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Reid Mortensen  
*University of Queensland*

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# Agency, Autonomy and a Theology for Legal Practice

## **Abstract**

[extract] In this article, I do not deal with the morals of divorce. I assume that, after her own thoughtful consideration of the question, a Christian lawyer has concluded that a given divorce is not morally justified. The lawyer's personal, but religious, moral view motivates an analysis of the rival claims of religious and professional role morals. These are addressed principally by reference to the concept of autonomy, as that concept relates to legal practice. This also compels a discussion of autonomy, first as it is presented by the dominant secular liberal accounts of the lawyer's role, and secondly as it can be both redefined and repositioned from a Christian perspective. As will be seen, I accept that the Christian consciousness of God consumes decisions she is to make even as a lawyer in professional practice, and that this can demand 'careful' moral input in dealings with a potential client. If God is 'something greater than can be thought', the believer's understanding of what it means to do God's will must consume the choices she has to make in all of the social roles she has to adopt.

## **Keywords**

religion, theology, christianity, legal ethics, agency, autonomy, divorce

# AGENCY, AUTONOMY AND A THEOLOGY FOR LEGAL PRACTICE

*Reid Mortensen*<sup>†</sup>

## **A papal challenge to Christian lawyers**

The Catholic Church has consistently maintained the indissolubility of a properly established union between a husband and wife as a central tenet of its canonical jurisprudence. Early in 2002, a papal statement on indissolubility spelt out the implications that this had for Catholic lawyers practising in secular family law. Pope John Paul II said that a lawyer could only 'cooperate' in a divorce when the client did not intend that it be 'directed to the break-up of the marriage'.<sup>1</sup> That statement provoked immediate and widespread reporting in the Australian press, which showed that the responses from Catholic lawyers extended from outright dismissal of the church's authority to deal with a 'state issue' like divorce<sup>2</sup> to an immediate decision not to accept any more instructions in divorce proceedings.<sup>3</sup> The Archbishop of Sydney, Dr George Pell, questioned the initial English translation of the papal statement, which he said had misconceived the role of lawyers in civil divorce proceedings, and advised Catholic lawyers in Australia

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<sup>†</sup> Senior Lecturer in Law, University of Queensland; BCom (Hons); LLB (Hons); PhD (UQ); Solicitor. A paper presented at the Second Australasian Christian Legal Convention, Bond University, Gold Coast, 3 May 2002.

1 The Pope said that 'professionals in the field of civil law should avoid being personally involved in anything that might imply a cooperation with divorce. For judges this may prove difficult, since the legal order does not recognize a conscientious objection to exempt them from giving sentence. For grave and proportionate motives they may therefore act in accord with the traditional principles of material cooperation ... Lawyers, as independent professionals, should always decline the use of their profession for an end that is contrary to justice, as is divorce. They can only cooperate in this kind of activity when, in the intention of the client, it is not directed to the break-up of the marriage, but to the securing of other legitimate effects that can only be obtained through such a judicial process in the established legal order': 'To The Roman Rota: Good of Indissolubility, Good of Marriage', *The Roman Observer* (Rome, Italy), 3 February 2002, <[http://www.vatican.va/news\\_services/](http://www.vatican.va/news_services/)> ('Indissolubility').

2 B Lane, 'A Word from the Pope and the Divorce is Off', *The Australian*, 30 January 2002 (Sydney), 3. For an Anglican's response, see J Murray, 'Church Crosses Line into Civil Territory', *The Australian* (Sydney), 30 January 2002, 3.

3 Lane, above n 2, 3.

that they could still undertake divorce work.<sup>4</sup> In Sydney, the St Thomas More Society, following Archbishop Pell's lead, released a statement repeating the archbishop's view that the papal statement had been misinterpreted, and endorsed Catholic lawyers continuing to be involved in divorce practice.<sup>5</sup> Furthermore, some recognised that a refusal to make the initial application for divorce would probably leave little other family law work for a Catholic lawyer.<sup>6</sup> There was some belief that the papal statement unfairly assumed that lawyers encouraged divorce, when most divorce lawyers saw that their role was 'undertaking' – or 'mopping up' after family breakdown had occurred.<sup>7</sup>

The Catholic lawyer has the canon law and Catholic moral theology to answer questions about the status of the papal statement on indissolubility, and whether it does mean that Catholic lawyers have some obligation not to undertake divorce work.<sup>8</sup> However, lawyers from other Christian traditions may have similar moral concerns about participation in divorce proceedings. Formally, Anglican canon law also holds to indissolubility.<sup>9</sup> In contrast, Orthodox churches recognise the validity of divorce, though still 'as an exceptional but necessary concession to human sin'.<sup>10</sup> Since the early years of the Reformation Protestants too have recognised the dissolubility of marriage, although divorce has also generally been regarded as a regrettable means of preventing a greater evil.<sup>11</sup> Even modern liberal Protestant thinking, which often views relationship collapse alone as making divorce, at times, 'morally justifiable and consistent with God's will', begins with the assumption that [t]he breakdown of marriage is another reflection of the

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4 Ibid; N Bitá, 'Vatican Stands by Divorce Edict', *The Australian* (Sydney), 31 January 2002, 4 (These comments preceded the English translation given in Indissolubility); R Mavey, 'When You're Talking Divorce, to Err is Human but, to Misstate is Divine', *Sydney Morning Herald*, 30 January 2002, 5.

5 St Thomas More Society, The Pope's Statement on Divorce and the Role of Lawyers, Press Release (29 January 2002), <[http://lawsocnsw.asn.au/about/president/20020201\\_message.html](http://lawsocnsw.asn.au/about/president/20020201_message.html)>.

