being present, though Hoffman further explains that addressing the observer's affective cues, such as victim's facial expression, voice tone, or posture, may serve to further enhance empathic understanding. [88]

Where the empathiser knows their target, or deems them to be similar to themselves, they are more likely to successfully "adopt their perspectives" and empathise with them; a phenomenon which Hoffman terms "familiarity bias."[89] Where the empathiser and the target are particularly different from each other, Coplan highlights the challenges posed in adopting an other-oriented perspective due to the difficulties involved in the observer reconstructing the target's subjective experiences.[90] Hoffman, however, argues that such biases can be reduced where moral educators are able to emphasise similarities between cultures, particularly in terms of emotional responses, whilst remaining sensitive to the differences between different groups.[91]

[86] Op.Cit. Note 58. Coplan, p13
[87] Ibid., p13
[88] Op.Cit. Note 5. Hoffman, p54
[89] Ibid., p206
[90] Op.Cit. Note 58. Coplan, p13
[91] Op.Cit. Note 5. Hoffman, pp294-295

Peter Goldie argues that other-oriented perspective-taking is only acceptable in what he terms "base cases," where the observer possesses "the same psychological dispositions (including character and personality) as the target."[92] In such situations, the target is uninhibited by "non-rational influences" such as mood; they are not "confused" and have clear mental and emotional states; and they are not "conflicted" in terms of their decision making.[93]

In any other circumstances, Goldie articulates that the empathiser is incapable of sufficiently imagining how that person would make independent decisions. He sees it as an "attempt to usurp the target's full-blooded essentially first-personal agency, replacing it with one's own."[94] He avers that only the target themselves can know what position they will take, and what their thoughts, feelings and goals are in relation to their own particular set of circumstances.[95]

Consequently, Coplan highlights the importance of empathisers making a special effort to try and "represent the situation and experiences of those we know less well and with whom we fail to identify".[96] Yet, despite observers' best efforts, research shows that it will not always be possible to adequately imagine the other person's internal states.[97]

4.1.2.2.3. Hybrid

In light of the concerns regarding the observer's inability to fully identify with and understand the target's perspective, Hoffman interestingly advocates the adoption of a hybrid model of perspective-taking. He asserts that such an approach enables the strengths of both types of perspective-taking to be utilised, whilst mitigating against the negative effects. Hoffman considers that it is arguably the most effective method due to the fact that it integrates the enhanced "emotional intensity" of self-oriented

[92] Goldie, Peter. 'Anti-Empathy.' In Coplan, Amy and Peter Goldie (eds.) *Empathy: Philosophical and Psychological Perspectives.* Oxford University Press, UK. 2011, pp302-317, p302
[93] Op.Cit. Note 3. Coplan and Goldie, pXLVI
[94] Ibid.
[95] Op.Cit. Note 92. Goldie, p303
[96] Op.Cit. Note 58. Coplan, p14
[97] Ibid., p14

perspective-taking, and the increased attentiveness to the other that arises from other-oriented perspective-taking.[98]

Ultimately, he concludes that "fully mature role-taking" may be characterised in terms of the observer imagining themselves in the other person's situation, and supplementing this simulation by combining "the resulting empathic affect" with information they have obtained about the other, along with knowledge and experience of how others feel in similar circumstances, though he highlights that either the affective or cognitive components of empathy may precipitate the start of the empathic process.[99]

4.1.2.3. Self/ Other Differentiation

Coplan explains that, in addition to matching affective states and perspective-taking from an other-oriented perspective, it is imperative that the observer maintains a clear distinction between themselves and the target.[100] This, she posits, is to avoid the merging of self and other, which can lead the observer to "introject," i.e. internalise, the target's own "thoughts, feelings and desires, substituting them for his own." [101] Thus, whilst someone may adopt the perspective of another person, and match with them on an emotional, affective level, if the observer consequently feels the target's emotional pain as their own, and takes on their perspective as their own, they have failed to empathise with the other.

As such, when empathising, it is imperative that the observer does not lose their own sense of personal agency by becoming entangled in the other's perspective. This arises, where as Michael Stocker and Elizabeth Hegeman note: "boundaries between them are too por[o]us or non-existent, each is too caught up in the life of the other, too involved and overly concerned with that person."[102]

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[98] Op.Cit. Note 5. Hoffman, p58
[99] Ibid, p58
[100] Op.Cit. Note 58. Coplan, p16
[101] Ibid., p15
[102] Stocker, Michael and Elizabeth Hegeman. *Valuing Emotions.* Cambridge University Press, Cambridge. 1996, p116

Whilst Hoffman views empathy more broadly than Coplan, self-other differentiation is similarly an intrinsic feature of his conception of his higher order modes of empathic arousal. He articulates that it is important for empathisers to strive to view themselves as distinct persons, with separate "internal states, personal identities, and lives beyond the situation," able to differentiate what others experience from what they experience.[103]

4.2. Importance of Empathy

Having considered empathy's constitution, I now wish to briefly explore the importance of empathy. Empathy is informally acknowledged as being a beneficial human characteristic, but why? First, it enables someone to gain an insight into the mind of another person, to anticipate and explain their thoughts, feelings and actions.[104] This is beneficial at a personal and societal level as it enables people to work together and look after each other.[105]

Empathy does not automatically mean that the observer will respond, or feel compelled to react, in a helpful manner.[106] Empathy can, however, further the observer's ability to help others, and empathic concern, which is linked to "prosocial behaviours" i.e. conduct which is anticipated as benefiting society, has been seen to facilitate altruistic behaviour and concern for others.[107]

Empathy can also inhibit someone from reacting aggressively and in a manner which may manipulate the other person.[108] Further, it enhances the empathiser's ability to respond to the other person, and their distress, in an ethical manner.[109] It has been argued that empathy in and of itself is "ethically neutral," with Ian Gallacher

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[103] Op.Cit. Note 5. Hoffman, p63
[104] Op.Cit. Note 3. Coplan and Goldie, pIX
[105] Decety, Jean and Jackson, Philip L. 'The Functional Architecture of Human Empathy.' *Behavioral and Cognitive Neuroscience Reviews*. 3:2, 2004, pp71-100, p73
[106] Ibid., p71
[107] Ibid., p72; See: Batson's Empathy-Altruism Hypothesis in Batson, C. Daniel, Judy G. Batson, Jacqueline K. Slingsby, Kevin L. Harrell, Heli M. Peekna, and Matthew R. Todd. 'Empathic joy and the empathy-altruism hypothesis.' *Journal of Personality and Social Psychology*, *61*(3). 1991, pp413-426.
[108] Op.Cit. Note 5. Hoffman, p36
[109] Op.Cit. Note 3, Coplan and Goldie, pIX

highlighting that an effective sadist or torturer can employ empathy in order to understand how to inflict the maximum amount of injury.[110] This serves to highlight that "all knowledge is vulnerable to abuse"[111] though, as Michael Slote notes, such an understanding is not typically regarded as amounting to empathy as psychopaths are commonly regarded as being deficient in empathy for others.[112]

4.3. Summary

Although there are a multitude of definitions of empathy that appear on initial consideration to be conflicting and disparate in nature, almost all of the definitions share two core elements: an awareness of a cognitive component, whereby an observer seeks to understand another's experience; and an affective element, whereby the observer shares in the emotions of another. The key differences in definitional terms centre on whether the cognitive perspective-taking element should involve the observer imagining what they would feel like in the other person's situation, or whether they, themselves, should imagine being the other person.[113]

Both forms of perspective-taking pose significant challenges, including over-arousal and cognitive biases; however, I consider that a hybrid model can be utilised to mitigate their negative effects. The hybrid model encourages the observer to use the information they have obtained about the other, along with knowledge and experience of how others feel in similar circumstances, to promote an enhanced empathic connection. This is achieved by marrying the emotional intensity associated with self-oriented perspective-taking with the increased concern for the other demanded by other-oriented perspective taking. Further, I agree that it is important for the empathiser to maintain a sufficiently clear boundary between their own identity and the other, to ensure that the observer does not take on the target's pain and substitute it for their own.

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[110] Gallacher, Ian. 'Thinking Like Non-Lawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect its Importance.' *College of Law Faculty Scholarship*, Paper 6. 2012, p5

[111] Op.Cit. Note 11. Henderson, p1585-1586

[112] Op.Cit. Note 66, Slote, p64-65

[113] Op.Cit. Note 2, Chlopan, et al., p635

CHAPTER THREE
EMPATHY AND ETHICS

1. Introduction

Having considered the concept of empathy, I now wish to consider how empathy fits into ethics, before assessing how it is situated within legal ethics. First, I shall briefly consider the deontic approaches, which fail to consider empathy, and will subsequently consider the ethical theories of postmodernism and the ethic of care, which promote client care through empathic engagement.

2. Deontic Ethics

There are many deontic approaches to ethics, the most prominent being deontology and consequentialism.[114] They both view ethics "in terms of universally applicable principles or rules imposing behavioural duties."[115]

Immanuel Kant's deontological approach to ethics consisted of absolute duties, rules and principles to be obeyed. In order to act in a morally correct way, people ought to act from duties, which should be obeyed regardless of consequences.[116] These duties stem from the three formulations of what he termed the "categorical imperative", set out in his *Groundwork of the Metaphysics of Morals,* which hold that such moral duties ought to be adhered to regardless of someone's aims or desires.[117]

In direct contrast to deontology lies consequentialism, where the morality of acts and rules are evaluated in terms of the resulting consequences. The most prominent example of consequentialist theory is utilitarianism, as advocated by Jeremy

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[114] Nicolson, Donald. 'Making Lawyers Moral? Ethical Codes and Moral Character', *Legal Studies*, 25. 2005, pp601–626, p607
[115] Nicolson, Donald. ''Education, education, education': Legal, moral and clinical.' *The Law Teacher*, 42:2. 2008, pp145-172, p157
[116] Kant, Immanuel. *Immanuel Kant: Groundwork of the Metaphysics of Morals: A German–English edition.* Translated and edited by M. Gregor & J. Timmermann. Cambridge University Press, Cambridge. 2012, 4: 397
[117] Ibid. Kant., 4:420–421

Bentham,[118] John Stuart Mill[119] and Henry Sidgwick.[120] Central to the theory of utilitarianism lie the fundamental elements of pleasure and pain.[121] In accordance with the "principle of utility", an action is judged as 'good' or 'right' by its propensity to increase or reduce the happiness of a person.[122] Utilitarianism fails to appreciate the uniqueness and "distinctness" of individuals,[123] and justifies manipulating people; inflicting pain in order to benefit the majority and achieve an overall "good".[124]

Focussed on the "right" and the "good", respectively, deontology and consequentialism fail to appreciate the complex, subjective experiences of others, preferring universal rules devoid of emotion.[125] They believe "that reason and emotion are separate, that reason can and must restrain emotion,"[126] and consequently "provide refuge from empathic response."[127]

Kant's objective approach removes emotion from decision-making, prizes rationality and, in doing so, prizes decisions that are devoid of cognitive empathy, compassion and empathic care. Utilitarians' focus on impartiality results in emotional detachment, which discourages empathic engagement. Therefore, legal ethical theories based on deontic ethical approaches will inevitably be devoid of considerations of empathy, which results in significant issues arising through their application. Alternatively, what is required is an approach that is based on the ethic of care and postmodernism. I shall now consider both in turn.

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[118] Bentham, Jeremy. An Introduction to the Principles of Morals and Legislation. In J. H. Burns and H. L. A. Hart (eds.) *The Collected Works of Jeremy Bentham*. Oxford University Press, UK. 1789/1996
[119] Mill, John S., *Utilitarianism*. Roger Crisp (ed.). Oxford University Press, New York. 1871/1998.
[120] Sidgwick, Henry. *The Methods of Ethics*. Seventh Edition. Macmillan, London. 1907.
[121] Op.Cit. Note 119. Bentham, p11
[122] Ibid. p12
[123] Rawls, John. *A Theory of Justice*. Harvard University Press, Cambridge, Massachusetts. 1971, p29
[124] Nicolson, Donald and Julian Webb. *Professional Legal Ethics: Critical Interrogations*, Oxford University Press, Oxford. 1999, p26
[125] Ibid., p13
[126] Op.Cit. Note 11. Henderson, p1575-1576
[127] Ibid., p1652

3. Ethic of Care

Starkly contrasting the deontic approaches to ethics is the ethic of care, which values an emotional approach to ethical issues, with empathy viewed as promoting a caring ethos. In response to what she considered to be a deficient, gender-biased analysis of moral theory, Carol Gilligan developed a feminist construction that challenged pervasive attitudes, such as those espoused by Sigmund Freud and her mentor, Lawrence Kohlberg, that women were less morally developed than men.[128]

In *A Different Voice*, Gilligan theorised that men and women view morality *differently,* with men more inclined to adopt what she terms an "ethic of justice", that is, one that follows a more traditional, rights and rules based, abstract ethical approach; as opposed to women who assume a more relational, subjective and contextual moral way of thinking.[129] She was critical of universal moral standards that promote "detachment, whether from self or others", which she saw as "morally problematic, since it breeds moral blindness or indifference."[130]

Nel Noddings, in *Caring: A Feminine Approach to Ethics and Moral Education*, built upon Gilligan's work and cultivated the ethic of care.[131] Unlike deontology and utilitarianism, which simply look to rationality and consequences, respectively, Noddings avers that this alternative approach to ethical reasoning provides a pertinent, and indeed superior, method of understanding the way that particularly women tackle ethical questions and concerns.[132] Care ethicists remove the primacy of abstract moral rules and principles used to evaluate the 'good' and 'right' course of action. Instead, they squarely place their focus on the person to be cared for, with a view to building a full picture of their situation and individual circumstances, in order to identify how to act towards them.[133]

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[128] Gilligan, Carol. 'Moral Orientation and Moral Development.' In Bailey, Alison and Chris Cuomo (eds.) *The Feminist Philosophy Reader*. McGraw Hill, Boston. 2008, p464
[129] Ibid., p467
[130] Ibid., p471
[131] Noddings, Nel. *Caring, A Feminine Approach to Ethics and Moral Education.* University of California Press, California. 2nd edition. 1984.
[132] Ibid., p2
[133] Op.Cit. Note 66. Slote, p10-11

Noddings' construction of the ethic of care arises "out of natural caring – that relation in which we respond as one – caring out of love or natural inclination," which is "the human condition that we, consciously or unconsciously, perceive as 'good'."[134] Actions are, therefore, 'good' where a person shows care towards another person. She emphasises the importance of caring "rooted in receptivity, relatedness, and responsiveness,"[135] which she asserts enables a person to connect meaningfully with the other to create an environment conducive to helping.

Noddings sees caring as motivated, and actualised, through building a relationship where, once the other person's perspective is realised, an individual is compelled to act to eradicate unbearable circumstances, mitigate the other's discomfort, help them meet their requirements and fulfil their aspirations.[136] This approach purports to resolve the problem of impartiality in consequentialist theory, such as utilitarianism, by focussing on the other person and how actions impact them, whilst still seeking to mitigate the infliction of pain and promote their happiness.

Care ethicists, such as Michael Slote, also contend that the partialism associated with deontology, derided by utilitarian thinking, is essential, though qualifies that Kantian conceptions require to be modified, in order to address all moral concerns.[137] Slote argues for the justification of Kantian deontology by basing his ethical approach in empathy. He proposes to view deontology through an emotional, rather than cognitive, purely rational lens, choosing to view it as deriving from a sentimentalist analysis. This, he considers, enables conflicts between competing acts to be resolved by considering our empathic reactions and aversions to taking certain (potentially egregious) courses of action, and also serves to provide a greater understanding of the distinction between doing and allowing something to happen.[138]

Noddings considers that a person cannot have an attitude of caring toward people they do not know. Slote, however, disagrees. Instead, he argues that empathy enables us to

[134] Op.Cit. Note 131. Noddings, p5
[135] Ibid., p2
[136] Ibid., p14
[137] Op.Cit. Note 66. Slote, p43
[138] Ibid., p54

connect with others, even those who are geographically remote, or remote in terms of immediacy.[139] In his formulation of the ethic of care, Slote proposes that "one acts wrongly if an act one performs … *reflects or exhibits* a lack of fully developed empathic caringness."[140] In other words, moral actions flow from acts that demonstrate empathic care towards that person. That is not to say that actions are morally wrong where a person does not *feel* empathically towards another person. Slote clarifies that the moral obligation placed on individuals is restricted only to their actions, it does not dictate that their motives are also caring in nature. Instead, it simply "requires us *not* to act from uncaring motives, *not* to act in ways that reflect a lack of empathic concern for others."[141]

Care ethics has been criticised by feminist theorists who assert that it encourages traditional gender roles, by stereotypically portraying women as "selfless nurturers," with caring duties being inequitably distributed to women.[142] Liberal feminists also consider that it places an insufficient emphasis on the value of equality, and fails to sufficiently regard the patriarchal system in which caring takes place.[143] Virginia Held, a prominent care ethicist agrees with these characterisations, though argues that care ethics can accommodate these concerns.[144]

Further, although empathy is regarded as an important component of care ethics, Held has cautioned that it is not "an unqualified good", highlighting that excessive empathy can result in substantial problems, for example, in terms of empathic over-arousal resulting in excessive personal distress.[145] Similarly to Martin Hoffmann, she holds that in order for empathy to be helpful, it requires to be rooted in, and limited by, specific moral principles that are duly examined and analysed in terms of their moral merits.[146]

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[139] Ibid., p27
[140] Ibid., p32
[141] Ibid., p33
[142] Held, Virginia. *The Ethics of Care: Personal, Political, and Global.* Oxford University Press. 2006, p22
[143] Ibid., p22
[144] Ibid., p22
[145] Ibid., p11
[146] Ibid., p11

Perhaps the most significant criticism of care ethics, however, lies in its purported lack of "completeness, comprehensiveness, and explanatory and justificatory power."[147] Beauchamp and Childress assert that the ethics of care is an insufficiently developed, though not inevitably inaccurate, theory.[148] What it requires, they assert, is "one or more central concepts and a set of bridging concepts to link it to the legitimate concerns of traditional theory."[149] I consider that this can occur through grounding itself in postmodern ethics, which cares for the Other.