6 D Farrant, 'Lawyers Oppose Pope on Divorce', *The Age* (Melbourne), 30 January 2002, 6.

7 Ibid; Editorial, 'The Pope Puts Lawyers in the Dock', *The Age* (Melbourne), 31 January 2002, 10.

8 See P Quirk, 'The Pope, the Divorce, the Lawyer?', a paper presented at the Second Australasian Christian Legal Convention, 3 May 2002, Bond University, Gold Coast, Queensland.

9 T Briden and B Hanson, Moore's *Introduction to English Canon Law* (3rd ed, 1992) 73-4.

10 T Ware, *The Orthodox Church* (1963) 302.

11 R Phillips, *Putting Asunder: A History of Divorce in Western Society* (1988) 40-94. Luther thought divorce and remarriage (in the former spouse's lifetime) were acceptable where there existed grounds like adultery, desertion, impotence or wilful refusal to consummate: 'The Estate of Marriage' in *Luther's Works* (1955) vol 45, 20-1, 33-5; 'On Marriage Matters' in *Luther's Works* (1955) vol 46, 311-12.

sinfulness of the human condition'.<sup>12</sup> The typical diversity of Protestant responses to divorce undoubtedly reflects the ambiguity of the scriptural witness to Christ's teaching on the dissolubility of marriage.<sup>13</sup> Across the Christian church in the developed world the established pastoral practice of tolerating divorce, even within the traditions that adhere to indissolubility, also belies formal doctrinal conclusions of its inherent sinfulness.<sup>14</sup> Still, it is unlikely that any Christian thinking would consider divorce morally justified *merely* because the Australian civil standard of a 12-month separation were satisfied.<sup>15</sup> To some Orthodox and Protestants a divorce granted on this ground might be morally justified, but for more substantial reasons than the fact of separation.

Whatever their tradition, therefore, divorce presents a moral question that most Christian lawyers confront. Should the Christian lawyer arrange a divorce when she believes it is not morally justified? This question is just one of many that involves the rival claims of professional role morals and personal morals, a pet topic in the scholarship and teaching of lawyers' ethics.<sup>16</sup> In this connection, the papal statement on indissolubility presents a radical challenge to lawyers of all Christian traditions. For the Pope's reservations about divorce practice stem from a more basic principle that lawyers 'should always decline the use of their profession for an end that is contrary to justice'.<sup>17</sup> That principle is incompatible with the standard modern conception of the lawyer's role, which discounts the relevance of personal morals to the lawyer's decision to represent a client. I believe that it nevertheless states a catholic principle for all Christian lawyers about the relevance of morals to decisions about legal work.

In this article, I do not deal with the morals of divorce. I assume that, after her own thoughtful consideration of the question, a Christian lawyer has concluded that a given divorce is not morally justified. The lawyer's personal, but religious, moral view motivates an analysis of the rival claims of religious and professional role morals. These are addressed principally by reference to the concept of

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12 Uniting Church in Australia. Assembly Task Group on Sexuality, Interim Report on Sexuality (1996) 37.

13 Especially Matt 5: 32, 19: 9; Mark 10: 9; Luke 16: 18.

14 M Keeling, *Morals in a Free Society* (1970) 98-9; cf P Ramsey, *Basic Christian Ethics* (1980) 70-3.

15 Under s 48 *Family Law Act 1975* (Cth).

16 The seminal articles include: R Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1; MH Freedman, 'Personal Responsibility in a Professional System' (1978) 27 *Catholic University Law Review* 191; T Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' [1984] *Wisconsin Law Review* 1529; SL Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' (1986) 4 *American Bar Association Research Journal* 613.

17 Indissolubility, above n 1, 9.

autonomy, as that concept relates to legal practice.<sup>18</sup> This also compels a discussion of autonomy, first as it is presented by the dominant secular liberal accounts of the lawyer's role, and secondly as it can be both redefined and repositioned from a Christian perspective. As will be seen, I accept that the Christian consciousness of God consumes decisions she is to make even as a lawyer in professional practice, and that this can demand 'careful' moral input in dealings with a potential client. If God is 'something greater than can be thought',<sup>19</sup> the believer's understanding of what it means to do God's will must consume the choices she has to make in all of the social roles she has to adopt. The results of this critique blend with Thomas Shaffer's 'moral counselling' role for the lawyer, although it justifies that role differently. Hopefully, it allows an ethically richer, though still ambiguous, experience of legal practice and the opportunity for the Christian lawyer to give expression to a deeper sense of God-given vocation.<sup>20</sup>

### Liberalism's lawyer

To a large extent, the standard secular conception of the lawyer's role has been shaped by a liberal social tradition that has, by somewhat uneven developments over the last two centuries, enlarged the personal autonomy of individual citizens. For lawyers, this has had two important consequences. First, the role of the lawyer has been increasingly cast as an essential means by which the individual can enjoy his autonomy. However, the standard secular conception of the lawyer as a necessary means to realising the individual's autonomy paradoxically denies the lawyer any significant moral autonomy in her professional role. Secondly, in addition to claiming for the lawyer a central role in the liberal tradition, the 'autonomy paradox' creates a strong expectation that she become a liberal individual, and *that* is what forces a Christian critique of this approach to the lawyer's role.

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18 I do not deal with the position of judges. Pope John Paul's statement implicitly recognises that the different conditions under which judges make decisions about divorce lead to different ethical conclusions about their involvement in divorce cases: *Indissolubility*, above n 1, 9. There are stronger reasons to suggest that a judge making decisions *qua* judge does not have the autonomy to refer to his own personal morals - but also that the judge does not bear much, if any, moral responsibility for those decisions.

19 Anselm of Canterbury, *Monologion and Proslogion* (1995) 109.

20 The article largely addresses the question of rival religious and professional claims on the Christian lawyer by reference to the tensions between the moral philosophies of Kierkegaard, Kant, Rawls and MacIntyre. No attempt is made to extend the analysis to other traditions of moral philosophy (eg, utilitarian or Marxian), nor to address sociological or behavioural analyses of lawyers' conduct.

### The agency ethic

There is a powerful professional expectation, although barely expressed in the rules of professional conduct, that suggests that client-controlled agency has an important, and near central, role in English-speaking systems of justice. In short, the 'agency ethic' assumes that only the law itself places limits on the lawyer's societal obligation to accept instructions from a potential client.<sup>21</sup> The lawyer should accept, and then pursue and conclude any work instructed by a paying client. So long as the work is lawful, any question of its justice or moral worth is consciously discounted as irrelevant to the principal decision by which the lawyer chooses to assume client-control: accepting the retainer. It is also often argued that the irrelevance of moral judgments to decisions to represent a client means that, under the standard conception of the lawyer's role, the lawyer carries no moral responsibility for the outcome of her work. From literature like Trollope's *Orley Farm*<sup>22</sup> to television like *North Square*, the lawyer who lives by the agency ethic is often caricatured as the thoughtless tool of an immoral client. But, while art might exaggerate the sins of this 'type', the standard secular conception of the lawyer's role is no figment of the artistic imagination.<sup>23</sup> As Justice Fortas explained of his own role as an attorney:

Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent ... They cannot and should not accept responsibility for the client's practices.<sup>24</sup>

The agency ethic seems to represent a common societal understanding of the lawyer's role, even if moral responsibility is a more contested issue than Fortas believed. That point deserves emphasis. In general, the agency ethic is a *socially constructed norm*, and rarely a requirement of any law or professional rule. In

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21 The decision to accept the retainer is the critical point at which broader ethical questions apply. Once a lawyer is retained, there are contractual and professional ethical duties that, with a number of exceptions, compel the lawyer's continued representation until the work is completed: GE Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, 2001) 62-6. This forces greater deliberation in the decision to accept the work in the first place.

22 '[T]here was a species of honesty about Mr Chaffanbrass [the barrister] which certainly deserved praise. He was always true to the man whose money he had taken, and gave to his customer, with all the power at his command, that assistance which he had professed to sell ... I knew an assassin in Ireland who professed that during twelve years of practice in Tipperary he had never failed when he had once engaged himself. For truth and honesty to their customers - which are great virtues - I would bracket that man and Mr Chaffanbrass together': A Trollope, *Orley Farm* (1985) 359.

23 Schneyer, above n 16, 1544-5; and see the aspirational statements in the American Bar Association's Code of Professional Responsibility, in C Wolfram, *Modern Legal Ethics* (1986) 569-78.

24 Quoted in TL Shaffer, *On Being a Christian and a Lawyer* (1981) 7 ('A Christian and a Lawyer').

most English-speaking countries, there is no formal obligation for a lawyer to accept any work instructed by a paying client. The exception, of course, is the 'cab rank rule' that applies to barristers in the English tradition and that, as a result, is limited almost to the independent bars in the United Kingdom, Ireland and Australia.<sup>25</sup> This can, at times, impose a legal obligation on barristers to accept work.<sup>26</sup> However, for most lawyers there is no cab-rank rule and both law and professional rules allow instructions to be refused for any reason.<sup>27</sup> Furthermore, it is probable that a competitive market for providing legal services does more to promote access to legal advice and representation than the cab-rank rule does.<sup>28</sup> The cab-rank rule's real significance may well be symbolic, as it is consistently presented as a central institution in English-speaking systems of justice.<sup>29</sup> It

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25 See the Australian Bar Association's Advocacy Rules, r 85:

'A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:

- (a) the brief is within the barrister's capacity, skill and experience;
- (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;
- (c) the fee offered on the brief is acceptable to the barrister; and
- (d) the barrister is not obliged or permitted to refuse the brief under Rules 87, 90 or 91.'

Rule 87 includes situations in which the barrister has conflicting duties, or a conflict of duty and personal interest. Rule 90 deals with pre-existing commitments to be in court. Rule 91 sets out discretionary grounds for refusing the brief, including situations where it is not offered by a solicitor or where there is a risk that the barrister will not be paid. See also r 85 NSW Barristers' Rules; r 11.05 Rules of Professional Conduct for Barristers and Solicitors (NZ); r 15.2(a) Professional Conduct Rules (NT); r 85 Queensland Barristers' Rules; r 16.2(a) Professional Conduct Rules (SA); r 94 Rules of Practice 1994 (Tas); r 87 Barristers' Practice Rules (Vic).

26 NSW: s 57D *Legal Profession Act 1987* (NSW); NZ: s 17 *Law Practitioners Act 1983* (NZ); Tas: s 17 *Legal Profession Act 1993* (Tas); Vic: Pt 3 Div 2 *Legal Practice Act 1996* (Vic). There is no evidence in Australia that the cab-rank rule has ever been enforced by the courts or tribunals, and it is undoubtedly difficult both to police and apply. In Queensland, where the bar is voluntarily organised, the cab-rank rule may only apply to members of the Bar Association, and might not apply at all to those barristers who are not members.

27 Ie, which is consistent with the anti-discrimination law. This right is explicit in Queensland: r 5.01(1) Solicitors' Handbook; Dal Pont, above n 21, 56-7.

28 For a supportive account of the cab-rank rule that is sceptical of its effectiveness, see HHA Cooper, 'Representation of the Unpopular' (1974) 22 *Chitty's Law Journal* 333. Cf the position in the United States, where no cab-rank rule applies to attorneys but where, compared to the Commonwealth, there is arguably greater access to law: see Wolfram, above n 23, 576-7.

29 Eg, see *Rondel v Worsley* [1969] 1 AC 191, 227 per Lord Reid; *Gianarelli v Wriath* (1988) 165 CLR 543, 580 per Brennan J; *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 WLR 543, 550 per Lord Steyn, 558 per Lord Hoffmann, 585 per Lord Hope, 610 per Lord Hobhouse.



therefore represents the inner core of what is, for many lawyers, a broader ethic that gives some direction as to how they should act. As Justice Fortas' comments reveal, the social construction of the lawyer's role brings a powerful claim on how a lawyer should make decisions about representing a potential client.