4. Postmodernism

Postmodern theorists have sought to challenge the very nature of how we define and interpret existing ethical rules and principles. Unlike its consequentialist and deontological counterparts, postmodern ethical theory rejects the notion that morality can be objectively known and articulated in a comprehensive set of abstract rules and principles. As morality is deemed to be relative, emphasis is consequently placed on the contextual application of each individual act or rule in a specific set of circumstances.[150]

Whilst "sceptical" postmodern theorists assert that there are no universal, fundamental truths,[151] "affirmative" postmodernists alternatively consider that there are some basic, albeit conditional, moral truths.[152] Affirmative postmodern theorists such as Levinas,[153] instead of seeking to reject foundationalism in its entirety, have sought to "re-ethicise" ethics by cultivating a postmodern "ethics of alterity".[154] Accordingly, this "dialogical" ethical approach examines the fertile ground of "interaction between

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[147] Zwier, Paul J. and Ann B. Hamric, 'The Ethics of Care and Relmagining the Lawyer/Client Relationship.' *Journal of Contemporary Law*. 22.2. 1996, pp383-434, p384
[148] Ibid., p384
[149] Ibid., p384
[150] Allan C. Hutchinson, 'Identity Crisis: The Politics of Interpretation.' *New England Law Review*. 26.4. 1992, pp1173-1219, p1185, 1188-1191
[151] Ibid., p1184
[152] Rosenau, Pauline Marie. *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions*. Princeton University Press, 1992, p15-16.
[153] Levinas, Emmanuel. *Totality and Infinity: An Essay on Exteriority*. Trans. Alphonso Lingis. Duquesne University Press, Pittsburgh, Pennsylvania. 1969
[154] Op.Cit. Note 124. Nicolson and Webb, p46

Self and *Other*"[155] and – similarly to the ethic of care – is derived from "the actual lived relationships of corporeal moral agents with concrete others."[156] The ethics of alterity rejects the notion of the self as an abstract entity treating others "instrumentally" without regard for their lived experiences; instead, it encourages a conception of self which is acutely aware of how their actions impact the Other, with their "awareness of alterity … rendered ethically meaningful by respect, compassion and love for the Other."[157] By encountering the "face" of the Other, the self becomes aware of their responsibility to the Other and, according to Levinas, as this responsibility is "asymmetrical" in nature, the self must attend to the concerns of the Other without the expectation that the Other will reciprocate.[158]

Postmodernism, with its focus on the Other, does not seek to provide a new set of rules or ethical codes to replace existing schools of thought,[159] particularly as rules can result in complacency – a sense of feeling that the Self has done all they can for the Other by achieving specific outcomes and tasks.[160] Since it is impossible, however, to know whether "enough" has been done[161] and, indeed, what impact any interactions may have on the Other – for better or worse – it is imperative that care be continuously offered. As a result, postmodern ethics undertakes to "re-awaken" people's consciences, opening their eyes to moral concerns which have previously been obscured from their vision as a result of moral and legal codes, resulting in their failure to assume personal responsibility for their actions.[162] Additionally, it seeks a "re-enchantment" of morality[163] through an acknowledgement that moral issues may be most effectively addressed through people's spontaneous, emotional, instinctive dispositions, and the fact that such an approach may be difficult to explain and justify does not automatically render it "morally inferior."[164]

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[155] Op.Cit. Note 15. Cook, p2458
[156] Op.Cit. Note 124. Nicolson and Webb, p46
[157] Ibid., p46
[158] Op.Cit. Note 153. Levinas, p297
[159] Bauman, Zygmunt. *Postmodern Ethics.* Blackwell, Oxford. 1993, p4
[160] Levinas, Emmanuel. *Ethics and Infinity*. Duquesne University Press, Pittsburgh, Pennsylvania. 1985, p105-106
[161] Op.Cit. Note 159. Bauman, p80
[162] Op.Cit. Note 124. Nicolson and Webb, p47
[163] Op.Cit. Note 159. Bauman, p33
[164] Op.Cit. Note 124. Nicolson and Webb., p47

Due to the complexities of human interactions, postmodern ethics does not seek to resolve ethical dilemmas as it is impossible to do so. Instead, the postmodern approach to ethics draws attention to "narrativity" over normativity. In doing so, in the words of Anthony Cook, it seeks to amplify:

> the voices that speak from this space of human interaction, a space too often emptied of its richness and potential by those who stuff experience into abstract, normative categories that stultify our understanding of life and its possibilities.[165]

There are many concerns levelled at postmodern ethics, perhaps the most pervasive being that it is "too demanding,"[166] as moral agents have a limitless, and therefore insatiable, responsibility to the Other.[167] In light of this responsibility, concerns are also raised as to whether there is a requirement to care for Others equally.[168] Levinas acknowledged that with the introduction of 'the Third'[169] people are compelled to compare and to "weigh" the competing demands of the Others; consequently, it is necessary "to moderate this privilege of the Other" to account for considerations of "justice" in situations involving three or more people.[170] As Cook emphasises, postmodern ethics "cannot be neutral".[171] He compellingly asserts that this "explicitly normative stance," which is still "contextual and narrative-generated," must be embraced by postmodernism in order to avoid it becoming "a contradiction in terms."[172]

In this respect, postmodernists require to have regard not just for the Other, but particularly Others considered to be "excluded" and "underprivileged."[173] This regard for the Other, not simply in terms of proximity but also in terms of hardship faced,

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[165] Op.Cit. Note 15. Cook, p2458
[166] Op.Cit. Note 124, Nicolson and Webb, p48
[167] Levinas, Emmanuel. *Otherwise Than Being, Or, Beyond Essence.* Trans. Alphonso Lingis. Duquesne University Press, Pittsburgh, Pennsylvania. 1998, p180
[168] Op.Cit. Note 124, Nicolson and Webb, p48
[169] Op.Cit. Note 167. Levinas, p157
[170] Op.Cit. Note 160, Levinas, p90
[171] Op.Cit. Note 15. Cook, p2463
[172] Ibid., p2463
[173] Douzinas, Costas, Peter Goodrich, and Yifat Hachamovitch. (eds.) *Politics, Postmodernity, and Critical Legal Studies: The Legality of the Contingent.* Routledge. 1994, p22

increases awareness of the wide-ranging impact actions may have on the Other in ways that may not be easily envisaged or anticipated.[174] As such, Bauman contemplates that a postmodern approach to ethics requires "very, very long hands"[175] in order to help people beyond our immediate sphere of influence – those "beyond our sight and beyond the present."[176]

Postmodern ethics, which focusses on the Other, can benefit from empathic engagement as it can facilitate interactions between the self and the Other, playing a crucial role in contributing towards understanding the Other's complex narratives. A postmodern approach, however, must be particularly vigilant against egocentric biases that result in an over-estimation of the similarities between the self and the Other, as personal beliefs can render the observer susceptible to misinterpreting, incorrectly attributing, or indeed dismissing, the thoughts of the Other. Additionally, familiarity bias may result in empathy being more difficult with Others who are substantially different to the observer; though, other-oriented perspective-taking is crucial in order to enhance the connection between the self and the Other.

5. Summary

Deontic-based ethical theories fail to consider empathy; though, the ethic of care and postmodernism, with their focus on caring for the Other, both promote empathic engagement. In order to be effective, however, such considerations of empathy must realise the nuanced interplay between its affective and cognitive components.

Having considered postmodernism and the ethic of care, this thesis will ultimately explore how such an approach will apply to legal ethics, and in doing so, I shall explore in detail the various issues and benefits that can arise from empathic engagement in such an approach. Before doing so, however, the next chapter will examine the traditional model of lawyering, which is derived from the deontic approach, in order

[174] Op.Cit. Note 124. Nicolson and Webb, p48-9
[175] Op.Cit. Note 159. Bauman, p218
[176] Op.Cit. Note 124. Nicolson and Webb, p49

to highlight the issues it raises in relation to empathy, before subsequently considering the two main critiques it has faced, and their deficient attempts to incorporate considerations of empathy into these models.

CHAPTER FOUR

EMPATHY AND THE THREE MAIN MODELS OF LAWYERING[177]

1. Introduction: Who's in Charge?

The question of who is in control in the lawyer-client relationship is one which has been the subject of increased academic commentary over the past 40 years.[178] This has arisen against the backdrop of significant criticism regarding lawyers' apparent domination, and clients' lack of control and involvement in decision-making processes[179] through the adoption of a traditional model of lawyering.

The traditional model of lawyering highlights two troubling issues that pervade the lawyer-client relationship: neutral partisanship and paternalism. These two ethical issues may arise - to varying degrees - in any model of lawyering, though are principally prevalent in the traditional model.

Each of these ethical issues arise in relation to the issue of control, both in terms of "whose voice is heard" and what that voice will say.[180] In analysing the lawyer-client relationship, John Basten articulates that the central question arises in establishing "where control lies or should lie".[181] When assessing where control lies in the relationship, it is necessary to evaluate the three main models of lawyering, which Basten terms the traditional "lawyer-control model", the "client-control model" and the "co-operative model".[182]

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[177] Material contained in sections 1-5 of this chapter has been derived from: Macleod, Maria. 'Does the Client-Centred Approach Resolve the Problems of Paternalism and Manipulation in the Traditional Model of Legal Representation?' LL.B. (Honours) Dissertation, University of Strathclyde. 2012, p6-25

[178] See: Rosenthal, Douglas E. *Lawyer and Client: Who's in Charge*. Russell Sage Foundation, 1974; Kilborn, Jason J. 'Who's in Charge Here?: Putting Clients in Their Place.' *Georgia Law Review*, 37:1, 2002

[179] Morgan, Thomas D. 'Thinking About Lawyers as Counselors.' *Florida Law Review*, Vol. 42, 1990, p455

[180] Op.Cit. Note 15. Cook, p2460

[181] Basten, John. 'Control and the Lawyer-Client Relationship.' *Journal of the Legal Profession* 6. 1981, pp7-38, p10

[182] Ibid., p10

The extent to which the parties exercise control is worthy of examination, and a nuanced examination of the complex power dynamic within the relationship will be provided at the end of this chapter. At the outset, however, the degree to which the lawyer may exert power over the client, by way of effecting specific professional rules,[183] will be examined through the traditional model. Subsequently, the two primary critiques of the traditional model will be considered in turn. First, the client-centred model, which empowers the client to take control of key matters in the relationship, will be examined. Second, the collaborative model, which promotes the lawyer and client balancing control, ultimately seeking to empower the lawyer to "reconcile her personal and professional personae," will be explored.[184]

Determining who defines the client's legal objectives and means of achieving them and who, if anyone, makes the moral decisions in relation to the client's action and the degree of zeal with which the client's interests are represented can, I consider, be significantly influenced by the presence and extent of empathic engagement exhibited in the relationship. Traditionally, lawyers' focus on rationality and objectivity resulted in *feeling* being relegated to the periphery of their legal analysis,[185] and consequently to the margins of their relationship with their clients. Lawyers' aversion to empathy has been attributed to legal education, where an adversarial culture has, at least historically, been promoted to the point where understanding the other side is deemed beneficial only insofar as it has the capacity to instrumentally enhance a specific objective.[186] Additionally, lawyers' empathic skills have not typically been nurtured and cultivated in professional environments.[187]

In the legal domain, reason and understanding were considered exclusively, and deleteriously, in terms of their crude cognitive components, devoid of appreciation of their emotional, affective, and "experiential understanding"[188] elements. This rejection, and "impoverished view", according to Lynne Henderson, amounted to the

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[183] Cahn, Naomi. 'Inconsistent Stories.' *Georgetown Law Journal*, 81.7. 1993, pp2475-2532, p2524
[184] Ibid., p2499-2500
[185] Op.Cit. Note 11. Henderson, p1575
[186] Ibid., p1576-7
[187] Ibid., p1576-7
[188] Ibid., p1575

banishment of the emotional and experiential facets of what it means to be human from "legal discourse".[189]

Unlike the traditional model, derived from the deontic tradition of ethics and consequently devoid of considerations of empathy, the two primary critiques do appreciate the value of empathy within the lawyer-client relationship and view it as a constituent part of the relationship. The collaborative-model, however, insufficiently appreciates its value, and the client-centred model, with its conception of empathy derived from a Rogerian approach, results in deficiencies in its ability to address the issues of neutral partisanship and paternalism. This chapter will explore in detail the extent to which empathy comports with each of the three main models of lawyering. First, I shall turn to the traditional model, and the issues of paternalism and neutral partisanship.

2. The Traditional Model

In the traditional model of legal representation, Basten notes that the lawyer is instructed by the client, with the lawyer subsequently determining what legal moves to make to progress their client's case, how those moves are to be made and when they are to be executed.[190] This approach derives from lawyers' professional and societal standing, where historically lawyers seized complete control over the majority, if not the entirety, of their client's legal determinations.[191]

Through the application of this model of lawyering, the lawyer assumes control due to their professional education and knowledge, which is what likely prompted the client to instruct the lawyer in the first place, as they are deemed to be best placed to determine what action best accords with their client's best interests.[192] Further, the lawyer's objective, impartial stance is asserted to enable them to clearly assess the

[189] Ibid., p1575
[190] Op.Cit. Note 181. Basten, p17
[191] Op.Cit. Note 178. Kilborn, p6
[192] Op.Cit. Note 181. Basten, p17

merits of the case and more definitively identify the clients genuine interests without being unduly affected by emotional attachments.[193]

Typically, it is presupposed that the client decides merely upon their rough aims and objectives,[194] with the lawyer considered best placed to gauge not only what is in their client's best interests, but also how to champion their legal interests.[195] Consequently, lawyers maintain considerable influence in relation to the key legal decisions in a case, deferring only a limited number of decisions to the client.[196]

2.1. Critique of the Traditional Approach: Overview

These arguments in favour of adopting a traditional approach to legal practice have properly been rigorously challenged. First, the manner in which the lawyer can dominate the relationship through utilising the traditional model is concerning, not simply due to the control exerted, but also due to the way in which the client is treated.[197] Richard Wasserstrom strikingly considers that, in doing so, the lawyer fails to accord their client the appropriate level of deference and dignity, with the lawyer responding to the client more like an inanimate entity than a person, and as a child more than a mature adult.[198] In addition, there is a risk that lawyers' will consider their client's interests only within the boundaries of the identifiable facts, rather than giving due attention to wider considerations that may affect the client.[199]

Emotional detachment is demanded by the traditional model of legal representation, with a lack of human emotion and warmth reflected in the relationship,[200] whereby in terms of the standard conception of neutral partisanship which will be discussed in more detail later, the lawyer is commanded not to be concerned with the moral merits of the client's case, so long as their actions are legal. As William Simon worryingly

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[193] Ibid., p17

[194] Parker, Christine. 'Regulation of the Ethics of Australian Legal Practice: Autonomy and Responsiveness.' *University of New South Wales Law Journal*, 25(3). 2002, p679

[195] Ibid., p679

[196] Op.Cit. Note 12. Strauss, p317

[197] Op.Cit. Note 181. Basten, p22

[198] Wasserstrom, Richard. 'Lawyers as Professionals: Some Moral Issues.' *Human Rights*. 5:1. 1975, pp1–24, p15-16

[199] Op.Cit. Note 181. Basten, p20

[200] Ibid., p22

highlights, where lawyers adopt this approach, they are likely to adopt extremely paternalistic assessments of their client's concerns.[201] Further criticism of the traditional model centres on degree of discretion that is conferred on the lawyer. Thus, it is evident that there are two fundamental issues with this conception of the lawyer-client relationship: paternalism and neutral partisanship. I shall turn firstly to the issue of paternalism.

2.1.1. Paternalism

2.1.1.1. What is Paternalism?

Paternalism is defined by Dennis F. Thompson as the imposition "of constraints on an individual's liberty for the purpose of promoting his or her own good,"[202] and by H. L. A. Hart as a procedure for "the protection of people against themselves".[203] Ultimately, Gerald Dworkin concluded that "paternalism is the denial of autonomy."[204]

There are two key opposing views regarding the value of autonomy. Utilitarians argue that autonomy is attractive because it increases the likelihood that people's desires will be advocated and they will be happy with the outcomes that follow.[205] Conversely, the deontological perspective holds that autonomy is intrinsically valuable because it acknowledges an individual's dignity, sense of self, and their right to make their own choices**.**[206] I, however, prefer Luban's conclusion, whereby he disputes both meanings[207] and argues autonomy is not innately valuable; instead, its significance is derived from other closely connected values.[208]

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[201] Ibid., p20
[202] Thompson, Dennis F. 'Paternalism in Medicine, Law and Public Policy.' In Callahan D., Bok S. (eds.) *Ethics Teaching in Higher Education*. Springer, Boston, Massachusetts. 1980, p245-246
[203] Hart, H.L.A. *Law, Liberty and Morality,* Stanford University Press, Stanford, California. 1963, p31
[204] Dworkin, Gerald. 'Paternalism' *The Monist*. 56.1. 1972, pp64-84, p70
[205] Young, Robert. 'The Value of Autonomy.' *The Philosophical Quarterly*, 32:126. 1982, p35.
[206] Ibid., p35.
[207] Luban, David. 'Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It).' *University of Illinois Law Review*. 2005, p826
[208] Luban, David. 'Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann.' *Columbia Law Review*, 90: 4. 1990, p1037

Advocates of client autonomy maintain that lawyers should simply act as a "mouthpiece" for their clients,[209] empowering them to make voluntary choices, to enable them to achieve their desired outcome[210] and become accountable for all anticipated consequences of their actions.[211] Alternatively, as Luban articulates, I consider that the lawyer must engage in a "balancing act" so that their instructions are effected in a manner that protects and promotes the client's best interests.[212]

Difficulties can arise, however, due to the fact that lawyers have a significant amount of discretion in implementing their client's instructions.[213] Further, they neglect to adequately consider that their obligations to carry out their client's instructions may be at odds with what they subjectively consider to be in their client's best interests.[214] The ethical dilemma that occurs is, therefore, where a client's autonomous instructions do not align with their best interests, as the lawyer subjectively sees them, whether interference with their decisions is acceptable in any circumstances.[215]

Simon avers that the "Dark Secret of Progressive Lawyering" is that proficient lawyers' values will inevitably colour their judgments to varying degrees and induce their clients to assume some or all of these judgments.[216] Further, in articulating that manipulation to serve clients' interests amounts to paternalism,[217] I am persuaded by Ellmann's conclusion that although intentional attempts to influence their client's decisions may be deemed to be especially unacceptable, even lawyers who do not seek to actively manipulate their clients are still capable of significantly influencing their

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[209] Arneson, Richard. 'Mill versus Paternalism.' *Ethics*. 90:4. 1980, p475
[210] Luban, David. 'Paternalism and the Legal Profession.' *Wisconsin Law Review*. 1981.3. 1981, pp454-493, p493
[211] Op.Cit. Note 209. Arneson, p475
[212] Op.Cit. Note 210. Luban, p493
[213] Op.Cit. Note 124. Nicolson and Webb, p140
[214] Ibid., p140
[215] Grill, Kalle. 'The Normative Core of Paternalism.' *Res Publica*, 13. 2007, pp441-458, p446
[216] Simon, William H. 'The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era.' *University of Miami Law Review*. 48.5. 1994, pp1099-1114, p1102.
[217] Ellmann, Stephen. 'Lawyers and Clients.' *UCLA Law Review* 34.3. 1987, pp717-780, p726: Ellmann defines manipulation broadly: "an effort by one person to guide another's thoughts or actions in a direction desired by the person guiding", where "the manipulator seeks this goal by means that undercut the other person's ability to make a choice that is truly his own."

clients to the extent that their client's capacity to generate their own decisions is significantly reduced.[218]

Simon profoundly illustrates this point through his analysis of "Mrs Jones' case." Here, he concludes that even when lawyers consider that they are only offering information to the clients to factor into their own decision making process, they have the capacity to influence their clients in infinite ways, whether intentionally or not, through: their judgements; by deciding what facts to set out to the client; the order in which they present it; which elements they choose to highlight; and the manner in which they articulate and express it.[219] Moreover, tone and facial expressions also play significantly influential roles and I concur that time constraints placed on lawyers in almost all areas of legal practice can pose substantial barriers to presenting impartial advice.[220]

2.1.1.2. Problems with Paternalism

Dworkin asserts that people crave being known by others as a person able to control their own fate.[221] Therefore, paternalism is deemed to be objectionable due to the fact that people are denied the opportunity to make their own choices as they see fit, regardless of whether those choices could (if possible) be objectively demonstrated to be erroneous.[222] Robert Dinerstein also considers that allowing people to make their own autonomous decisions is essential as it confers respect onto them[223] and by acting paternalistically, to any extent, lawyers fail to demonstrate an appropriate degree of

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[218] Ibid., p727
[219] Simon, William H. 'Lawyer Advice and Client Autonomy: Mrs. Jones's Case.' *Maryland Law Review* 50.1. 1991, pp213-226, p217
[220] Ibid., p218
[221] Dworkin, Gerald. 'Autonomy and Informed Consent.' In President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. *Making Health Care Decisions: The Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship.* Volume Three: Appendices (Studies on the Foundations of Informed Consent). The Commission, Washington, D.C. 1982, pp63-81, p74
[222] Dinerstein, Robert D. 'Client-Centered Counseling: Reappraisal and Refinement.' *Arizona Law Review.* 32.3. 1990, pp501-604, p514
[223] Ibid., p513

respect to their client.[224] This, as Wasserstrom asserts, results in a morally defective relationship.[225]

I agree, however, with Luban who avers that the most fundamental problem with paternalism is not that lawyers interfere with their client's autonomous decisions. Instead, it is that, at times, they disregard the component parts of a person's life that make it meaningful to them and bestow dignity upon it.[226] In sum, the problem is not that a person's autonomy is violated, per se; rather, that their human dignity is violated as their voice is discarded.[227] The capacity of empathy to address this problem will be explored in detail in chapter five.

2.1.1.3. Causes of Paternalistic Interference

It is widely accepted by scholars concerned with lawyers' paternalistic interference with their client's decisions that it is attributable to tensions that exist within the principal-agent relationship. This is evident where the agent's legal knowledge, skills and training are relied upon by inexperienced principals who require to place their trust in the agent to assist them with their often very personal concerns.[228]

The fact that clients approach a lawyer for assistance at times where their circumstances render them vulnerable can consequently result in them being viewed by their lawyers as individuals who need paternalistic assistance, instead of autonomous people. [229] Wasserstrom, the original proponent of this view, concluded that inequality permeates the lawyer-client relationship due to five key factors: first, the client's reliance on the lawyer's specialist knowledge and practical ability; second, the complexity of legal terminology; third, the problem of the client gauging the effectiveness of the lawyer's service provision, and the lawyer's subsequent lack of motivation to address their client's needs; fourth, the lawyer's view that the client lacks

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[224] Op.Cit., Note 198, Wasserstrom, p19
[225] Ibid., p19
[226] Op.Cit. Note 207. Luban, p826
[227] Ibid., p829-30
[228] Felstiner, William. L. F., and Ben Pettit. 'Paternalism, Power, and Respect in Lawyer–Client Relations.' In Sanders Joseph and V. Lee (eds.) *Handbook of Justice Research in Law*. Springer, Boston Massachusetts. 2000, p142
[229] Ibid., p143

objectivity in determining how best to successfully advance their own interests; and finally, the attitude instilled in law students that lawyers are exceptional and in some way superior to their clients.[230]

2.1.1.4. Does Paternalism Produce Better Results?

It should be noted that varying degrees of paternalistic interference may be appreciated and welcomed by clients who value their lawyer's professional judgment, over their own, about the course of action they deem to be in their best interests.[231] It has, however, been problematically suggested that lawyers frequently make decisions which are superior to those their client would make.[232] Mark Spiegel powerfully challenges this notion by articulating that the client has more information and background knowledge regarding their own legal issue and understanding of how their values and goals align with them.[233] Accordingly, I agree that the client is arguably best placed to make decisions in his case, and this can be facilitated through lawyers' empathic engagement with their clients, which will be explored in detail in chapter five.

Additionally, the question arises as to whether the lawyer is genuinely capable of identifying their client's desires and values,[234] and I agree with Spiegel's suggestion that a lawyer can never fully comprehend them due to the nuanced assessment required.[235] In her analysis, Marcy Strauss considers that lawyers, even those with genuine intentions, can assign typically anticipated goals to the client, instead of appreciating the client's own specific needs and aims.[236] As Paul Tremblay persuasively elucidates, even though a lawyer may be incredibly proficient at identifying the client's priorities, the client's own individual predilections and

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[230] Op.Cit. Note 198. Wasserstrom, p16-18
[231] Op.Cit. Note 228. Felstiner and Petit, p137
[232] Spiegel, Mark. 'Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession.' *University of Pennsylvania Law Review*. 128.1. 1979, pp41-140, p85-86
[233] Ibid., p86
[234] Ibid., p100. Op.Cit. Note 228. Felstiner and Petit, p141: This is due to "communication problems, changing circumstances, subjective and often indeterminate values, and possible professional–client class value biases."
[235] Ibid., p100
[236] Op.Cit. Note 12. Strauss, p328

aversion to taking risks are unique to them, and the lawyer will never know this to the same degree as the client.[237]

Further, Tremblay notes that the conception of paternalism generating better results for clients presupposes that, when acting on behalf of their clients, it is possible for lawyers to make determinations that have ‘right’ answers.[238] Anticipating legal outcomes, however, is infamously an inexact science, and as a result of the fact that decisions are made on the basis of numerous indeterminate factors, including: the client’s principles, aversion to taking risks, and the mental and societal impact - not solely on the evaluation of the legal position – I agree that it is the client themselves that will more often than not be best placed to make the better, ‘correct’ decision in this regard.[239]

2.1.2. Neutral Partisanship

The second ethical issue which shall now be examined is that of neutral partisanship, the concept of which concerns lawyers’ “professional role morality.”[240] Derived from the “standard conception” of the lawyer’s role,[241] neutral partisanship obliges lawyers to act as zealous advocates on behalf of their clients regardless of the lawyer’s concerns in relation to the client’s goals.[242] It holds that lawyers favour their client’s concerns over others and that the duties owed to their clients permit, and arguably dictate, that the lawyer act in a manner which would, in any other circumstance, be deemed morally unacceptable.[243]

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[237] Cochran, Robert F. Jr., Rhode, Deborah L., Tremblay, Paul R., Shaffer, Thomas L. ‘Symposium: Client Counseling and Moral Responsibility.’ *Pepperdine Law Review* 30.4. 2003, pp591-640, p617

[238] Tremblay, Paul R. ‘On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client.’ *Utah Law Review* 1987.3. 1987, pp515-584, p524

[239] Ibid., p525

[240] Op.Cit. Note 124. Nicolson and Webb, p161

[241] Dare, Tim. ‘Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers.’ *Legal Ethics*, 7.1. 2004, pp24-38, p24

[242] Nicolson, Donald, ‘Afterword: In Defence of Contextually Sensitive Moral Activism.’ *Legal Ethics*, 7.2. 2004, pp269-275, p269

[243] Op.Cit. Note 241. Dare, p24

When advancing their client's best interests, a lawyer's conduct is assessed by distinct moral criterion than those by which a layman would be judged for similar conduct.[244] In the traditional view, if the lawyer's conduct is lawful it is morally defensible, regardless of whether the aims and ways in which they seek to achieve them are morally reprehensible, and it is the client, not the lawyer, who is answerable for their actions.[245] Thus, the ethical dilemma transpires where a lawyer acts in a manner that he deems to be personally unacceptable, but his conduct will not be subject to professional disciplinary action or legal punishment.[246]

There are two key principles that comprise this ethical issue, those of neutrality and partisanship. The first dictates that lawyers must not permit their own personal assessments of either the client's integrity, or the virtues of the client's chosen course of action, to impact the degree to which they earnestly and zealously seek to achieve their client's legal aims.[247] Thus, the principle of neutrality shields lawyers' from moral, legal or political concerns related to their client's objectives or the manner in which they are achieved.[248] Additionally, it is posited that the application of this principle protects against the potential of someone not being able to assert their rights in an appropriate legal forum simply because their lawyer deems those rights, or the assignment of them to that person or persons, to be morally unacceptable.[249] The related principle of partisanship requires lawyers to assertively and steadfastly seek to achieve the client's desired outcomes to the greatest possible extent allowed by the law.[250] By adhering to this principle, lawyers are expected to assist their clients to achieve favourable outcomes using any legal means necessary.[251]

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[244] Pepper, Stephen L. 'The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities.' *Law and Social Inquiry* 11.4. 1986, pp613-634, p614
[245] Ibid., p614
[246] Fried, Charles. 'The lawyer as friend: The moral foundations of the lawyer-client relation.' *The Yale Law Journal* 85.8. 1976, pp1060-1089, p1082
[247] Op.Cit. Note 241. Dare, p28
[248] Op.Cit. Note 124. Nicolson and Webb, p163
[249] Op.Cit. Note 241. Dare, p28
[250] Ibid., p29
[251] Simon, William H. *The practice of justice: a theory of lawyers' ethics*. Harvard University Press, 2009, p28

2.1.2.1. Problems with Neutral Partisanship

Criticism of the lawyer's amoral role has justifiably been sustained and diverse, with one of the primary critiques being that it results in lawyers exercising "excessive zeal".[252] This occurs where a hyper-zealous legal representative seeks to attain an outcome to which the client is legally entitled, but they do so by pursuing any benefit that they can legally achieve, even beyond what is strictly necessary to achieve that outcome.[253] Lawyers' utilisation of tactics in such an "instrumentalist" manner has the potential to cause damage to a significant number of diverse interests.[254]

Another criticism levelled against neutral partisanship is that lawyers ignore conflicts that arise between their professional role morality and their personal "ordinary" morality. This "moral detachment strategy" could alternatively lead to the converse issue of excessive zeal, that is, the correspondingly concerning use of "insufficient zeal" with lawyers' providing sub-standard legal advice, assistance and representation.[255] Where lawyers exclude moral considerations, they are arguably less capable of constructing effective legal arguments than others with deep-rooted moral feelings.[256] Yet, perhaps more troubling still is the fact that when lawyers cease to engage with moral sentiments, they may subsequently cease to engage with connected "feelings of empathy, sympathy and concern," which results in the lawyer focussing solely on the client's legal concerns that are situated within their distinct area of skill and competence.[257] A further fundamental concern is that, in addition to moral detachment, another key reason why lawyers exercise insufficient zeal, and thus provide deficient legal services, is due to a number of "institutional constraints," including pressure to meet their firm's financial targets, and their desire to maintain amicable relations with the courts, adjudicators and other practicing lawyers.[258]

[252] Op.Cit. Note 124. Nicolson and Webb, p171
[253] Op.Cit. Note 241. Dare, p30
[254] Op.Cit. Note 124. Nicolson and Webb, p171
[255] Ibid., p178
[256] Ibid., p179
[257] Ibid., p179
[258] Ibid., p178

Significant concerns have also been raised regarding a lawyer's neutrality. In clarifying the client's objectives, the principle of neutrality deters lawyers from analysing the moral ramifications that may arise as a result of pursuing a particular course of action.[259] As a consequence, such a failure to explore the moral implications arising from their proposed conduct may result in lawyers' employing their own value judgements or making paternalistic judgements about how they think their client would wish to proceed, and may ultimately induce clients to concur with proposed legal outcomes that they otherwise would have vetoed had other options been considered. [260]

2.1.2.2. Justifications for Neutral Partisanship

There are three justifications for the use of neutral partisanship. First, it is asserted to protect "the institutions of liberal government," enabling democracy and the rule of law to be upheld; second, it is purported to promote liberal principles of "dignity, autonomy and equality"; and third, it is argued that it enables the adversarial justice system to function effectively.[261] I consider that each of these justifications are unsustainable on their own, and the reasons for this will be highlighted below.

2.1.2.2.1. Institutions of Liberal Government

The first justification for lawyers acting as neutral partisans is that their refusal to advance the client's legal entitlements may damage the institutions of liberal government.[262] In particular, this is deemed to have the capacity to undermine "the legislature's right to set behavioural standards for society."[263] Accordingly, this view holds that lawyers should zealously represent their client's position regardless of any personal objections to the law they are being asked to uphold.[264] Where lawyers object to legislation, they are alternatively encouraged to raise challenges through other democratic means in a transparent manner, rather than "surreptitiously substituting their views for those of the institutions of liberal government."[265]

[259] Ibid., p179
[260] Ibid., p179
[261] Ibid., p166
[262] Ibid., p205
[263] Ibid., p205
[264] Ibid., p205
[265] Ibid., p205

In addition, by refusing to argue cases in court, lawyers are arguably appropriating the "judiciary's role as the adjudicator of disputes," thereby denying the courts the opportunity to develop and clarify the law relating to legal matters in dispute.[266] By raising these issues in a public forum, it is suggested that this may encourage clients to "modify their behaviour" as a result of "moral pressure," and provide them with an appropriate forum through which their dispute can be resolved.[267]

This justification, however, fails to appreciate that not all legal conduct "is necessarily legislatively and judicially condoned" and, therefore, "may justifiably be furthered by lawyers without moral criticism."[268] It also fails to consider that a lawyer's zealous representation can result in them generating their client's rights, where there were no previously articulated rights or in the case of "competing rights"; as such, it may be inevitable that lawyers play a significant role in terms of creating the law.[269] Furthermore, zealous advocates seeking to advance their client's interests "can significantly undermine the courts' truth-finding capability,"[270] and the manner in which they craft the facts of the case to suit the legal narrative can also shape the extent to which rights are "created".[271] Conversely, lawyers' zealous advocacy may "effectively negate rights," for example where lawyers' "rely on tactical devices" in order to mitigate against, or evade, undesirable legal outcomes, which has been argued to "undermine the authority of those creating and enforcing such rights."[272] Acting as zealous advocates can therefore result in lawyers not only playing a role in terms of rights creation but, in fact, subverting "legislative and judicial decisions as to how people should behave."[273]

Additionally, where lawyers identify potential weaknesses in their client's cases, they may actively seek to avoid the matter being adjudicated upon. Accordingly, lawyers' zealous representation arguably serves to undermine the role of the court instead of

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[266] Ibid., p205
[267] Ibid., p206
[268] Ibid., p207
[269] Ibid., p208
[270] Ibid., p208
[271] Ibid., p208
[272] Ibid., p208
[273] Ibid., p208

defend it.[274] Moreover, this justification fails to acknowledge that the vast majority of cases are resolved outwith the court process, and that settlements are not necessarily representative of "likely judicial decisions."[275] This is particularly the case where there are inequalities in terms of parties' negotiating power.[276]

2.1.2.2.2. Promoting Dignity, Autonomy and Equality

The traditional narrative also justifies neutral partisanship by attaching central importance to respect for dignity of all human beings. In doing so, Alan Donagan concludes that all potential clients should have their opinions taken into account during litigation and negotiation, even where they are misguided about the factual circumstances of their case, or the moral correctness, or otherwise, of their position.[277] Building upon this analysis, Pepper broadened the scope of Donagan's argument to include the performance of all legal services, on the basis of autonomy and equality.[278]