Ancestors of the cab-rank rule applied to medieval advocates,<sup>30</sup> but did not exclude the justice of the cause from the advocate's decision to represent a potential client. Indeed, St Thomas Aquinas advised lawyers not to act in a cause known to be unjust,<sup>31</sup> and given the dominance of Thomism in Catholic moral theology that probably informs the present papal statement on indissolubility. This earlier ethic of unprejudiced representation rested principally on the functional distinction between the roles of the advocate and the judge, and was credited to the structure of adversarial justice as late as Erskine's defence of Tom Paine. 'If the advocate refuses to defend, from what *he may think* of the charge or of the defence, he assumes the character of the judge'.<sup>32</sup> Interestingly, the Trial of Tom Paine also marks the emergence of an alternative rationale for the old ethic of unprejudiced representation. The successful prosecution of Paine for publishing *Rights of Man*, itself a book that popularised liberal ideas in England, witnessed widespread support for Paine and his right to publicise, what was then, an emerging liberalism.<sup>33</sup> The cab-rank rule (to use the term anachronistically) therefore received its definitive statement in the course of defending liberal ideas, in an embryonic liberal society. Significantly, it is within the liberal tradition that the agency ethic has an enhanced and philosophically central role.

### The liberal tradition

It might initially seem inappropriate to call liberalism a tradition, given that the Enlightenment project was to free the individual from the despotism of traditions borne by church and state.<sup>34</sup> However, 'tradition' is here taken in MacIntyre's sense of 'a coherent movement of thought' that is, necessarily, relative to a given

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30 See the references in *Gianarelli v Wriath* (1988) 165 CLR 543, 580 per Brennan J.

31 Thomas Aquinas, *Summa Theologiae* (1975) vol 38, 151: '[I]f [a lawyer] takes up a cause knowing that it is unjust, he is undoubtedly committing a grave sin, and he is bound to make good the loss which the other party incurred unjustly. If, on the other hand, he took up the cause in ignorance, thinking that it was just, he is excused to the extent that ignorance excuses'. See also M Harding, 'True Justice in Courts of Law' in Thomas Aquinas, *Summa Theologica* (1948) vol 3, 3345, 3355-6.

32 *R v Thomas Paine* (1792) 22 St Tr 357, 412. Samuel Johnson gave the same rationale for unprejudiced representation in 1773: J Boswell, *The Journal of the Tour to the Hebrides* (1985) 168-9.

33 J Keane, *Tom Paine: A Political Life* (1995) 330-3, 345-9.

34 I Kant, 'What is Enlightenment?' in *Foundations of the Metaphysics of Morals* 51-2 ('Foundations').

place and culture but over an extended period.<sup>35</sup> This recognises that liberalism is both an 'ought' and an 'is'. It is a normative philosophy in a broad sense but one that 'belongs to the flesh and bones of our institutions'.<sup>36</sup> As intellectual scaffolding for English-speaking societies, it is the tradition within which enquiry and debate about justice, morals, institutions and our life together take place. So, its efforts at enabling individuals to transcend past dogmatisms have, paradoxically, transformed liberalism itself into a tradition by which individuals are expected to develop and enjoy their own life plans, preferences and priorities. The liberal tradition does not allow individuals, or government, the use of force to reshape society in accordance with any given idea of human good.<sup>37</sup> In this light, it can be seen how unilateral divorce after a minimal period of 12 months separation emerges as a liberal institution. The 12-month separation rule abdicates any responsibility for defining the moral structure of marriage other than requiring that a year's thought be given to the relationship. So long as they wait long enough, the rule leaves the circumstances in which marriage can, if at all, be dissolved to the choice of individuals involved.

At this point, the import of Lord Hobhouse's description of the cab-rank rule as 'a fundamental and essential part of a liberal legal system'<sup>38</sup> becomes apparent. Its supporters present the agency ethic as an essential structural characteristic of a liberal society. Although the functional role of an advocate could provide an alternative justification of a more limited ethic of unprejudiced representation, the liberal tradition has necessarily seen this ethic enlarged and extended. It is not limited to work in criminal defence or litigation, and it has become more central in defining the lawyer's role in the broader community. The modern accounts of the agency ethic, whether supportive or critical, assume that it directs

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35 A MacIntyre, *Whose Justice, Which Rationality?* (1988) 326 ('Whose Justice'); see also *ibid.*, 7. In more detail, '[a] living tradition then is a historically extended, socially embodied argument, and an argument precisely in part about goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations. Hence the individual's search for his or her good is generally and characteristically conducted within a context defined by those traditions of which the individual's life is a part, and this is true both of those goods which are internal to practices and of the goods of a single life ... [T]he history of a practice in our time is generally and characteristically embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us; the history of each of our own lives is generally and characteristically embedded in and made intelligible in terms of the larger and longer histories of a number of traditions': A MacIntyre, *After Virtue: A Study in Moral Theory* (2nd ed 1985) 222. For doubts as to whether liberalism can be called a tradition, see A Rudd, 'Reason in Ethics: MacIntyre and Kierkegaard' in JJ Davenport & A Rudd (eds), *Kierkegaard After MacIntyre* (2001) 131, 135.

36 G Grant, *English-Speaking Justice* (1998) 80.

37 *Whose Justice*, above n 35, 335-6.

38 *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 WLR 543, 610.

the lawyer's conduct in all kinds of legal work,<sup>39</sup> but in doing so locate the ethic in the concept of individual autonomy.<sup>40</sup> These reached maturity in Pepper's 'autonomous citizenship' rationale for the agency ethic, in research conducted for the American Bar Foundation.<sup>41</sup> A brief sketch of this model, and of supporting accounts of the lawyer's role, show how it is argued that the agency ethic is embedded in the practical outworking of the secular liberal tradition.

### **The autonomy paradox**

The autonomous citizenship model of the lawyer's role assumes that government and law are organised to allow individual citizens the right to choose their own ideas of the good life and, within limits required only to maintain personal and public safety, to be able to live their chosen lives to the greatest extent possible. In other words, it assumes a liberal tradition and that the law roughly embodies a liberal tradition. While the law must have a minimum moral content, it does not overly prescribe moral standards for all citizens to live by. Indeed, it has peculiar institutions like contracts, trusts, companies and wills that assist choice and the individual's right to plan his affairs in ways that others might think are immoral.<sup>42</sup> This represents 'a societal commitment' to individual autonomy.<sup>43</sup> So, to the Christian a man's serial monogamy might be symptomatic of a longstanding pattern of immoral promiscuous behaviour. The 12-month separation rule nevertheless leaves the moral judgment to the man himself, and even provides the means by which he can perpetuate his behaviour by allowing divorce without reference to moral wrongdoing, and at his own option.

Law is thus elevated as the basic institution by which individual autonomy is realised. The conclusion of the autonomous citizen model is, then, that if the individual citizen is to have access to law and to realise his autonomy he needs the help of a lawyer, and a morally heteronomous lawyer at that. The complexity of law means that it can often only be deployed with expert assistance.<sup>44</sup> As Schneyer points out, the individual often needs a lawyer's advice just to recognise what his rights are.<sup>45</sup> Pepper concludes that:

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39 Wasserstrom, above n 16, 12; Pepper, above n 16, 621-4; ML Schwartz, 'The Professionalism and Accountability of Lawyers' (1978) 66 *California Law Review* 669.

40 Freedman, above n 16, 197, 203, 204-5; Pepper, above n 16, 616-17; Schneyer, above n 16, 1539-40.

41 Pepper, above n 16. Pepper calls this the 'first-class citizenship' model. However, 'first-class citizenship' does not convey the specific liberal sense around which Pepper assumes a modern polity is organised. Given classical approaches to citizenship, Pepper's own term does not require the emphasis on autonomy that lies at the heart of his model.

42 Ibid, 616-17.

43 Ibid; Schneyer, above n 16, 1539-40.

44 Pepper, above n 16, 616-17.

45 Schneyer, above n 16, 1540.

... [f]irst-class [ie autonomous] citizenship is frequently dependent on the assistance of a lawyer. If the conduct that the lawyer facilitates is above the floor of the intolerable – is not unlawful – then this line of thought suggests that what a lawyer does is a social good. The lawyer is the means to first-class [autonomous] citizenship, to meaningful autonomy, for the client.<sup>46</sup>

In the scholarly literature the lawyer's role under this model has been tagged the hired gun,<sup>47</sup> although Pepper rightly doubts that much legal work makes the lawyer anything analogous to the client's personal champion.<sup>48</sup> He prefers the image of a skilled machinist.

... [T]he image more concordant with the first-class [autonomous] citizenship model is that of the individual facing and needing to use a very large and very complicated machine (with lots of whirring gears and spinning data tapes) that he can't get to work. It is theoretically there for his use, but he can't use it for his purposes without the aid of someone who has the correct wrenches, meters and more esoteric tools, and knows how and where to use them.<sup>49</sup>

However, it would be an even more accurate representation of the lawyer's role in this model to depict her as a cog in the justice machine. While the image of a lifeless cog is certainly more disturbing,<sup>50</sup> it does reinforce more immediately than the image of a skilled machinist that, according to this model, the lawyer is part of the scheme of liberal justice – not an outside operator who can choose to start the machine or not.

The reason why the lifeless cog is a better metaphor for Pepper's model of the lawyer's role is that he concludes that the role is amoral, as the lawyer has 'no moral input' into the client's plans.<sup>51</sup> This means that, so far as a lawyer's work is concerned, the control of its moral direction is given over entirely to the client. In

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46 Pepper, above n 16, 617.

47 The references are numerous. Eg, see *ibid*, 623; Freedman, above n 16, 192; Wolfram, above n 23, 580-1; T Schneyer, 'Some Sympathy for the Hired Gun' (1991) 41 *Journal of Legal Education* 11; TL Shaffer and RF Cochran, *Lawyers, Clients, and Moral Responsibility* (1994) 15-29.

48 Pepper, above n 16, 623. Kressel's study of the attitudes of New Jersey divorce lawyers revealed that few found the image of the hired gun appropriate: K Kressel, *The Process of Divorce: How Professionals and Couples Negotiate* (1985) 148.

49 *Ibid* 623-4.

50 Ie, because it parallels Weber's depiction - 'horrible to think' - of modern, dehumanised bureaucrats as 'those little cogs, little men clinging to little jobs and striving toward bigger ones—a state of affairs which is to be seen once more, as in the Egyptian records, playing an ever increasing part in the spirit of our present administrative systems': M Weber, 'Bureaucratization' in JP Mayer, *Max Weber and German Politics* (2nd ed 1956) 125, 127. Kressel uses the metaphor of a 'mechanic': above n 49, 131.