Pepper highlights that parity of access to the law is important,[279] and the denial of legal help is an affront to the notion of equality.[280] The issue of inequality is especially acute due to the inequitable distribution of power in the lawyer-client relationship, emanating from both the lawyer's legal knowledge and experience and the client's reliance on the lawyer to effect their instructions, and potentially their inferior academic, social and economic standing.[281] Pepper notably asserts that because of this power and knowledge imbalance between lawyer and client, as the client requires the legal assistance but is unable to appraise it, the client is consequently 'vulnerable' with respect to their lawyer.[282]

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[274] Ibid., p209
[275] Ibid., p208
[276] Ibid., p208
[277] Donagan, Alan. 'Justifying Legal Practice in the Adversary System.' In David Luban (ed). *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*. 1983, pp123-149, p133
[278] Ibid., p133
[279] Op.Cit. Note 244. Pepper, p618
[280] Op.Cit. Note 124. Nicolson and Webb, p193
[281] Ibid., p192
[282] Op.Cit. Note 244. Pepper, p615

Additionally, since for most people most of the time worthwhile access to the legal system calls for the help of a lawyer, it is argued that lawyers are therefore essential in order to achieve significant personal autonomy.[283] Lawyers as gatekeepers may result in only people who are sufficiently legally proficient, or those in a position to teach themselves to an adequate standard, being realistically able to access to the law themselves. As a result, people who are typically less well educated and legally fluent have their access curbed due to their lawyer's ability to impose their own moral judgment or ultimately decline to act.[284]

Ultimately, Pepper concludes that the law is envisioned as being "a public good" that enhances autonomy, and enhancing peoples' autonomy is "morally good".[285] He asserts that lawyers should not, as Luban posits, insert their own opinions and moral apprehensions as "filters" onto their clients to dictate what ventures their clients can and cannot engage in.[286] He asserts that those who refuse assistance on moral grounds wrongly "substitute their beliefs for individual autonomy and diversity"[287] and, as Tim Dare notes, declining to represent their client, or failing to exercise appropriate zeal, would result in the client being denied their entitlement to have their legal rights be decided upon.[288]

Alternatively, Luban advocates that neutral partisanship should be a presumption that can be defeated and only utilised in circumstances where there are no powerful conflicting "considerations of common morality".[289] He agrees with Pepper to the extent that, in normal circumstances, enhancing an individual's autonomy is "morally good"; however, where the consequences of an individual's exertion of autonomy produces an action that is immoral, such a promotion of autonomy is not morally acceptable.[290] In doing so, Luban clearly delineates between the appeal of people

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[283] Op.Cit. Note 124. Nicolson and Webb, p192
[284] Op.Cit. Note 244. Pepper, p.619
[285] Luban, David. 'The Lysistratian Prerogative: A Response to Stephen Pepper.' *Law & Social Inquiry*. 11.4. 1986, pp637-649, p638
[286] Ibid., p638
[287] Op.Cit. Note 124. Nicolson and Webb, p192
[288] Op.Cit. Note 242. Nicolson, p270
[289] Ibid., p275
[290] Op.Cit. Note 285. Luban, p639

"acting autonomously," and the appeal of people's "autonomous acts" – a line he avers that Pepper has blurred.[291] Luban asserts that clients are not unduly impacted if the other connections they have in life are generally autonomous in nature.[292] He notes that it is vital that people's lawfully acceptable ventures are subject to informal checks, highlighting that we "rely to a vast extent on informal social pressure to keep us in check" – for example, standing in a queue.[293]

Luban concludes that lawyers' autonomy permits them to employ the "Lysistratian prerogative," which justifies their refusal to provide services to people where they object to their ventures.[294] As a result, when a lawyer is instructed to act in a manner which, despite being lawful, is offensive or immoral, the lawyer should be permitted to decline to effect the client's instructions and/ or end the existing lawyer-client relationship where the lawyer is "reasonably convinced" that another lawyer can be instructed to represent the client.[295] Yet, as Fried articulates, the key question is whether the lawyer is morally obliged to decline to act when they are the 'last lawyer in town', where there are no other lawyers willing or able to assist the client in order to relieve the lawyer of his moral dilemma.[296] Fried persuasively concludes that, where there is no other lawyer able to assist, the difficulty of the lawyer's decision becomes particularly acute. In those circumstances, the obligation to act placed on the lawyer is an institutional one, to present legal arguments which are morally acceptable but which the lawyer deems morally reprehensible. As the issue is a moral consideration, and the law dictates that the lawyer act in a manner contrary to his conscience, the lawyer should conscientiously object, though he should be aware that such a stance may result in him suffering negative consequences.[297]

[291] Ibid., p639
[292] Ibid., p643
[293] Ibid., p641
[294] Ibid., p642
[295] Op.Cit. Note 246. Fried, p1083
[296] Ibid., p1083
[297] Ibid., p1086

2.1.2.2.3 Adversarial System

Lawyers acting as neutral partisans is further justified by the traditional narrative in that it is purported to be essential in order for the adversarial system of justice to function.[298] The adversarial system is said to be the most congruent with perceptions of fairness, and an effective method of resolving disputes and producing satisfactory judgments.[299] Such conduct by legal representatives, whose focus is placed squarely on zealously advocating their client's position regardless of moral considerations, is further defended on the basis that it ensures that both parties to a legal action will have their best lines of argument presented in court, which, therefore, enhances the quality of judges' decisions and promotes each party's interests.[300]

These arguments promoting the effective operation of the adversarial system as a justification rely on the legal system's purported capacity to identify the 'truth'. Yet, this proposition is highlighted, ironically, as arising from zealous advocacy itself.[301] The question of whether lawyers are genuinely seeking to ascertain the truth in litigation, and indeed any form of dispute resolution, is extremely questionable since, during their legal training, the importance of winning cases is emphasised over the subtler messages of constraints on zeal, and 'truth' is esteemed for its use in winning arguments rather than for being an important professional value.[302]

Further, there is a presumption that both parties are represented and on an economically equal level. As Luban compellingly highlights, however, where unrepresented clients are unable to access legal services, the utilisation of zealous advocacy associated with neutral partisanship frequently allows clients who can afford legal assistance to increase their advantages over those who cannot afford such assistance, which may lead eventually to a "vicious spiral of social inequality and outright damage".[303] Blatant disparities in terms of clients' resources and standard of legal support quashes the notion that zealous advocates will negate other zealous

[298] Op.Cit. Note 124. Nicolson and Webb, p183
[299] Ibid., p189
[300] Ibid., p183
[301] Ibid., p187
[302] Ibid., p187
[303] Op.Cit. Note 285. Luban, p644

advocates' exploitation of the adversarial system, enhance the identification of the 'truth' and promote 'fairness', and advance the safeguarding of legal rights.[304] Accordingly, the argument for the adversarial system only extends to circumstances where parties have equality of arms, with neutral partisanship only potentially justifiable when utilised in litigation and potentially extended to negotiations that take place "in the shadow of the courts".[305]

How both of these ethical issues can be mitigated through enhanced empathic engagement in the lawyer-client relationship will be considered in detail in the next chapter. Now, though, I shall consider the client-centred model, and how its conception of empathy proves problematic.

3. The Client-Centred Model

In an attempt to decrease lawyers' control, thereby challenging the traditional balance of power in the lawyer-client relationship, Binder and Price introduced a "client-centred practice," which they derived primarily from Carl Rogers' client-centred counselling model.[306] The client-control model dictates that the client makes all of the important choices concerning their case,[307] transforming the lawyer's function into one of an "open, accepting helper" whereby the lawyer and client are considered to be equal.[308] Additionally, Basten emphasises that the client-centred model does not seek to contradict the fact that lawyers' possess particular abilities, experience, and understanding, and are consequently best placed to assess what judgment a court is likely to reach in certain circumstances. Instead, in light of lawyers' comparatively powerful position, the client-centred approach endeavours to avoid them becoming a domineering force in the relationship.[309]

[304] Op.Cit. Note 124. Nicolson and Webb, p191
[305] Ibid., p183
[306] Op.Cit. Note 217. Ellmann, p720
[307] Op.Cit. Note 181. Basten, p19
[308] Bastress, Robert, M. 'Client Centred Counseling and Moral Accountability for Lawyers.' *Journal of the Legal Profession* 10. 1985, pp97-138, p125
[309] Op.Cit. Note 181. Basten, p20

Binder and Price evaluated that client-centred lawyering was the most effective way to enhance understanding between the lawyer and client and promote clients' autonomous decisions,[310] and highlighted the value of clients making decisions devoid of manipulation.[311] Douglas Rosenthal determined that, having the benefit of their lawyer's conscientious legal advice, the client is best placed to evaluate the consequences of each particular course of action and as they have to contend with the real-world impacts of their decisions, and so should be permitted to command their own fate.[312] This approach operates on the premise that "lawyers may be experts on the law, but only clients are experts on their own lives."[313]

The client-centred model places the client, instead of their legal concerns, at its heart,[314] in order to prevent lawyers' regarding their clients as merely abstract legal problems, devoid of human concerns.[315] Thus, in utilising this model of lawyering, the client's related non-legal concerns[316] become more relevant and, as such, since the lawyer is able to take a more well-rounded view of the client's values, they are able to provide advice which is more pertinent to the client.[317] Moreover, the client is deemed to be in a better position to make decisions about their own life since they will be provided with more information about the significance and emphasis to be placed on these factors, in addition to gaining a greater understanding of how his choice of legal options will impact his non-legal concerns.[318]

In utilising this method, Bastress clarifies that the lawyer must adopt a "demonstrably sincere … nonjudgmental and honest" approach, and employ reflective, empathic

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[310] Op.Cit. Note 237. Cochran, et al. p616
[311] Jacobs, Michelle S. 'People from the Footnotes, The Missing Element in Client-Centred Counselling,' *Golden Gate University Law Review*, 27.3. 1997, pp345-422, p346
[312] Op.Cit. Note 178. Rosenthal.
[313] Kruse, Katherine R. 'Engaged Client-Centered Representation of the Moral Foundations of the Lawyer-Client Relationship.' *Hofstra Law Review*. 39.3. 2011, pp577-594, p586
[314] Kruse, Katherine R. 'The Jurisprudential Turn in Legal Ethics.' *Arizona Law Review*. 53.0. 2011, p525
[315] Op.Cit. Note 313. Kruse, p584; For a more in-depth analysis, see: Kruse, Katherine R. 'Beyond Cardboard Clients in Legal Ethics.' *Georgetown Journal of Legal Ethics,* 23.1. 2010, pp103-154.
[316] Op.Cit. Note 314. Kruse, p525. I.e. their "economic, social, psychological, political, moral, and religious considerations."
[317] Ibid., p525
[318] Ibid., p525

listening to promote an open dialogue so information can be easily shared.[319] Empathic response, colloquially known as "active listening,"[320] allows the lawyer to respond to the client in a manner that coveys to the client that they have listened by responding to both "the substance" of the client's problem and "its emotional content."[321] Active listening in the lawyer-client relationship is asserted to convey empathy,[322] which results in an enhanced, comprehensive legal examination[323] and is ultimately beneficial to the very result of the legal matter.[324]

3.1. Critique of the Client-Centred Approach

3.1.1. Deficiencies with the Client-Centred Conception of Empathy

Due to the fact that Binder, Bergman and Price's client-centred approach is derived from Carl Rogers' conception of empathy, a number of significant issues arise. The client-centred model, which promotes "non-judgmental" understanding, prides itself on being a "value-neutral" lawyering model;[325] they consider that lawyers should view the client from *"outside"* both the lawyer *and* the client's experiences to avoid the lawyer employing their own knowledge and experience, and therefore not be susceptible to judging the client.[326] The lawyer stays "neutral no matter what the client says or does,"[327] which is immensely concerning due to its "chilling effect on the client's voice."[328]

Since their conception of empathy is based on Rogers' cognitive-focused definition, the client-centred lawyer faces significant challenges in order to obtain a full

[319] Op.Cit. Note 308. Bastress, p99
[320] Barkai, John L., and Virginia O. Fine. 'Empathy training for lawyers and law students.' *Southwestern University Law Review*. 13.3. 1983, pp505-530, p507
[321] Dinerstein, Robert, Stephen Ellmann, Isabelle Gunning, and Ann Shalleck. 'Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary.' *Clinical Law Review*. 10.2. 2004, pp755-804, p758-759
[322] Op.Cit. Note 308. Bastress, p101
[323] Ibid., p114-115
[324] Ibid., p114
[325] Op.Cit. Note 1. Margulies, p608
[326] Ibid., p609
[327] Ibid., p608
[328] Ibid., p609

understanding of their client's inner world.[329] The client-centred model's formalistic, almost scientific, approach whereby lawyers' employ specific skills such as active listening, in order to effectively interview and counsel clients,[330] "downplays the contingent, fluid nature of the counsel[l]ing process and neglects the affective dimension of the lawyer's role."[331]

Client-centred lawyers' focus on technique hides the "importance of the client's own situation, including her ideology, affective ties, and material needs."[332] They are trained to view clients as "emotional minefields, rife with 'inhibitors'" that impede the effective transfer of information and ideas, rather than as people with their own unique perspectives and values.[333] The lack of deference to the affective components of the client's case is concerning because emotional dimensions will inevitably exist in almost every case, even in circumstances where clients may feel devoid of emotion with regard to their legal issue itself; the prospect of seeking legal advice, engaging in a court process[334] and/ or awaiting the outcome of a settlement or decision from a legal adjudicator, is likely to result in the client developing an emotional response.[335]

3.1.2. Problems with Empathy as Conceived by Client-Centred Lawyers

There are three profoundly concerning effects of lawyers adopting a client-centred approach based on this conception of empathy. First, empathy in this environment lacks context and is "reductively universalistic;"[336] it results in lawyers disregarding "differences among clients in order to enthrone a single view of human behavio[u]r and motivation."[337] In their attempt to espouse a comprehensive, "universal

[329] Ibid., p609
[330] Ibid., p608
[331] Ibid., p610
[332] Ibid., p610. Footnote 20. See: Binder, David A., Paul B. Bergman, Susan C. Price, *Lawyers as Counselors: A Client-Centered Approach,* West Publishing Company, 1991, p35
[333] Ibid., p610.
[334] Op.Cit. Note 320. Barkai and Fine, p509. At p510: For example, "[e]ven a business or corporate client who may not 'distrust' its lawyers may be embarrassed because it has encountered a problem that it cannot handle internally, or because the problem has been caused by an oversight or mistake."
[335] Ibid., p510
[336] Op.Cit. Note 1. Margulies, p612
[337] Ibid., p612

approach," they consequently end up with an approach to lawyering that lacks "depth".[338]

Second, due to the fact that empathy in this context is frequently utilised "in informal, unregulated settings," such as interviews that take place in law firms' offices, it can, as Peter Margulies emphasises, accordingly bolster existing disparities of power between lawyers and clients that arise within these environments.[339] This concern arises from fears that "subordinate people" need to depend on "empathy or generosity from members of the dominant culture" as opposed to being in a position to assert their own rights, which results in the reproduction of "power imbalances."[340] Accordingly, the subordinate client regularly faces "an additional disempowerment instead of the empowerment" resulting from asserting their rights.[341] Additionally, lawyers' display of empathy and purported concern for the other can, in fact, disguise their ambition to acquire more power.[342] In these circumstances, empathy becomes "a set of expectations that clients must meet" rather than the lawyer placing an onus on themselves to act empathetically, with the clients engaging empathetically.[343] As Margulies eloquently expresses: "lawyer empathy becomes client compliance with lawyer power."[344]

Finally, empathy as conceived by client-centred lawyers is boiled down to a mechanical application of skills and conveyance of reactions to clients' circumstances, which "drains momentum from any genuine movement to transform power relationships."[345] Client-centred lawyers adopt specific "routines," such as the 'T-Funnel' and 'Chronological Overview," which arguably destroys their ability to harness empathy's "transformative energy."[346] These formalistic routines eradicate the likelihood of lawyers adopting spontaneous, creative responses; instead, replacing

338 Ibid., p609
339 Ibid., p613
340 Ibid., p613
341 Ibid., p613
342 Ibid., p613
343 Ibid., p613
344 Ibid., p613
345 Ibid., p614
346 Ibid., p614

it with rigid "professional dogma".[347] Lawyers' responses are accordingly "filter[ed] … through a professional prism," rather than the lawyer organically responding "as a human being."[348] Instead of prompting genuine responses, lawyers are inclined to offer responses devoid of emotion.[349] These mechanical responses can result in lawyers' increasing their power and reinforcing the current state of affairs, whereby empathy can be utilised by lawyers to "manipulate clients through the empathic cues" the client-centred lawyer proposes.[350]

3.1.2.1. Hired Gun

Additionally, one of the most prominent concerns raised regarding the client-centred model of lawyering itself is that, by focussing exclusively on the client, the lawyer simply becomes a "hired gun" in the client's hands.[351] Robert Cochran also voices concern that client-centred practitioners' approach directs toward making decisions that take into account only consequences that affect themselves.[352]

Cochran considers that client-centred practitioners may be justified in placing their emphasis on empowering clients, particularly in situations where inequalities of resources arise, for example, where lawyers represent impoverished clients against affluent parties in striving to balance the scales of justice.[353] He acknowledges, however, that this model of legal representation will not be suitable for all legal contexts and in certain circumstances where the client-centred approach is employed, considerable questions about justice will be raised. This is particularly the case, he stresses, when clients who exert substantial power make choices exclusively by evaluating the consequences that will affect themselves, significant damage can be inflicted on others.[354] Therefore, he advocates for the adoption of a collaborative approach, which will now be considered.