51 Pepper, above n 16, 626.

effect, the lawyer *qua* lawyer is a morally heteronomous agent. Here, two points need clarification. First, even within a liberal account of the lawyer's role the need to describe it as 'amoral' is doubtful. It is probably as accurate to depict the lawyer's role in the autonomous citizenship model as sharing the moral basis of the liberal tradition itself. The model's conclusion is that the lawyer's refusal to invoke her personal morals in her professional work is needed to realise a 'social good'<sup>52</sup> – the societal commitment to an individual's autonomy. For the most part the moral grounds that liberal philosophers claim for liberal polities descend from Kant's categorical imperative to treat individuals as ends in themselves, and not as means to another's or to government's own ends.<sup>53</sup> This immediately illuminates the paradox of autonomy in the standard secular conception of the lawyer's role. The model openly treats the lawyer as 'the *means* to first-class [autonomous] citizenship'.<sup>54</sup> The lawyer is a *means* of guaranteeing that the individual citizen is treated as an *end*. On this understanding, the question arises whether this role offends the basic Kantian ethic that it supposedly rests on.

This leads to the second point. The unexplored assumption of the model is that the heteronomous lawyer is indispensable if all are to be given access to law. Again, this is debatable. For example, a competitive market for legal services is another liberal institution that could ensure broad access to law, without requiring any individual to trade her moral autonomy for the right to become a lawyer. While *any* legal system demands that judicial decision-making be directed by law – and law could represent a moral scheme differing from the judge's personal morals – there is much greater doubt that a liberal society depends on morally indifferent lawyers.

### Liberal agents

Liberalism is not necessarily limited to a political structure that enables individuals to be treated as ends in themselves, to the extent that that is possible. There are liberals – notably Rawls – who recognise a fuller conception of the good for individuals themselves.<sup>55</sup> Liberalism has its 'transformative dimension'. Even

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52 Ibid 633.

53 This is the second version of the categorical imperative, stated in *Foundations*, above n 34, 51-2. See also I Kant, 'On the Common Saying: "This may be true in theory, but it does not apply in practice"' in H Reiss, *Kant's Political Writings* (1970) 73. Rawls effectively treats this as the 'thin' conception of the good, adapted to the limited political objective of neutral government, and 'thinner' than the different ideas of the good held by the individuals who make up the society in question: J Rawls, *A Theory of Justice* (1972) 395-9. Dworkin suggested that both Rawls and he ground liberalism on a thin ethic of equal concern and respect for individuals, a standard that has evident Kantian antecedents: R Dworkin, 'The Original Position' in N Daniels (ed), *Reading Rawls* (1975) 16, 51-2.

54 Pepper, above n 16, 617 (emphasis added).

55 Rawls, above n 53, 433-9, 548-54.

though it does formally allow citizens to pursue their own life plans and goals, liberalism necessarily has its own influence on the development of those plans and goals. It 'must constitute the private realm in its image, and it must form citizens willing to observe its limits and able to pursue its aspirations'.<sup>56</sup> A liberal society makes a liberal individual. And further, the agency ethic strongly promotes the idea of a lawyer as a liberal individual.

Liberal societies are marked by extensive social segmentation, whether because of the political accommodation of moral pluralism, an advanced division of labour, or the structural differentiation of economic, home, religious, cultural and educational life. In any liberal society, the individual must negotiate a range of different social settings, each potentially with different plans and goals. So, part of a liberal society's transformative dimension is that it encourages the individual to deny the existence of one conception of the good that embraces all social settings. It encourages the division of life into segments, and the limiting of God to one of those segments.<sup>57</sup> At this point, some deep differences between liberal thought and Christian belief emerge. Two advocates of individualism, Rawls and Kierkegaard, can agree that the Christian's single-minded desire for God is 'madness'. Rawls thinks it best to rationalise the madness by confining it to Sunday.<sup>58</sup> On the other hand Kierkegaard thought that, if it could be called religion at all, 'the Sunday God-relationship' was a lower form of religion. Only by choosing the madness - the religious life - could the individual develop personal coherence, as that choice levelled the different commitments embodied in different social roles and left the individual alone before God.<sup>59</sup> However, the individual who does not make that choice is capable of being transformed by liberalism's fuller conception of the good, and could develop a segmented existence. To return to MacIntyre, he concludes that:

... to be educated into the culture of a liberal social order is, therefore, characteristically to become the kind of person to whom it appears normal that a variety of goods should be pursued, each appropriate to its own sphere, with no overall good supplying any overall unity to life.<sup>60</sup>

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56 S Macedo, 'Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism' (1998) 26 *Political Theory* 56, 58; R Ahdar, 'Religious Group Autonomy, Gay Ordination and Human Rights Law' in R O'Dair & A Lewis (eds), *Law and Religion: Current Legal Issues 2001, Volume 4* (2001) 275-7.

57 As MacIntyre has suggested from his earliest writings: *Whose Justice*, above n 35, 337; A MacIntyre, *Marxism: An Interpretation* (1953) 9-10.

58 Rawls, above n 53, 554.

59 SA Kierkegaard, *Concluding Unscientific Postscript* (1941) 423 ('Concluding Unscientific'); SA Kierkegaard, *The Present Age* (1962) 52-4, 68.

60 *Whose Justice*, above n 35, 337.

It is no wonder, then, that he casts lawyers as ‘the clergy of liberalism’.<sup>61</sup> The lawyer’s role in negotiating a life that subordinates her personal morals to the client’s is characteristic, though more pronounced, of others’ experience of pursuing different goals in different social settings. In this connection the agency ethic can be seen as demanding that the lawyer be more than a cog in the justice machine, giving effect only to its thin moral basis of delivering the equal treatment of individuals as ends. It demands that the lawyer embrace liberalism’s fuller conception of the good, and become a liberal individual.<sup>62</sup> The ‘clergy’ must be exemplars of liberal belief.

### The priority of Christian morals

Christians can, and must, endorse much that emanates from the broad liberal tradition.<sup>63</sup> After all, the genealogical descent of liberalism from Protestant theologies and political agitation itself suggests that there will be much common ground between liberal ideas and Christian theology. Nevertheless, the Enlightenment project has also seen modern liberalism depart from its theological or metaphysical sources.<sup>64</sup> Indeed, as will soon be explained, the specifically liberal definition of personal autonomy sits uncomfortably beside the Christian belief that man is inescapably God-dependent and possesses his dignity as one created and loved by God.<sup>65</sup> Still, the liberal justifications of lawyers’ standard agency ethic themselves recognise the paradox that, as an important means by which individuals can enjoy personal autonomy, the lawyer *qua* lawyer must be denied the same right to personal autonomy. It is therefore no surprise that alternative accounts of the lawyer’s role suggested by religionists should agonise over the agency ethic, and advocate greater lawyer autonomy.<sup>66</sup>

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61 Ibid 344.

62 Shaffer and Cochrane, above n 47, 67-8.

63 Eg, a liberal democracy could be considered a – though not the - Christian state to the extent that it generally allows the believer (along with others) to practise his faith as he believes he should: R Mortensen, ‘A Christian State: A Comment’ (1999) 13(2) *Journal of Law and Religion* 101.

64 Eg, see Grant’s explanation of Rawls’ admiration for Kant’s egalitarianism, but without any acknowledgment of Kant’s metaphysical conception of the will: Grant, above n 36, 31-4.

65 Cf G Tinder, *The Political Meaning of Christianity* (1991) 15, 17, 28.

66 Eg, *A Christian and a Lawyer*, above n 24, 21-33; Shaffer and Cochran, above n 47, 60-1. Sir Gerard Brennan claims broadly that ‘there is no conflict between Christian and professional duty’ but recognises that ‘[o]ur relationship with God ... should so mould our conduct that we neither contribute to an injustice nor unreasonably suffer an injustice to go without remedy’: ‘The Christian Lawyer’ (1992) 66 *Australian Law Journal* 259, 260, 261. For a Jewish example, see SH Resnicoff, ‘Professional Ethics and Autonomy: A Theological Critique’ in O’Dair & Lewis, above n 56, 329, 343-5. The following is partly an attempt to adjust Resnicoff’s approach to a Christian theological perspective.

### *A theology of autonomy*

Theological accounts of legal practice do not necessarily need a stronger conception of autonomy than secular liberalism espouses. As argued earlier, the assumption of a lawyer's moral heteronomy in the autonomous citizen model could compromise the standards of Kantian ethics and, therefore, even within liberalism there could be a re-presentation of the lawyer's ethic for client representation that both enhances lawyer autonomy and serves as a more coherent alternative to the agency ethic. Accordingly, some consensus on defining a professional role that allows a lawyer greater moral input into the work undertaken for a morally autonomous client is possible. The disagreement between Christian and liberal accounts of professional autonomy stem rather from the different conceptions of the *source* of human autonomy, and therefore the nature and motivation for the lawyer's having moral input into her professional work.

The secular liberal concept of autonomy makes man 'the glory, jest and riddle of the world'.<sup>67</sup> Individual autonomy therefore tends to be regarded as a condition of moral independence and self-sufficiency. Liberals may disagree as to whether morals inevitably originate within the individual or, more precisely, within human reason, but the characteristic view is that rational moral standards capable of measuring the rights and wrongs of divine and human action are a product of human reason.<sup>68</sup> Therein lies secular liberalism's radical disagreement with Christian belief.

A Christian must reject the idea that man is morally self-sufficient, and the idea that the conduct of God or man is to be judged against rational standards developed by man himself. Indeed, to the believer, any proposition that rationally developed human standards should be the measure of Christ, the god-man who is prior to and the source of all things,<sup>69</sup> must by definition be false. Some would say

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67 Alexander Pope, quoted in M Kuehn, *Kant: A Biography* (2001) 240. I adopt Kant's conception of autonomy as the most influential and commonly used in modern liberalism. As the dominant thinker of the Enlightenment and 'the philosopher of Protestantism', Kant has been regarded as both the fulfilment and negation of both the Enlightenment and reformed Christian thought. He therefore serves as an important, though often ambiguous, point of distinction between secular and Christian ideas: P Tillich, *A History of Christian Thought: From its Judaic and Hellenistic Origins to Existentialism* (1968) 361-2 ('Christian Thought').

68 Foundations, above n 34, 5-6, 37-8; I Kant, *Practical Philosophy* (1996) 255; JB Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (1998) 512-13. In Kantian thought, the categorical imperative is not a product of the will, as it is established a priori and without reference to experience: Foundations, above n 34, 37-9.

69 Col 1: 17.



it is blasphemous.<sup>70</sup> The Christian belief is that man is utterly dependent on God as his creator and nourisher. Therefore, the individual's being and dignity are necessarily God-dependent. Furthermore, Christian teaching is that, as the believer grows in grace, his consciousness that he is God-dependent expands and deepens. To develop the mind of Christ is to grow more aware of one's essential God-dependence and, as a result, to become more completely human. For the secular liberal, this is a wholehearted embrace of heteronomy and, thereby, denies much of the Enlightenment project. The Christian belief in God-dependence is therefore as repugnant to the liberal conception of moral autonomy as, for the believing Christian, the secular claim to moral self-sufficiency demands an exile from Eden.

Furthermore, this God-dependence is reinforced by man's epistemic and ethical condition after the Fall. There are limits to the human capacity to reason within a finite world,<sup>71</sup> and there is a perversion of man's will that disables his capacity to live in accordance with God's will.<sup>72</sup> The secular liberal may, at times, also agree with something akin to the Christian doctrine of original sin or, as Kant dubbed it, radical evil.<sup>73</sup> However, Christian theology is more conscious that the state of original sin reinforces the vulnerability of human existence and man's dependence on the will of God himself to transcend those limitations by a powerful act of grace.<sup>74</sup> Autonomy must therefore build on this comprehensive picture of man as God-dependent, and present the individual's moral independence in some sense different to self-sufficiency. For the most part, in Christian ethics autonomy is only presented as an explanation of the social or political basis on which the expression of the Christian freedom to live faithfully in relationship with God is grounded.