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[347] Ibid., p614
[348] Ibid., p614
[349] Ibid., p614. For example: lawyers responding with platitudes such as "it must have been hard for you…".
[350] Ibid., p614; This is not to say that there are no benefits to be derived from Binder and Price's conception of empathy.
[351] Op.Cit. Note 237. Cochran, et al. p596-597
[352] Ibid., p598
[353] Ibid., p598
[354] Ibid., p598

4. The Collaborative Model[355]

The collaborative model of lawyering, as described by Deborah L. Rhode, is a participatory model that views lawyers and clients as jointly tasked with the resolution of legal problems and equally accountable for the ethical effects of their collective action.[356] The approach valiantly demands that lawyers and clients both strive to achieve a comprehensive appreciation of the other's aims and perspectives and, as far as possible, to hold them in common, with the matter progressing only where the lawyer and client both consider the approach to be morally satisfactory.[357] Where consensus cannot be reached regarding a course of action either the lawyer or client may defer to the other's viewpoint, though it is not mandated that they do so and, ultimately, the lawyer-client relationship is deemed to have stopped functioning where viewpoints are diametrically opposed and unable to be aligned.[358]

Cochran posits that the collaborative model's benefits lie in its aim to guard freedom and promote personal autonomy, placing restraints on paternalistic and manipulative interference.[359] When utilising the collaborative model, lawyers must not utilise their skills and experience to control their client. Additionally, clients cannot insist that lawyers act as hired guns, without due regard to moral considerations.[360] Proponents of this model, therefore, consider it superior to the traditional and client-centred models which, it is asserted, both fail to allow either the lawyer or the client the ability to decide, and take action, upon their own views,[361] with responsibility for broaching moral considerations resting solely with either the lawyer or client.[362]

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[355] A different, specific collaborative model has been developed and utilised within the context of family law. See: Tesler, Pauline H. 'Collaborative Law: What it is and why family law attorneys need to know about it.' *American Journal of Family Law.* 13.4. 1999, pp215-225; and Tesler, Pauline. 'Collaborative Law: A New Paradigm for Divorce Lawyers.' *Psychology, Public Policy, and Law*. 5: 967. 1999.
[356] Op.Cit. Note 237. Cochran, et al. p610
[357] Op.Cit. Note 181. Basten, p23
[358] Ibid., p23
[359] Op.Cit. Note 237. Cochran, et al. p610
[360] Op.Cit. Note 181. Basten, p23-24
[361] Ibid., p23
[362] Op.Cit. Note 237. Cochran, et al. p598

Unlike the client-centred model, Cochran articulates that the collaborative model shatters the notion that "neutrality" is either feasible or beneficial.[363] Instead, it enables lawyers and clients to jointly solve moral concerns by engaging in "moral discourse," where although the lawyer is fully engaged in the process, it is the client who ultimately decides how to proceed.[364] Through engaging in moral discourse in the collaborative model, lawyers' view the relationship between themselves and the client as one of friendship, which accordingly promotes values vital to effective moral discourse, such as "compassion, tolerance, humility, courage, honesty, care, and persistence."[365] Furthermore, by substituting the purported benefits of an approach devoid of emotion grounded in professional detachment, the collaborative approach is admirable in its focus on providing coherent, insightful advice, appropriate to the client's position, due to an enhanced understanding of their client's position.[366]

4.1. Critique of the Collaborative Model

Although heralded as a solution to significant problems associated with the traditional and client-centred models, including the issues of paternalism and neutral partisanship, there are a number of fundamental limitations with the collaborative model. One of the primary criticisms is that the conception of 'lawyers as friends' fundamentally ignores the economic underpinnings of the relationship,[367] where lawyers may excessively relate to their client's concerns and interests, particularly where they can derive a financial benefit in doing so.[368] Moreover, lawyers' cognitive biases, concern for their own regard, and restricted vantage point impact their assessment of their client's proposed actions, with many lawyers altering or deferring moral judgement during representation.[369]

Another significant criticism is that wisdom is required in order appropriately identify, broach, and deliberate upon moral issues, and that wisdom typically comes with

[363] Ibid., p610
[364] Ibid., p598
[365] Ibid., p610
[366] Op.Cit. Note 181. Basten, p26
[367] Op.Cit. Note 237. Cochran, et al., p612
[368] Ibid. p611
[369] Ibid. p612

maturity and experience.[370] Additionally, Cochran importantly highlights that moral discourse can take a considerable amount of time, which is in short supply in practice environments where lawyers require to meet billable-hour targets in corporate settings; or where lawyers have large caseloads, particularly where representing clients in receipt of legal aid.[371] Moreover, disparities in the balance of power can pose significant challenges for lawyers and clients working collaboratively together where the risk exists that one will dominate the other.[372]

Further, Cochran stresses the challenges of marrying "sympathy and detachment that is the heart of good lawyering."[373] I disagree, however, with his assertion that the value placed on empathy may be inappropriate, which he explained by reference to studies into organisations' malfeasance.[374] Cochran controversially considers that, alternatively, what may be required from lawyers is, in fact, "less empathetic identification and more independent judgment".[375] Yet, in articulating this position, Cochran only appears to consider empathy in terms of self-oriented perspective-taking – lawyers' walking in the shoes of their client.[376] For reasons to be explored in detail in the next chapter, I consider that a more empathically sensitive approach can enhance pragmatic decision-making and serve to enable lawyers to find the balance between emotional detachment and concern for the client, though, lawyers must adopt a fuller conception of empathy, one that includes affective components in addition to self- *and* other- cognitive perspective-taking components.

Having considered the three main lawyering models, I shall now turn to consider the crucial power dynamic in the relationship, which can have a profound impact on the prevalence of the ethical issues discussed above.

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[370] Ibid. p600
[371] Ibid., p611
[372] Ibid., p611
[373] Ibid., p600
[374] Ibid., p611
[375] Ibid., p611. See: Op.Cit. Note 181. Basten, p26. Basten notes that: "[t]he commitment and involvement" that is vital to the adoption of the co-operative model "has undoubtedly contributed to the 'burn-out' phenomenon and the high turnover of lawyers, thus providing evidence that the co-operative model is only likely to survive where there is a strong commonality of goals and values between lawyers and clients."
[376] Ibid., p611.

5. The Locus of Control

5.1. Power in the Lawyer-Client Relationship

Numerous studies have assessed the dynamics of power within the lawyer client relationship, with many scholars noting that it is often portrayed "as one of professional dominance and lay passivity".[377] Further studies have illustrated that the relationship is controlled by either the lawyer or the client, or "split into rigidly isolated spheres of influence, with clients autonomously defining goals and lawyers determining the means to achieve them."[378]

John Heinz and Edward Laumann elucidate that the area of legal practice dictates the extent to which the lawyer dominates the relationship, determining which approach and tactics to adopt.[379] Consequently, Richard Abel asserts that "corporate clients" generally tend to be the "dominant" characters in comparison to their lawyers, whilst lawyers in smaller firms tend to "dominate" the relationship with their clients.[380] Other studies indicate that the locus of power is variable on a "case by case" basis, with Cain's research indicating variations on a "client to client" basis,[381] and Robert Nelson and Eve Spangler's research on large law firms noting that power can be allocated differently on a task-to-task basis.[382]

According to Austin Sarat and William Felstiner, however, in their observation of divorce lawyers, the interplay in the lawyer-client relationship regularly "resembles a

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[377] Op.Cit. Note 228. Felstiner and Petit, p143. See: Heinz, John P. 'The Power of Lawyers.' *Georgia Law Review.* 17.4. 1983, pp891-911, p892; and Johnson, Terence J., ed. *Professions and Power (Routledge Revivals)*. Routledge, 2016, p53

[378] Sarat, Austin, and William L. F. Felstiner. *Divorce Lawyers and Their Clients, Power and Meaning in the Legal Process*, Oxford University Press, UK. 1996, p19. See: Kagan, Robert A. and Robert Eli Rosen. 'On the Social Significance of Large Law Firm Practice'. 37 Stanford Law Review, 399, 1984-1985.

[379] Heinz, John P., and Edward O. Laumann. *Chicago lawyers: The social structure of the bar*. Russell Sage Foundation, 1982, p104. Factors such as "whether or not the clients are likely to produce repeat business or have the ability to pay fees" are deemed influential in this regard.

[380] Richard, L. Abel. *American lawyers*. Oxford University Press, USA, 1989, p204

[381] Op.Cit. Note 228. Felstiner and Petit, p144. See: Cain, Maureen. 'General-Practice Lawyer and The Client-Towards a Radical Conception.' *International Journal of the Sociology of Law*. 7.4. 1979, pp331-354

[382] Ibid., p144. See: Nelson, Robert L. *Partners with power: The social transformation of the large law firm.* University of California Press, 1988; and Spangler, Eve. *Lawyers for hire: Salaried professionals at work.* Yale University Press, 1986.

complex, shifting, conflicted set of negotiations."[383] Sarat and Felstiner broaden the scope of their conclusions to the general practice of law as they consider that the lawyer and client negotiate consistently throughout the life of the relationship on a variety of matters.[384] Alex Hurder adopts a similar position, noting that lawyers and clients negotiate outcomes that affect their relationship both intentionally and unintentionally.[385] It is asserted that such an approach to interviewing and advising clients is the most effective way to achieve an equal and successful partnership.[386]

In their analysis, Sarat and Felstiner embrace what Michael White designates a "Foucaultian", "post-structural" methodology, which questions the orthodox structural conceptions of power as something that a person can possess and exercise over another person.[387] They evaluate that by enquiring who is in control of the relationship there is an implication that a solitary, constant response can be articulated and that it is obvious who 'holds' the power.[388]

Sarat and Felstiner persuasively conclude that it may be the case that, regularly, there may not be anyone in charge as the exchanges between lawyers and their clients can entail a significant degree of ambiguity in terms of objectives and a lack of clear way forward. As such, it may prove challenging to identify who, at any point in time, is in charge of "defining objectives, determining strategy, or devising tactics."[389] This is due to the fact that power is not an entity that can be held; "it is continuously enacted and re-enacted, constituted and reconstituted."[390] On this assertion, it proves difficult to locate a specific, over-arching locus of power.

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[383] Ibid., p145
[384] Ibid., p145
[385] See: Hurder, Alex J. 'Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration.' *Buffalo Law Review*. 44.1. 1996, pp71-100.
[386] Op.Cit. Note 228, p145
[387] Op.Cit. Note 378. Sarat and Felstiner, p18. See: Bernauer, James W, and David M. Rasmussen. *The Final Foucault*. MIT Press, Cambridge, Massachusetts. 1988, p12: "[R]elationships of power are changeable relations, i.e. they can modify themselves, they are not given once and for all … These relationships of power are then … reversible and unstable."
[388] Felstiner, William L. F. and Austin Sarat. 'Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions.' *Cornell Law Review*. 77. 1991-1992, pp1447-1498, p1456
[389] Ibid., p1454
[390] Op.Cit. Note 378. Sarat and Felstiner, p22

5.2. Choice of Lawyering Model: Power and Voice

Each of the three main models of lawyering, therefore, adopts "a somewhat static model," where power is deemed to vest in the profession, the lawyers, or the client, with the lawyer having the power to determine which model should be adopted.[391] The traditional model, which privileges the voice of the profession, is criticised by both the client-centred and collaborative models due to the fact that each approach deems that the wrong voice is prioritised; the client centred model, instead, amplifies the voice of the client, whilst the collaborative model promotes the voice of the lawyer.[392]

Importantly, Cahn highlights that these outlooks fail to acknowledge "the shifting nature of power between lawyer and client (and around and beyond the lawyer and client),"[393] with postmodernism highlighting the problems of presuming that one party has the power and therefore has the ability to "control legal representation," and "that cases exist as discrete entities."[394] Instead, she persuasively elucidates that it is "simplistic" to assume that one of these lawyering models will be able to address "the various power issues inherent in the attorney-client relationship"[395] due to the lawyer-client relationship's intricacies, which necessitate "alternative approaches that recognize its inconsistent and shifting nature."[396]

A postmodern approach may claim that, while there is no 'correct' approach to legal ethics, the client-centred or collaborative approaches provide 'better' solutions than the traditional model. Whilst each of the critiques on the dominant paradigm may argue that lawyers should adopt a more client-centred approach to legal representation or that they should be more moral, from a postmodern perspective it proves impossible to mandate that one approach to lawyering will always be better than another.[397] Despite this, affirmative postmodernists may accept that in specific circumstances

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[391] Op.Cit. Note 183. Cahn, p2526
[392] Op.Cit. Note 15. Cook, p2461
[393] Op.Cit. Note 183. Cahn, p2526-2527
[394] Ibid., p2526. See: Op.Cit. Note 388. Felstiner and Sarat. At p1450: "[A] postmodern approach [to the lawyering process accordingly] suggests that neither clients nor lawyers exclusively exercise power. Instead, power is "mobile and volatile, and it circulates such that both lawyer and client can be considered more or less powerful, even at the same time."
[395] Ibid., p2527
[396] Ibid., p2527-2528
[397] Ibid., p2508-2509

there are varied and more optimal methods of lawyering that can be discerned. In practical terms, although each individual lawyer is able to determine for themselves how they wish to "practice law", it may be the case that "some stories of how to practice accord more appropriately with the needs of certain clients and within certain areas of the law than others."[398]

As Cook underlines, lawyers should not feel pigeon-holed into a position of feeling that they must choose between privileging the voice of the profession, the lawyer, or the client. Instead, lawyers should appreciate the fact that each model of lawyering does not need to be applied in a "mutually exclusive" manner; depending on the circumstances in which the lawyer and client find themselves, different approaches can be pragmatically blended in order to best comport with the client's needs.[399] A variety of contextual factors may influence which model – or models – may be adopted, and by whom, and this will ultimately depend upon the particular features of the lawyers and clients.[400] As Basten notes, lawyers' "backgrounds, experience, areas of work and the nature of their clientele" may all impact their selection of a lawyering model and the way in which they approach their client's case.[401]

I agree, however, with Naomi Cahn that regardless of whether the lawyer is able to cultivate a variety of different approaches, it is inescapable that "tensions and

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[398] Ibid., p2508-2509

[399] Op.Cit. Note 15. Cook, p2461

[400] O'Leary, Kimberly E. 'When Context Matters: How to Choose an Appropriate Client Counseling Model.' *Thomas M. Cooley Journal of Practical and Clinical Law*. 4.2. 2001, pp103-160, p125. At p129: O'Leary, in examining the impact of lawyers' characteristics, considers Susan Daicoff's determination that since lawyers tend to be 'thinkers' as opposed to 'feelers' in terms of 'Myers-Briggs Type Indicator' measures, they are, therefore, 'more aggressive' and desire to be in control. Consequently, she concludes that lawyers collectively may, in comparison to non-lawyers, be deficient in their capacity to participate in particular kinds of conversations concerning "values, morality or broader-based problem-solving" and, therefore, may struggle to adopt a client-centred, or even collaborative model. See also: Diacoff, Susan. 'Asking Leopards to Change Their Spots: Should Lawyers Change - A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes.' *Georgetown Journal of Legal Ethics*. 11.3. 1998, pp547-596.

[401] Op.Cit. Note 181. Basten, p16: Most professional ethical codes do not specifically set out which model should be employed. Detailed consideration of professional ethical codes is out with the scope of this thesis. It is important to note, however, that most codes of ethics typically promote the use of the traditional model, with some restricted consideration given to the client-centred model. Ultimately, lawyers (and clients) have the capacity to choose which model to adopt. The collaborative model is considered "inconsistent with any generalized code of ethics".

inconsistencies" will arise.[402] Client-centred lawyers will almost inevitably find themselves in "impossible" positions whereby they are unable to always completely accept the client's stated positions and proposed goals; they will unavoidably need to contribute their perspective to at least a minimal degree.[403] Collaborative lawyers will almost inevitably be influenced by their client's stated aims in determining which cases they accept and how they tactically approach each case.[404] Despite the collaborative and client-centred approaches allowing room for flexibility and "ambiguity," none of the three main models of lawyering sufficiently appreciate the complexities and the dynamic, connected nature of the relationship between the lawyer and client.[405] Each model fails to acknowledge that "[t]he story that gets told in a case depends on both lawyer and client, as well as the contexts in which they speak."[406]

Whilst both the client-centred and collaborative approaches strive to "contribute to an understanding of client stories," unlike the traditional model,[407] all of these approaches based on "the principles of conventional legal ethics" dictate that "a lawyer should not be concerned with inconsistent stories, but should focus only on constructing the clients story so that the client will achieve her objectives."[408] As Cahn persuasively argues, "the dominant legal discourse suppresses the multiple narratives imbedded in the experiences of clients."[409] Accordingly, I consider that there is a need for an alternative approach that illuminates and explores clients' multiple narratives, one that values and strives to promote the experiences of the Other, particularly the oppressed Other, to explore these inconsistent stories; that approach is the ethic of care, with its focus on listening to, and understanding, client narratives, due to its nuanced focus on empathic engagement.

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402 Op.Cit. Note 183. Cahn, p2528
403 Ibid., p2528
404 Ibid., p2528
405 Ibid., p2528
406 Ibid., p2528
407 Op.Cit. Note 15. Cook, p2500
408 Ibid., p2460
409 Ibid., p2460

6. Summary

Traditionally, the lawyer was deemed to hold the power within the lawyer-client relationship; however, a postmodern analysis highlights that the concept of power is not fixed but fluid and contextually derived. Within the last century, however, the client-centred and collaborative models of lawyering emerged to challenge the voice that is exalted within the relationship. The traditional model, devoid of considerations of empathy, prizes emotional detachment over connection with clients, and raises two specific issues: paternalism and neutral partisanship. The client-centred model promotes empathic responses, however, fails to adequately consider empathy's affective dimension. The collaborative model, in contrast, values empathy but cautions against lawyers' using too much.

Whilst lawyers and clients will require to determine which approach, or approaches, are adopted, I consider that an alternative model of lawyering requires to be utilised. I consider that an approach to legal ethics based on an ethic of care, which has an appreciation of, and value placed on, listening to the narratives of the Other – particularly the subordinated Other – is best placed to address, and mitigate against, the negative effects of neutral partisanship and paternalism due to its contextual and subjective nature. Such an approach to lawyering, which champions empathic engagement, must adopt a conception of empathy that has both affective and cognitive components and, specifically, in terms of cognition, adopt both self- and other-oriented perspective-taking in order to enable lawyers to engage with clients in a more effective manner. I shall now turn to consider this model in detail.

CHAPTER FIVE

THE ETHIC OF CARE

1. Introduction: An Alternative Approach Based on Connection

Whilst the three main models of lawyering all purport to amplify the voice of the profession, the client, or the lawyer, Naomi Cahn convincingly argues that the client's multiple narratives require to be explored, and that these stories – the client's experience – should serve to guide not only "whose voice will tell the story" but also what "story that voice will tell."[410] I consider that the best way to achieve this is through an alternative approach to lawyering that promotes empathic engagement in order to ensure that the voices are listened to, and a genuine attempt to understand them is made, and that approach is the ethic of care.

The ethic of care will be examined in detail at the outset of the chapter, following which, the ethic of care's ability to address the issues of paternalism and neutral partisanship will be explored. Turning first to the ethic of care itself, we need to ask what is the ethic of care for lawyers and what distinguishes it from justice-focussed models of lawyering?

2. The Ethic of Care for Lawyers[411]

Despite its roots in feminist ethics, the ethic of care is not exclusively available to women.[412] It is concerned with how all "lawyers actually practice" and connect with their clients.[413] All lawyers, in a sense, care for their clients. They do so in a myriad of ways, for example, by conducting research and investing time in setting out their case, representing them and advancing their position.[414] What distinguishes the ethic of care from other approaches to lawyering, however, is that it "re-imagines" the lawyer-client

[410] Op.Cit. Note 183. Cahn, p2499-2500

[411] Op.Cit. Note 147. Zwier and Hamric, p431: It is not for the lawyer to impose the caring approach upon their clients; the client should choose to adopt it themselves. At p407: "If agreements cannot be reached using a care-based analysis, then the rights-based legal system may provide a safety net."

[412] Ellmann, Stephen. 'The Ethic of Care as an Ethic for Lawyers.' *Georgetown Law Journal* 81.7. 1993, pp2665-2726, p2726

[413] Cahn, Naomi R. 'Styles of Lawyering.' *Hastings Law Journal* 43.4. 1992, pp1039-1070, p1054

[414] Op.Cit. Note 412. Ellmann, p2693

relationship as one where the crucial "moral concern" is "one of creating and sustaining responsive connection to others".[415]

2.1. Caring

The caring approach to lawyering stands in stark contrast to the justice perspective, particularly exemplified by the traditional model of lawyering, and this is evident in several ways. First, the ethic of care, particularly the conception espoused by Ellmann, sets out that decisions concerning how lawyers should act in any particular set of circumstances "[are] not determined by the rigid application of universal norms"[416] and abstract principles.[417] Instead, the lawyer is concerned with "the lived experiences of those affected by the decision."[418] The ethic of care "is subjective, particularistic and contextual and emphasizes responsiveness and responsibility in relationships with others,"[419] acknowledging that moral judgments are "situation-attuned perceptions sensitive to others' needs and to the dynamics of particular relationships."[420] Although the ethic of care does not provide a detailed concise framework governing how lawyers should act, it does provide "fluid", "contextual" normative guidance, which results in a unique balancing of factors in each ethical interaction.[421] As such, Cook highlights that this formulation of the ethic of care is decidedly postmodern in nature.[422]

Second, the care perspective values "relationships and connectedness over autonomy."[423] Therefore, it avoids the promotion of "individual rights" when reaching conclusions regarding moral concerns that have the capacity to inflict harm and have a detrimental impact on the parties concerned.[424] Using the care perspective has the ability to liberate lawyers from the traditional constraints of "role-playing,"[425] viewing the client's issue as an abstract problem to be solved. Accordingly, the lawyer is less

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[415] Op.Cit. Note 147. Zwier and Hamric, p386
[416] Op.Cit. Note 15. Cook, p2469
[417] Ibid., p2471
[418] Ibid., p2471
[419] Op.Cit. Note 147. Zwier and Hamric, p384
[420] Ibid., p387
[421] Op.Cit. Note 15. Cook, p2471
[422] Ibid., p2471
[423] Op.Cit. Note 147. Zwier and Hamric, p387
[424] Ibid., p387
[425] Ibid., p387

inclined to dominate the relationship due to their position of power derived from their legal skills and knowledge and thereby usurp the client's autonomy, and the client is less likely – in seeking to assert their rights – to impose their moral views on the lawyer and undermine the lawyer's "moral integrity".[426]

Third, the ethic of care "rejects impartiality" and objectivity as crucial moral components, and is consequently in a position to remedy concerns regarding lawyers' neutrality, particularly evident in relation to the client-centred approach's conception of empathy.[427] Finally, but by no means least, with its focus on empathy and concern,[428] the ethic of care, as Ellmann eloquently articulates, "abandons the complete insulation of heartlessness that sometimes seems implicit in the current formulations of lawyers' ethics."[429]

In order to be effective, considerations of care should be implemented at the outset of the lawyering process.[430] This is particularly important where clients are engaged in legal disputes where parties are engaged in close relationships, in order that the lawyer can obtain all pertinent information and gauge the care that each party concerned requires at the earliest possible stage.[431] By implementing caring considerations, lawyers are purported to be able to provide more effective, innovative, bespoke options in seeking to resolve parties' disputes due to the model's grounding in effective legal counselling.[432]

On the basis that connection forms the cornerstone of the relationship, I shall now turn to examine the way in which lawyers can build connections with their clients. In doing so, the potential issues with, and barriers to, connection will also be considered.

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[426] Ibid., p388
[427] Ibid., p387. At p412: The objectivity promoted by the client-centred model "is in marked contrast to the ethic of care."
[428] Ibid., p401
[429] Op.Cit. Note 412. Ellmann, p2726
[430] Op.Cit. Note 147. Zwier and Hamric, p430
[431] Ibid., p432
[432] Ibid., p388

2.2. Connection

I agree with Ellmann that establishing and cultivating dynamic connections with clients is at the heart of the ethic of care, and is essential in the relationship between the lawyer and their client.[433] I concur that connection benefits both lawyers and clients,[434] opening channels of communication,[435] and facilitating meaningful interactions.[436] Lawyers and law students have the ability to develop their capacity for connection by endeavouring to enhance their "interviewing and counselling skills," and caring lawyers are able to – and, indeed, should – strive to accomplish this.[437] The particularly challenging component of connection is identifying and determining "to what or whom to be connected."[438]

Due to the focus on connection, it is perhaps surprising that detachment is considered acceptable in the ethic of care: the ethic does not dictate that the lawyer must have any personal interaction or, indeed, a personal relationship with their client in order to assist them.[439] Detachment is, however, only permissible where it is itself an expression of care, either for the for the lawyer to care for their clients, for example, where a lawyer with a demanding caseload requires to detach in order to be capable of effectively representing all of their clients;[440] or for the lawyer to care for themselves, where the lawyer's personal circumstances are such that they feel unable to develop the relationship with their client due to the lawyer fearing that an enhanced connection with the client will require more skill or emotional capacity than the lawyer possesses.[441] Where detachment is viewed as an expression of care, Cook persuasively advocates that in the circumstances such care must be "weighted in favo[u]r of a greater concern for the oppressed and subordinated Others," to reduce the likelihood of lawyers being inclined to favour resolutions in their own self-interest.[442]

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[433] Op.Cit. Note 412. Ellmann, p2700
[434] Op.Cit. Note 413. Cahn, p1067
[435] Ibid., p1065
[436] Op.Cit. Note 412. Ellmann, p2700
[437] Ibid., p2700
[438] Op.Cit. Note 413. Cahn, p1066
[439] Op.Cit. Note 412. Ellmann, p2693
[440] Ibid., p2693
[441] Ibid., p2694
[442] Op.Cit. Note 15. Cook, p2472

Despite this degree of acceptable detachment, personal relationships – connecting emotionally with clients – is encouraged within the relationship. Connection requires that lawyers have a sufficient degree of "self-awareness,"[443] so they do not lose their sense of self and remain capable of differentiating their experience from that of their clients. I consider that it is imperative that the lawyer does not take the client's problems on as their own, feeling personally impacted by what happens to the client. Lawyers' ability to "maintain a perspective both inside and outside of the relationship" is crucial, due to the fact that it enables them to cultivate a connection that is "minimally exploitative."[444]

2.2.1. Potential Issues with Connection

Naomi Cahn persuasively argues that the "structures of dominance and subordination" within the lawyer-client relationship result in an increased likelihood for exploitation in the relationship.[445] Connection opens up the possibility for exploitation. The lawyer can exploit the client by appropriating their aims, "dominate the connection" so that the lawyer acts paternalistically towards the client; and, as a result of failing to maintain their "sense of self", fall back into the traditional conception of the lawyer as a 'hired gun,' raising concerns in relation to neutral partisanship.[446]

To counter the risk of exploitation, I consider that the lawyer should take into account the "psychological and emotional needs of the client" to address matters of legal strategy in terms of the client's wider concerns.[447] The lawyer should also be aware of their own biases and veiled agenda, being conscious not to misrepresent the client's objectives, and vigilant against acting manipulatively towards the client.[448] Furthermore, the lawyer should seek to "empower" their client to make decisions pertinent to her case, "rather than falling into the easier paradigm of the lawyer who takes control."[449] This can be achieved by placing empathy at the core of connection

[443] Op.Cit. Note 413. Cahn, p1067-8
[444] Ibid., p1067-1068
[445] Ibid., p1067
[446] Ibid., p1067
[447] Ibid., p1065
[448] Ibid., p1065
[449] Ibid., p1066

and doing so can mitigate the likelihood for exploitation and thus provide the client with superior representation.[450] This will be explored in detail in the next section of this chapter when examining empathy's role in the ethic of care.

Additionally, there are many potential barriers to connection, which can result in lawyers feeling distant and disconnected from their clients, and vice versa. The lawyer's opinions concerning the merits of the client's case can impact the degree of disconnect,[451] along with "differences rooted in larger social or cultural background influences, or socially constructed identity categories."[452] Such barriers can result in lawyers feeling almost a complete disconnect.[453] Breaking down these barriers may not be easy, and may be particularly challenging in terms of the financial, emotional, or time constraints involved. Empathic lawyering cannot completely resolve these challenges; however, even where resources are limited, empathic connection remains both possible and necessary. The caring lawyer should strive to overcome the barriers they face,[454] acknowledging these factors into account in assessing the degree to which they can connect with the client.[455] Lawyers who fail to make an attempt to connect and understand their client, when such an attempt could be made, may be revealing "deliberate indifference,"[456] which is contrary to the ethic of care.

Lawyers do not have an obligation to care for and understand everyone equally.[457] Indeed, empathy with everyone concerned may have the capacity to "create decisional paralysis."[458] The lawyer's endeavouring to understand the client "is an expression and an exercise of care, and that care will be felt more strongly in some situations than in others."[459] Yet, due to the fact that lawyers' work frequently includes a level of caring connection which results in a genuine need for emotional attachment, lawyers have a

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[450] Ibid., p1066-7
[451] Op.Cit. Note 321. Dinerstein, et al. p768
[452] Ibid., p769
[453] Ibid., p769
[454] Ibid., p769
[455] Op.Cit. Note 412. Ellmann, p2701
[456] Ibid., p2702
[457] Ibid., p2861
[458] Op.Cit. Note 11. Henderson, p1584
[459] Op.Cit. Note 412. Ellmann, p2702. At p2698: An ethic of care "should acknowledge that inequality can legitimately exist, though it rejects the view that relationships must fit the mo[u]ld of an inflexible hierarchy."

"particularly salient" responsibility to understand their clients,[460] and that ability to understand is derived from effective empathic engagement, which will now be considered.

2.3. Empathy and the Ethic of Care

In the lawyer-client relationship, I consider that the lawyer should strive to cultivate strong emotional links with their clients,[461] and at the root of the emotional connection is the value placed on empathy and concern for the client and others.[462] Peter Margulies elucidates that empathic engagement enables the lawyer to imagine:

> what the world would look like … from another position, imagining how [they] would look to [themselves] from within a different world, and coming to understand that [they] might define [their] principles differently if [they] did not stand where [they are] accustomed to. [463]

Lawyers and clients are regularly unable to understand each other, in large part due to their failure to convey their feelings – "those nonverbal, deeply rooted energies that can lead us to act in contradiction to our will and our rational decisions." [464] Through being attentive to the client's affective cues, and listening to the client's concerns, the lawyer is able to improve their ability to identify and understand the client's feelings, which I consider to be crucial to understanding their position.[465] I do not consider that the degree of affective matching must be identical; what is required is simply that the lawyer and client achieve a sufficiently similar match.

An enhanced level of understanding should, I consider, result in the lawyer being better able to care for the client, and provide them with a higher quality of service.[466] By listening to the client's concerns empathically, lawyers can not only understand, and

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[460] Ibid., p2702
[461] Ibid., p2695
[462] Although the ethic of care does acknowledge that lawyers can, and should, care for some people over others.
[463] Op.Cit. Note 1. Margulies, p617-618
[464] Op.Cit. Note 147. Zwier and Hamric, p403
[465] Ibid., p421
[466] Ibid., p421

consequently feel better connected with others,[467] but as Barkai and Fine suggest, the lawyer "can strengthen the case, increase the client's satisfaction and improve the business aspects of the lawyer's practice."[468]

The care approach commands that the lawyer engages empathically with the client, where the lawyer "apprehend[s] the client's reality, feeling what he feels as nearly as possible."[469] Ellmann highlights the various definitions of empathy, including those of Binder and Price, as well as acknowledging definitions that view empathy as both a cognitive and emotional response, such as those of Lynne Henderson and Martin Hoffman. Ellmann underlines that lawyers require to strike a delicate balance between their emotional engagement and their ability to make "cool-headed decisions."[470] They require to strive to achieve "a depth of understanding that engages her heart as well as her head,"[471] and ultimately concludes that the lawyer's goal "is to enter her client's world without leaving her own."[472] Whilst it is imperative that lawyers engage in self-oriented perspective-taking in order to try and understand how *they,* "with [their] own attachments and insecurities, would feel in that situation;"[473] I consider that it is also essential for the lawyer to 'leave her own world' and attempt to enter the client's by engaging in other-oriented perspective-taking.

2.3.1. Self-Oriented Perspective-Taking

Self-oriented perspective-taking alone is inherently problematic, not least because it can lead to empathic over-arousal in the form of personal distress. Through engaging in self-oriented perspective-taking, the lawyer is liable to feel the client's distress so acutely that they may strive to identify methods to "block" the feelings of distress in a variety of ways, by: ceasing to listen to the client; distracting themselves with other thoughts; re-formulating the client's narrative; or withdrawing from distressing situations (and potentially from their clients), finding procedural reasons for avoiding

[467] Op.Cit. Note 11. Henderson, p1579
[468] Op.Cit. Note 320. Barkai and Fine, p507
[469] Op.Cit. Note 147. Zwier and Hamric, p386-7
[470] Op.Cit. Note 412. Ellmann, p2700. Footnote 98.
[471] Ibid., p2700
[472] Ibid., p2700
[473] Op.Cit. Note 1. Margulies, p618

taking action.[474] This can result in the lawyer under-identifying with the client, and where the distress becomes so acute that they withdraw from the interaction, the lawyer no longer remains empathically engaged.[475]

Another significant issue related to self-oriented perspective-taking is that lawyers can be susceptible to being influenced by their own beliefs, which can lead to significant errors in prediction and misattributions. Whilst self-oriented perspective-taking can foster a beneficial degree of dynamism and exuberance in the relationship,[476] by focusing on themselves, lawyers can ‘over-identify’ with their clients, which can lead to them making assumptions about the what the client desires, and what they require.[477] This can result in the client viewing the lawyer as forcing them to take action that they may not – or perhaps no longer – want to take.[478] Where the lawyer’s focus is exclusively on themselves, engagement does not amount to genuine empathy due to their lack of consideration of their client.

Moreover, significant differences between the lawyer and client renders self-oriented perspective-taking particularly challenging and can lead to what Richard Delgado terms “false empathy,” which he highlights in relation to race. He cautions lawyers against empathy which is “unreflective” and disingenuous, characterised by “shallow,”[479] “superficial”[480] identification with the other. He highlights that disingenuous empathy can be harmful,[481] arguing that false empathy “is worse than none at all, worse than indifference.”[482] This, he asserts, is due to its capacity to make lawyer’s unduly self-assured, which can lead to the lawyer being inclined to be paternalistic, thinking they know what the client wants but instead envisaging what the

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474 Op.Cit. Note 11. Henderson, p1582
475 Op.Cit. Note 320. Barkai and Fine, p1652
476 Op.Cit. Note 321. Dinerstein, et al. p766
477 Ibid., p767
478 Ibid., p767
479 Delgado, Richard. ‘Rodrigo's Eleventh Chronicle: Empathy and False Empathy.’ *California Law Review.* 84.1. 1996, pp61-100, p72
480 Ibid., p70
481 Ibid., p73
482 Ibid., p94

lawyer would want in the client's circumstances, without regard to the fact that their desires and "experiences are radically different."[483]

2.3.2. Other-Oriented Perspective-Taking

In order to mitigate against these negative effects of focussing on the self, I consider that it is also essential for the lawyer to "reciprocally" engage in other-oriented perspective-taking.[484] In attempting to understand the other, the lawyer should try to imagine how the client would feel in the circumstances, having regard to their "commitments and vulnerabilities."[485] In order to genuinely empathise and successfully engage, I consider it to be imperative that lawyers see clients as distinct persons, which necessitates that they are attentive to, and appreciate the importance of, voice.[486] Voice, as Margulies emphasises, is "difficult to attain and even harder to preserve"[487] due to the fact that clients often convey their aims and objectives in ambiguous, indirect ways, via "stories, values, and impressions," and can struggle to resolve clashes between their short- and long-term goals.[488]

Clients, as Cahn identifies, have not just "one voice, but a repertoire of voices,"[489] with each client having multiple, "overlapping, and different stories."[490] It is vital, as Cook urges, that lawyers do not simply stop searching for the truth[491] because there is "no 'necessarily correct version' of the story."[492] I agree that the lawyer should, therefore, "accept and explore variations in stories,"[493] listening in order to identify the client's voice within these various narratives,[494] whilst being aware of affective cues in order to enhance the degree of empathic understanding. Moreover, I concur that the lawyer requires to be cognisant and have an appreciation of intersectionality, acknowledging

[483] Ibid., p94
[484] Op.Cit. Note 1. Margulies, p618
[485] Ibid., p618
[486] Ibid., p630
[487] Ibid., p630
[488] Ibid., p631. See: Op.Cit. Note 210. Luban.
[489] Ibid., p631
[490] Op.Cit. Note 183. Cahn, p2478
[491] Ibid., p2531
[492] Op.Cit. Note 15. Cook, p2461
[493] Op.Cit. Note 183. Cahn, p2531
[494] Op.Cit. Note 1. Margulies, p631

that the client's voices are derived "from the overlapping communities that help form her identity."[495] Dealing with clients' multiple narratives, and addressing intersectionality, is an important avenue for future research into empathy in the lawyer-client relationship.

2.3.2.1. Problems with Other-Oriented Perspective-Taking

Focusing on the other also raises significant issues in the lawyer-client relationship. First, there is an increased likelihood that lawyers will empathically engage with clients with whom they are in a "direct relationship", and "where concrete interaction occurs and incentive for understanding exists."[496] This "here and now" bias, described by Hoffman, may accordingly result in empathic engagement proving more challenging with clients when they are not present, and may result in lawyers being less able to empathise with others who may be impacted by the client's proposed actions.[497] Put simply: the others are out of sight and out of mind.

Additionally, it may be easier (and more likely) for lawyers to empathically understand the perspectives of clients who are similar to them due to 'familiarity bias'.[498] Henderson terms this type of understanding, which "may be so automatic that it goes unnoticed," as "'unreflective' empathy".[499] Conversely, empathy for clients who are significantly different, for example in terms of race, culture, or gender, requires more effort, and may prove much more challenging for lawyers to empathically engage, though, she contemplates that "it is not impossible".[500]

Michelle Jacobs, in particular, underlines the importance of lawyers and law students increasing awareness of "cultural and racial differences" in order to "truly put clients at the center rather than at the margins of their work."[501] By identifying common ground and emphasising similarities, lawyers may be better able to engage in

[495] Ibid., p631. See: Op.Cit. Note 183. Cahn.
[496] Op.Cit. Note 11. Henderson, p1586
[497] Op.Cit. Note 5. Hoffman, p209
[498] Op.Cit. Note 11. Henderson, p1584
[499] Ibid., p1584
[500] Ibid., p1584
[501] Minow, Martha. 'Lawyering for Human Dignity.' *American University Journal of Gender, Social Policy & the Law.* 11.1. 2002, pp143-170, p154

understanding the perspective of others. This does not mean, however, as Henderson astutely highlights, that lawyers feign similarities with their clients. Instead, it means that lawyers should endeavour to "align with others' … hopes and dreams,"[502] whilst remaining sensitive to the differences that exist.

2.3.3. Empathy's Impossibility

It is important to highlight that empathy – regardless of the target the lawyer seeks to empathise with – *is* "impossible," as Peter Margulies astutely acknowledges.[503] Despite this, we must regard "empathy not as a thing but as a continuing and contingent journey" so that "the contradiction becomes a challenge, not a source of stalemate."[504]

Therefore, although it may not be possible for lawyers to fully "share another's feelings, or thoughts,"[505] this should not preclude lawyers from trying to empathically engage with others simply because they cannot and will never be able to fully empathise and understand. Lawyers should strive to improve their "empathic accuracy" - the degree to which they can accurately identify and understand what the client is experiencing.[506] In order to do so, I consider that lawyers will need to adopt listening techniques[507] that encourage them to consistently ask the client to remedy any deficiencies in their understanding, in order to ensure that the lawyer has correctly understood the client's position, and it will also involve focussing on the client's "empathic narrative."[508] This will take a significant investment in terms of time and energy, and although it may not always be possible for lawyers to "interpret correctly the empathic messages received," this should not excuse considerations of "empathic

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[502] Ibid., p156-7
[503] Op.Cit. Note 1. Margulies, p605
[504] Ibid., p606
[505] Op.Cit. Note 412. Ellmann, p2700. Footnote 98.
[506] Op.Cit. Note 11. Henderson, p1651
[507] For an example of "listening techniques that correspond with the values that Gilligan, Noddings and Carse describe in the ethic of care," see: Tom Rusk, *The Power of Ethical Persuasion*. Penguin Books Ltd. 1993.
[508] Op.Cit. Note 11. Henderson, p1651. At p1592, Henderson defines empathic narrative as including: "descriptions of concrete human situations and their meanings to the persons affected in the context of their lives. It is contextual, descriptive, and affective narrative, although it need not be 'emotional' in the pejorative sense of overwrought. It is, instead, the telling of stories of persons and human meanings, not abstractions."

narratives”,[509] based on “concrete human stories.”[510] What is required is an acknowledgement that understanding based on those narratives “will always be only partial.”[511]

Moreover, I consider that empathy’s impossibility should serve as a motivating factor for lawyers to obtain as much information about the client as they are willing to share, to enable the lawyer to become “a more responsible moral agent,” and consequently a more proficient lawyer.[512] By enhancing their degree of understanding of the client’s thoughts, feelings, and desires, the lawyer is arguably better placed to understand their choices.[513]

An absence of empathy has the capacity to result in moral error, and although deficiencies in the breadth and depth of lawyers’ empathic skills can result in moral errors, empathy remains an invaluable, morally pertinent tool for understanding.[514] I agree with Henderson that what lawyers must caution against is “selective” or “unreflective empathy”[515] so that lawyers’ and clients’ moral options and responsibilities do not remain obscured.[516] Ultimately, although empathy cannot prescribe how lawyers should act to achieve a desired outcome, effective empathic engagement may have the capacity to enable the lawyer to identify “other ‘right’ answers, or a continuum of answers.”[517] Or, as Henderson considers, “it may simply make the decision-maker aware that what once seemed like no choice or a clear choice is instead a tragic one.”[518]

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[509] Ibid., p1651
[510] Ibid., p1650
[511] Ibid., p1586: “Empathic experiencing of emotion is … influenced by cultural messages about which nonverbal and even verbal cues manifest particular emotions.”
[512] Ibid., p1585
[513] Ibid., p1585
[514] Ibid., p1652. See: Becker, Lawrence. *Reciprocity*. Chicago University Press. 1990. 159
[515] Ibid., p1652
[516] Ibid., p1653
[517] Ibid., p1653
[518] Ibid., p1653

2.3.4. Summary: Why Lawyers need to adopt a Self- Other Hybrid

Due to the problems with both self- and other-oriented perspective-taking when utilised on their own, I consider that lawyers must make a specific effort to marry the emotional intensity of self, with the increase in attentiveness towards the other – their client. I consider this to be imperative because by focussing solely on the self, the lawyer is inclined to view their clients as more "like" them than they may be,[519] which may result in lawyers' failing to appreciate the client's repertoire of voices and the strength that comes from their particular experiences.[520]

Alternatively, by focussing solely on the other, the lawyer may over-emphasise the differences between themselves and others, viewing the client as "more exotic that they need be,"[521] disinclining the lawyer from being completely engaged as they are distanced from the outcome. Whilst empathy may be impossible, through utilising both perspectives, lawyers are able to cultivate an enhanced connection; one with the requisite degree of empathic engagement.[522]

Having considered the ethic of care, and empathy's place within it, I shall now turn to consider how this enhanced conception of empathy – that appreciates both the cognitive and affective components, and includes both self- and other-perspective-taking – can serve to address the issues of neutral partisanship and paternalism in the lawyer-client relationship. I shall begin by examining paternalistic interference.

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[519] Mitchell, John B., 'Narrative and Client-Centered Representation: What Is a True Believer to do when his Two Favorite Theories Collide?' *Clinical Law Review*. 6.85. 1999, pp85-126, p101. Footnote 61. See: White, Lucie E. 'Seeking... The Faces of Otherness.... A Response to Professors Sarat, Felstiner, and Cahn.' *Cornell Law Review.* 77:6. 1992, pp1499-1511.

[520] Op.Cit. Note 1. Margulies, p618

[521] Ibid., p618

[522] Ibid., p618. At p617: Such empathic engagement must take into account "the power imbalances which flow from the different spaces occupied by attorney and client and the physical space of the law office. It should also put the lawyer on notice that the interview occurs not in a vacuum, but in the locations - social, political, and affective - occupied by the client and the lawyer."

3. The Ethic of Care and Paternalism

Objections to paternalism are not be derived solely from empathy,[523] and an ethic of care does not expressly prohibit lawyers' paternalistic interference with their client's autonomous decisions.[524] In fact, as Cook articulates, caring lawyers' "representation may range from fairly innocuous forms of paternalistic intervention to outright manipulation."[525]

Autonomy is not exalted in the ethic of care as being of primary importance in the lawyer-client relationship. It is, however, still important in ethical care terms; it would simply require to be considered alongside other caring factors and would not automatically be the crucial determining factor.[526] Further, as Ellmann notes, a significant amount of evidence exists indicating that "care and paternalism are compatible or even intertwined."[527]

I consider that an intrinsic part of caring means that the lawyer seeks to ensure that the client's voice(s) are heard. Although power can be fluid and changeable, typically the lawyer holds the majority of power within the relationship, even if only through their expertise and legal training.[528] Accordingly, I consider that a particular effort requires to be made by caring lawyers to place an emphasis on promoting the client's autonomy, thereby minimising the risk of paternalistic intervention, except in limited, caring circumstances, which will be considered below.

3.1. Reducing Paternalistic Intervention

Caring lawyers' focus on meaningfully empathising with their clients arguably enables them to improve their relationship with the client and develop an enhanced

[523] Op.Cit. Note 67. Slote, p85. For example, "[y]ou can completely empathise with a person who wants to ride their motorcycle with their hair blowing freely in the wind, yet insist that they wear a helmet for their own good". Empathy, therefore, needs to be supplemented.
[524] Op.Cit. Note 412. Ellmann, p2705
[525] Op.Cit. Note 15. Cook, p2471
[526] Op.Cit. Note 412. Ellmann*,* p2705: avoiding 'indifference' towards other people is the primary vice in the ethic of care, not usurping autonomy.
[527] Ibid., p2706
[528] Ibid., p2679

understanding of the client's inner world.[529] Although the lawyer may be unable to fully understand the client's thoughts, feelings and goals, it is imperative that lawyers try to gain as full an appreciation as possible of other cultures and clients' experiences that are different from their own, with which they are less familiar and with whom they struggle to identify. I consider that it is vital they do so in order to effectively engage in other-oriented perspective-taking so that they mitigate against the capacity for paternalistic interference promoted by focussing solely on the self.

Balancing self-oriented perspective-taking with other-oriented perspective-taking – whereby the lawyer imagines what they would feel like in their client's position, then combining this awareness of "empathic affect" with the information gained by imagining how their clients, and others, may feel in their current circumstances – arguably provides lawyers, as Carrie Menkel-Meadow suggests, with the capacity to engage with a lesser degree of paternalistic interference.[530] This is due to the fact that such perspective-taking removes the likelihood of lawyers imposing their own conception of the client's best interests onto the client due to the fact that they have more comprehensively identified "the client's needs, aspirations and motivations."[531] Lawyers may determine that, after achieving a deeper level of understanding of the facts of the case, as they see them, paternalistic interference is no longer appropriate.[532] Furthermore, by developing an enhanced connection with the client built on trust, the lawyer may not view dramatic paternalistic intervention as required, thereby decreasing the degree of paternalistic intervention they may otherwise have used.[533]

Caring lawyers who obtain a more genuine understanding of their client's position will be, as Ellmann notes, "less likely than a more ignorant counterpart to engage in *inaccurate* paternalism;" accordingly, the lawyer will not envisage the client seeking "one thing when he actually wants another".[534] Similarly, lawyers may be less likely to dismiss the client's objectives as imprudent where they are able to identify that they

[529] Ibid., p2698
[530] Ibid., p2703
[531] Ibid., p2703
[532] Ibid., p2707
[533] Ibid., p2707
[534] Ibid., p2704

are appropriate to the client's circumstances. Neither, it is argued, will they impose their perspectives on the client where they can identify that potential damage to the client's mental state will be greater than the potential advantages they would receive in terms of provision of legal advice. In such circumstances, the lawyer would "know better".[535]

This is not to say, however, that lawyers' empathic engagement precludes lawyers from acting paternalistically and manipulatively towards their clients. Indeed, increased levels of understanding and rapport may enable lawyers to "manipulate the client with great subtlety and effectiveness," should they desire to do so.[536] Caring lawyers are arguably more inclined to paternalistically impinge upon their client's choices where they have obtained knowledge, through empathically connecting with their client and developing a close relationship, that indicates a "need for action".[537] For example, where a lawyer is instructed by their client to "abandon pursuit of a protective order" that would prevent her abusive husband from being able to enter the family home, the lawyer, through empathically engaging with the client, comes to appreciate how deleterious this would be for the client. Furthermore, caring lawyers could seek to manipulate their client's autonomous choices where they deem their actions could promote uncaring outcomes,[538] which will be considered specifically in relation to neutral partisanship.

In isolation, caring factors may "justify lawyers' intense and even intrusive engagement in client decisions" due to its interventionist nature.[539] Yet, I consider that the degree to which paternalistic interference is justified in a care perspective should be significantly curtailed to avoid the risk of lawyers' dramatically usurping their client's autonomy. In practice, this would require the adoption of Ellmann's approach whereby the ethic of care would not replace a rights-based approach to ethics. Instead, the ethic of care would "give shape to the 'measure of intrusion' on those rights that

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[535] Ibid., p2704
[536] Ibid., p2703
[537] Ibid., p2704
[538] Ibid., p2709
[539] Ibid., p2711

can properly be justified,"[540] which would allow "room for debate and discretionary judgment." [541] In assessing the measure of intrusion, it is important to explore the potential factors that may give rise to paternalistic interference being justifiable under the ethic of care. As such, this will be explored in the forthcoming section.

3.2. Justifications for Paternalistic Interference and Manipulation[542]

Due to the importance placed on client's voices being heard in the ethic of care, I consider that paternalism should have limited justifications. I reject the first of the two classic positions used to distinguish between justifiable and unjustifiable paternalism.[543] The first position, associated with Gerald Dworkin and John Rawls, justifies paternalistic interference in a singular set of circumstances: where the person making the decision is deemed to be 'irrational' and they would approve of the interference if they were of sound mind and in possession of all relevant information.[544] Critics of this position have rightly raised concerns that it "tolerates the thwarting of any impetuous and any imprudent choice,"[545] with Jason J. Kilborn articulating that whether the lawyer considers the client to be making the incorrect decision is immaterial and should not automatically justify paternalistic intervention.[546]

Alternatively, I prefer the viewpoint adopted by proponents of the second viewpoint, including Thompson and Luban, who posit that a person's choice should not automatically be considered "impaired" simply because they articulate a preference that is deemed unreasonable or illogical. Luban clearly elucidates that even if a person appears to make strange, foolish choices, these decisions may have been given due

[540] Ibid., p2711
[541] Ibid., p2712
[542] Material contained in section 3.2. has been derived from: Op.Cit. Note 177. Macleod, p26-34
[543] Scoccia, Danny. 'Paternalism and Respect for Autonomy.' Ethics, 100:2, 1990, pp318–334, p318
[544] Ibid., p318. See: Dworkin, Gerald. *The theory and practice of autonomy*. Cambridge University Press, 1988; and Op.Cit. Note 123. Rawls.
[545] Ibid., p318
[546] Op.Cit. Note 178. Kilborn, p38

consideration and, as a result, are without basis for objection.[547] Thus, respect for autonomy requires that a person's autonomous aims should not typically be interfered with, even where the lawyer deems them to be imprudent or incorrect.[548]

To justify paternalistic intervention, Thompson articulates that an "impairment" that can be articulated as distinct from a person's aims and objectives must be identified.[549] Further, he posits that three conditions must be satisfied to justify paternalism: first, that the person's ability to make decisions must be reduced; second, the restraints on a person's autonomy have to be as restricted in scope and impermanent as practicable; and finally, the impending harm to the person has to be acute and permanent.[550]

Luban's convincing analysis extends further; he ultimately suggests that whether paternalism is deemed justifiable or not rests upon a balancing act between the client's well-being and their autonomy – an approach which appears compatible with the ethic of care. In his evaluation, he asserts that the only justifiable paternalism is 'Interests Over Wants' paternalism, where the lawyer believes that the client's desires do not genuinely represent their principles.[551] In those circumstances where, for example, the person does not have sufficient information or their decision-making capacities are diminished,[552] I concur with Luban that it may be justifiable for the lawyer to instead use the "Ideal of Prudence."[553]

I find William Simon's assertion that it may be permissible for a lawyer to manifestly manipulate their clients in order to stimulate the client's comprehension of their genuine interests, or their involvement in achieving them particularly troubling,[554] without reference to caring factors. I, like Ellmann, consider this to be immensely problematic due to the fact that it endorses blatant manipulation thereby fundamentally

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[547] Op.Cit. Note 210. Luban, p477
[548] Op.Cit. Note 178. Kilborn, p329
[549] Op.Cit. Note 202. Thompson, p252
[550] Op.Cit. Note 210. Luban, p465
[551] Ibid., p491
[552] Op.Cit. Note 228. Felstiner and Petit, p150. See: Op.Cit. Note 209. Luban, p465
[553] Op.Cit. Note 210. Luban, p493
[554] Simon, William H. 'Lawyer Advice and Client Autonomy: Mrs. Jones's Case.' *Maryland Law Review* 50.1. 1991, pp213-226

undermining the client's ability to make their own decisions.[555] I similarly consider that a degree of manipulation might be justifiable, even though it affects elements of their ability to make independent choices, but only where it is utilised to promote caring connections and cure defects in client's capacity to make fully-autonomous decisions.[556] Two such defects are clients' lack of relevant information and their emotional disabilities.

3.2.1. Clients' Lack of Relevant Information

Due to the fact that clients may regularly, and indeed normally, be in need of vital information to make crucial decisions,[557] Ellmann highlights that a lawyer's requisite skills and knowledge, along with a client's corresponding lack of knowledge, may arguably condone lawyers' exerting their influence when making decisions or manipulating clients' choices concerning legal problems.[558] He rightly fears the cost to be incurred in terms of the legal system's efficacy; lawyers' satisfaction derived from their work and its benefits and, therefore, arguably in the standard of legal advice and assistance provided; and inevitably the expense, financially and also in terms of time, for people who would be subject to demanding learning processes in order to resolve their practical issues that resulted in them approaching a lawyer in the first place.[559] He highlights that the impact would be felt most by poorly educated people living in poverty, who are arguably the most susceptible to paternalistic interference by their lawyers. As such, Ellmann argues that on balancing all of these factors, paternalistic manipulation may accordingly be justified,[560] though, it may only potentially be justifiable where lawyers endeavour to promote client autonomy as much as possible[561] and, in the circumstances, neither increasing clients' understanding through education or simplifying the advice proffered would result in the client being able to arrive at a completely 'competent' choice.[562]

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[555] Op.Cit. Note 217. Ellmann, p772
[556] Ibid., p772
[557] Ibid., p766
[558] Ibid., p766
[559] Ibid., p765–766
[560] Ibid., p766–767
[561] Ibid., p766–767
[562] Ibid., p766

3.2.2. Clients' Emotional Disabilities

The second significant justification proffered for lawyers' acting in a paternalistically manipulative manner towards their clients would be as a result of their client's emotional disabilities. I concur with Ellmann's averment that where a client is incapable, emotionally, of making their own decisions or incapable of effectively making those decisions, a lawyer may be justified in manipulating and, indeed, in some circumstances over-ruling, a client's articulated desires, such as the "caring paternalism of the lawyer attempting to persuade her client not to go back to an abusive partner."[563] Importantly, where appropriate to the context, a lawyer's limited paternalistic manipulative interference may include making a referral to another professional in order for the client to obtain support in relation to their mental health, advising that the client hold off on making a decision,[564] and/ or may also involve the lawyer setting out a prescribed form of decision-making.[565]

Ultimately, manipulation of this kind, which strives to empower clients to gain decision-making power and improve their ability to make decisions, may be especially justifiable since it also enhances client autonomy.[566] Nevertheless, a lawyer's decision to manipulate a client's decision-making process must be carefully considered[567] and weighed against other caring factors.

3.3. Summary

In situations where paternalistic interference promotes caring and enhances, rather than detracts from, their client's autonomy,[568] such interference with client decision-making may be justifiable and, indeed, essential when endeavouring to act in their best interests. This may only transpire, however, where the lawyer has attempted to engage in both self- and other- oriented perspective-taking, particularly striving to obtain as full an awareness as possible of the client's unique circumstances and experiences; and where the client's decision-making capacity is impaired, either through lack of

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[563] Op.Cit. Note 15. Cook, p2472
[564] Op.Cit. Note 217. Ellmann, p768
[565] Op.Cit. Note 228. Felstiner and Petit, p141
[566] Op.Cit. Note 217. Ellmann, p768-769
[567] Ibid., p769
[568] Ibid., p764

information or, as a result of their emotional disabilities, the clients are deemed to lack the ability to make fully competent decisions.

4. The Ethic of Care v Neutral Partisanship

With its focus on relationships and connectedness over autonomy, and rejection of impartiality and neutrality, the ethic of care necessitates a re-conceptualisation of the concept of neutral partisanship, which is viewed "in caring terms."[569] This "re-imagining" of neutral partisanship advocates that lawyers should not simply do what they have a 'right' to do but rather do what 'care' commands.[570]

4.1. Alternative Conception of Neutral Partisanship

The ethic of care does not, like a calculus, provide a 'correct' answer for how to deal with questions relating to lawyers acting as zealous advocates.[571] How then, should a caring lawyer proceed where the client instructs their lawyer to act in a manner that may, or is likely, to cause harm to others?

Unlike the traditional approach to lawyering, the ethic of care's rejection of indifference, objectivity,[572] and disconnection encourages lawyers to develop an enhanced moral connection with their clients, which results in lawyers becoming "invested in the outcome."[573] The lawyer is encouraged to have regard to their own personal moral considerations,[574] and not to ignore conflicts that arise between their professional role morality and their personal 'ordinary' morality. Consequently, with an increased empathic connection that values empathy's requirement for self- and other-oriented perspective-taking, avoiding neutral conceptions of empathy particularly associated with the client-centred model that can result in the lawyer

[569] Op.Cit. Note 412. Ellmann, p2716
[570] Op.Cit. Note 147. Zwier and Hamric, p407
[571] Op.Cit. Note 412. Ellmann, p2717
[572] Op.Cit. Note 147. Zwier and Hamric, p407
[573] Ibid., p421
[574] Kruse, Katherine R. 'Lawyers, Justice, and the Challenge of Moral Pluralism.' *Minnesota Law Review.* 90.2. 2005, pp389-458, p441

acting as a hired gun,[575] the lawyer's feelings of "non-accountability" for the actions of their client diminish,[576] and the lawyer's viewpoint consequently becomes important.

In terms of empathic engagement, other-oriented perspective-taking is highly important in enabling lawyers to value varied "cultural and moral perspectives"; however, seeing past their own personal moral viewpoints may prove difficult.[577] Katherine Kruse emphasises the significant obstacles to employing empathy, particularly where profound disputes regarding morality arise. In particular, she highlights the challenges faced by lawyers who must make a concerted effort to enter the world of another who is significantly different to themselves.[578] Lawyers may be hesitant to engage in an effort to explore the client's perspective where they fervently object to the moral implications of their client's chosen course of action due to apprehensions that doing so may amount to "condoning their views."[579] Moreover, lawyers may be reluctant to empathically engage with the other due to their own personal biases and life-experiences, resulting in them failing to appreciate the client's moral standards and outlook on life.[580] Accordingly, lawyers must be vigilant in challenging their own biases, and seek to avoid over-identification with the client, embracing empathic connection with the other – despite its challenges and potential for being an uncomfortable experience – in order to obtain a more complete understanding of the client, whilst evaluating how they would feel in the client's circumstances.

In terms of partisanship, the ethic of care does not dictate that zealous advocacy should be completely abandoned; instead, it provides vital checks on lawyers' zeal.[581] As such, in re-conceptualising neutral partisanship, an ethic of care, which focusses on

[575] Ibid., p421: As Kruse effectively highlights, "nonjudgmental empathy," associated with the client centred-model is "problematic in the face of fundamental moral disagreement."
[576] Op.Cit. Note 183. Cahn, p1063. See: Luban, David. 'Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann.' *Columbia Law Review*, 90: 4. 1990.; and Luban, David. *Lawyers and justice: An ethical study*. Princeton University Press, 1988.
[577] Op.Cit. Note 574. Kruse, p406-407
[578] Ibid., p417. See: Op.Cit. Note 11. Henderson
[579] Ibid,, p417. See: Footnote 108.
[580] Ibid., p417-8. Footnote 109.
[581] Op.Cit. Note 412. Ellmann, p2712: It "calls for an abridgement of zeal".

lawyers' empathic engagement, should shape the degree to which lawyers zealously represent their clients, serving to temper "the extremes of lawyers' zealous advocacy, while preserving the core idea of the lawyer as her client's advocate," [582] thereby mitigating the likelihood for potential harm to be inflicted through lawyers' zealousness (or lack thereof).

Ellmann convincingly opines that the caring lawyer can agree to zealously represent clients in circumstances where care for themselves "outweighs the other moral costs involved in pursuing the case,"[583] for example, where career advancement would enable them to promote caring from a more advanced professional position. Where caring factors do not outweigh other moral concerns, such representation may still be justifiable as a result of other caring factors.[584] In such circumstances, when seeking to represent a client who demands that their goals are effected in a manner which causes, or is likely to cause, harm to others, lawyers should zealously represent their client in caring terms, taking into account the impact that such representation may have on "oppressed and subordinated Others," as advocated by Cook.[585]

In an alternative conception, I consider that lawyers should reject neutrality. Instead, they should be encouraged to engage in moral dialogues with their clients and promote caring objectives,[586] with a view to avoiding, or mitigating, the likelihood for harm to be inflicted.[587] Empathy is a crucial moral component of moral dialogue;[588] by listening to the client's feelings, goals and desires, lawyers can first identify and try to genuinely understand the client's objectives and whether they have "a moral basis" for taking such action.[589] The lawyer may not be in a position to conclusively determine that harm will be inflicted; their decisions are subject to their own biases, self-regard, and restricted vantage point.[590] It is important, however, that lawyers make a

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[582] Ibid., p2726
[583] Ibid., p2713
[584] Ibid., p2722
[585] Op.Cit. Note 15. Cook, p2472
[586] Op.Cit. Note 412. Ellmann, p2726
[587] Op.Cit. Note 321, Dinerstein, et al. p794-795
[588] Ibid., p801
[589] Ibid., p801
[590] Ibid., p801

determined effort to understand the client's perspective and goals to identify whether harm may be done. Consequently, the lawyer is likely to find themselves in a better position to sensitively engage in discussions with clients concerning their challenging moral decisions. [591]

The client may wish to take into account moral considerations and so be open to listening to their lawyer's point of view.[592] They may not be apathetic towards considerations of morality, and may consider the lawyer's attempt to address moral concerns to be respectful, in that they have viewed them as "a moral person" who would "want to take these considerations into account."[593] Despite this, it should be acknowledged that moral dialogue may amount to "an effort at persuasion," which may significantly impact upon the client's ability to make decisions free from paternalistic interference.[594] Such a dialogue may, however, be justifiable on the basis that it promotes caring objectives.

Lawyers may decline to represent their client, though, this option would seldom be appealing to caring lawyers should the option to withdraw from acting be open to them.[595] Although withdrawing from acting would mean that the lawyer would not directly inflict harm, it would come at the expense of failing to help the client they had agreed to assist.[596] Furthermore, by withdrawing from acting, the caring lawyer is simply passing the same issue onto another lawyer who will find themselves facing the same dilemma or, worse still, omit to address the issue after the client amends their narrative, having learned to re-frame their issue so as to avoid scrutiny.[597] Withdrawal, therefore, may be viewed by the caring lawyer as indifferent – in direct contravention with the central tenets of the ethic of care – and so amounts to another unsavoury alternative as opposed to a simple resolution.[598] Furthermore, by withdrawing from acting, the lawyer would resultantly "lose access to her client, and so forfeit the chance

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[591] Ibid., p801
[592] Ibid., p801
[593] Ibid., p801
[594] Ibid., p801
[595] Op.Cit. Note 412. Ellmann, p2713
[596] Ibid., p2714
[597] Ibid., p2714
[598] Ibid., p2714

to persuade him to permit her to act in accordance with her sense of the responsibilities of care."[599]

Therefore, typically, caring lawyers will be willing to represent clients and place themselves in a position where they are obliged to harm others,[600] accepting responsibility for being the person to inflict harm, so that they are not plagued by questions relating to their commitment to, and care for, their client each time issues concerning the infliction of harm arise.[601] In doing so, however, the caring lawyer will alternatively "seek to reshape situations and counsel clients so as to vindicate connection rather than to inflict harm."[602] By engaging in moral dialogues, the caring lawyer may be in a position to encourage their client to agree to parameters of zeal the lawyer deems appropriate in care terms.[603] They may also, importantly, be able to encourage their clients to consider the potential long-ranging effects that their proposed actions may have on others, which may be essential particularly where a lack of information and/ or the client's emotional disabilities may otherwise be clouding their judgement.

4.2. Summary

The ethic of care, with its rejection of neutrality and focus on connectedness and relationships serves to challenge traditional conceptions of what it means for a lawyer to zealously represent their clients. With its rejection of impartiality, lawyers' views matter and therefore moral dialogues are encouraged within the ethic of care. When engaging in moral dialogues, empathy plays a crucial role; the lawyer must seek to

[599] Ibid., p2714-2715
[600] Ibid., p2722
[601] Ibid., p2723
[602] Ibid., p2722
[603] Ibid., p2713. It is not possible to set out a prescribed list of circumstances where zeal should be tempered, or what the parameters of zeal should be, due to the ethic of care's rejection of universal norms; lawyers require to assess each moral issue on a contextual basis. Despite this, Ellmann highlights at p2719-20: "ruthless and psychologically damaging cross-examination of a truthful rape complainant, designed to make her honest testimony look like a lie, might be unacceptable in a system responsive to care concerns." In such circumstances, Luban argues that "the lawyers' role should be to protect individuals against powerful institutions, such as the state or patriarchy. Thus, in cross-examining an alleged rape victim, a criminal defence lawyer ought not "make [the victim] look like a whore."" Luban, David. *Lawyers and justice: An ethical study*. Princeton University Press, 1988, p151

undertake other-oriented perspective-taking, despite its potential to place the lawyer in an uncomfortable position, and they must challenge their own personal biases when imagining how they would feel in the client's position. Although moral dialogues may amount to paternalistic interference, such interference may be justified on the basis that it encourages clients to consider the far-reaching impact of their actions.

Lawyers who feel that their client's instructions do not comport with their personal conceptions of care can withdraw from acting; though, lawyers who consider that caring factors compel them to act may decide to temper the degree of zeal they exercise in advancing their client's position in order to mitigate the potential for harm to be inflicted by their clients' actions. Zealous representation in such circumstances, however, would only likely be justifiable during the litigation process where parties have equality of access to the law.

CHAPTER SIX

CONCLUSION

Empathy's lack of definitional certainty has posed significant challenges in assessing its utility and value in the lawyer-client relationship. Empathy as conceived by client-centred lawyers, with its definition derived from the psychotherapeutic literature, focusses almost exclusively on the cognitive component of empathy through the counsellor's desire to understand the other's perspective and thereby facilitate a strong connection with the other.[604] I, however, consider this definition to be deficient and, indeed, damaging.

Alternatively, Hoffman's conception of empathy provides a far superior basis upon which to evaluate empathy's value in the lawyer-client relationship due to its focus on both the cognitive *and* affective components. An approach based on this definition of empathy provides the bridge to facilitate and enhance understanding between people and, effectively utilised, empathy has a transformative capacity to enhance lawyers' "knowledge and approaches to legal problems – which are, ultimately, *human* problems."[605]

Within the lawyer-client relationship, the "opposing pulls of empathy and detachment" are seen as diametrically opposed.[606] I believe, however, that a balance needs to be struck – and can be struck – in a nuanced manner to ensure that clients are provided with effective, contextually appropriate legal services. Due to its subjective and contextual nature, I consider that an ethic of care, which embraces a postmodern ethic of alterity that is attentive to clients' multiple narratives and has particular regard for the subordinated Other, is best placed to enable lawyers to effectively engage with their clients and address the negative effects of paternalism and neutral partisanship.

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[604] Op.Cit. Note 11. Henderson, p1580
[605] Ibid., p1576
[606] 'Being Atticus Finch: The Professional Role of Empathy in 'To Kill a Mockingbird'.' *Harvard Law Review*. 117.5. 2004, pp1682–1702, p1690

The ethic of care encourages a re-conceptulisation of neutral partisanship. With its rejection of neutrality and a strong emphasis placed on relationships and cultivating connection, neutral partisanship in the ethic of care challenges traditional notions of what it means for lawyers to zealously represent their clients. Moral dialogues are encouraged in light of the rejection of impartiality, and empathy plays a crucial role in lawyers' obtaining as full a conception as possible of the client's personal circumstances. Lawyers and clients are encouraged to consider the long-ranging impact of their actions in terms of the potential harm they may inflict. As a result, lawyers may withdraw from acting or temper the degree of zeal in order to mitigate the potential harmful effects of their client's actions. This re-conceptualisation of neutral partisanship will arguably only be justifiable, however, in litigation or in negotiations in the shadow of the courts where parties have equal access to legal services. In circumstances where equality of access to the law does not exist, the impact of the re-conceptualisation of neutral partisanship is limited, and further research in this area is required to address this limitation.

I reject a conception of the ethic of care that endorses blatant manipulation of clients due to the lawyers' caring concerns. I, like Cook, consider that where considerations of care solely serve to inform lawyers' decisions, this can result in lawyers acting in paternalistic and manipulative ways that favour their own of self-interest. To reduce this likelihood, I consider that the ethic of alterity should serve to increase attentiveness to the Other, particularly the subordinated Other, and the client's multiple narratives.

Paternalistic interference can range from the seemingly innocuous to blatant manipulation, and I consider that caring lawyers should seek to minimise paternalistic interference with their client's decisions. I consider that paternalistic interference may be justifiable, notably in circumstances where the client's emotional decision-making capacity is impaired through their emotional disabilities or a lack of information. Although moral dialogues may amount to paternalistic interference, I deem such

interference to be potentially justifiable on the basis that it encourages clients to consider the wide-reaching impact that their actions may have on others.

The potential for empathic engagement to positively impact the relationship is immense; however, in order to build effective connections with their clients, lawyers must strive to be vigilant against being unduly influenced by their biases. Empathy, as Peter Margulies reminds us, is impossible; but that should not stop lawyers from striving to empathically engage with their clients.