In this respect, autonomy is a response to both original sin and the possibility of grace. The Fall leads to the recognition that, as in the individual's own actions, evil can be done through collective human action in social institutions and government. It is therefore just as sensible to limit the social, political and legal claims made on the individual as it is to recognise the need to place social, political and legal restrictions on the individual's conduct when it has potential to do evil to others. As Tinder said:

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70 A MacIntyre, *Difficulties in Christian Belief* (1959) 105.

71 Kantian epistemology is the same. Human finitude is a function of 'the two pure forms of sensuous intuition': space and time. Man is limited in that he cannot represent to himself anything that transcends space or time: *Critique of Pure Reason* (1934) 43-54, but especially 61.

72 I Kant, *Religion within the Limits of Reason Alone* (1960) 27.

73 Ibid, 34-9.

74 *Christian Thought*, above n 67, 362.

It is perverse to deny liberty to almost everyone because of human faults and then to grant some, who are human and thus presumably affected by the same faults as all others, the limitless liberty inherent in absolute power.<sup>75</sup>

Limitations on social and governmental claims made on individuals importantly provide space for the individual to choose to respond faithfully to God's grace. And, while the theological justification for this social and political autonomy is primarily to create freedom for the individual to make a choice *for* the religious life, it necessarily accepts that the same autonomy must create the possibility of freedom *from* religion.<sup>76</sup> Tinder fears that a Christian commitment to autonomy is a morally perilous decision to allow people not to resist evil.<sup>77</sup> Still, unless there is the freedom to choose to reject grace it remains that there can be no true freedom to choose to respond to it. This does not create an autonomy paradox, although paradox is a frequent feature of Christian theology. Autonomy in this sense respects the individual for what he can hope to be,<sup>78</sup> and so consistently responds to both the impaired condition of man after the Fall and the opportunity given to all to receive God's grace.

Initially, the effect of Christian autonomy seems indistinguishable from that of secular liberal autonomy. However, as we will see, the individual's God-dependence has implications for the enhanced autonomy of the Christian lawyer. First, while recognising that different ethical commitments can attach to different social roles, the autonomy exercised by a Christian does not allow any significant segmentation of his life into different moral universes - 'with no overall good supplying any overall unity to life.'<sup>79</sup> Life still brings social roles and role morals to all individuals, and if in a liberal society this kind of segmentation is exaggerated then, to a significant extent, the Christian must live with that and the ambiguities it leaves in its wake. However, the development of a Christian mind enlarges the power to transcend circumstance, and to liberate the believer from the control of socially constructed circumstance.<sup>80</sup> The believer's very consciousness that his dependence is on *God* - in St Anselm's words, 'something greater than can be thought'<sup>81</sup> - carries a profound intellectual recognition that God's will must be done. As Kierkegaard explained, 'the absolute consciousness of God consumes [the believer] as the burning heat of the summer sun when it will

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75 Tinder, above n 65, 107; see also R Niebuhr, *The Children of Light and the Children of Darkness* (1944) 70-1.

76 Tinder, above n 65, 106-7; Ramsey, above n 14, 356-7.

77 Tinder, above n 65, 102.

78 Ibid 105.

79 *Whose Justice*, above n 35, 337.

80 Keeling, above n 14, 45; S Hauerwas, *Vision and Virtue: Essays in Christian Ethical Reflection* (1974) 60-2.

81 Anselm of Canterbury, above n 19.

not go down'.<sup>82</sup> Evidently, man's will to do what emanates from God remains impaired, but the Christian's growth in grace should naturally witness a closer alignment of his will with the will of God. The Christian might still know that he must negotiate different role morals in different roles, but in none could he fail to 'seek first [God's] kingdom, and his righteousness'.<sup>83</sup> So, recognising a degree of Christian autonomy to express our God-dependence in all social roles brings us to the point made by Pope John Paul in the statement on indissolubility. Lawyers 'should always decline the use of their profession for an end that is contrary to justice'<sup>84</sup> – 'justice' being a specific sense of morality.

Secondly, Christian autonomy implies humility. In particular, it suggests the need for reluctance, and even caution, in exercising moral judgment about another.<sup>85</sup> The action of God's grace does not rescue the believer from man's finitude - quite the opposite. It enhances the believer's consciousness of his own God-dependence and, as a consequence, his bounded knowledge and moral incapacities. There are Christian ethicists who suggest that this strictly limits us to judging our own actions, and to assessing what another's actions suggest about his needs. The 'morally serious' individual will be prepared to give moral reasons for his own actions, and submit them willingly to the test of others' reasoned judgment.<sup>86</sup> However, as a mild aspect of the Christian ethic of self-abnegation, the believer would make no equivalent demand of another. Indeed, on this understanding, the only judges qualified to evaluate another person's actions are God and the other himself.<sup>87</sup> I doubt that Christian ethics demand a moratorium on exercising moral judgment about others, and serious conclusions that evil is being done have to be made. But it is inevitably a hazardous exercise and, when our beliefs about God-given standards are involved, a weighty judgment to make about another. The moral priority is certainly to listen closely, to respond with care, and to suspend judgment if there is the slightest possibility that of making an unjust assessment of another.<sup>88</sup>

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82 Concluding Unscientific, above n 59, 433. The depth of the religious commitment in Kierkegaard is more rationally cast by Tillich as the individual's 'ultimate concern': P Tillich, *Dynamics of Faith* (1957) 1-4, 9-12.

83 Matt 6: 33. 'The Christian dependence on God is a little like falling in love; and like the marriage which follows falling in love it has its own difficulties, adjustments and disappointments; and its own dull patches; but like marriage, it sets limits on our freedom only as a necessary preliminary to the deeper exploration and adventure which is the nature of commitment, either to God or to another person. It is the exploration and the adventure that we really talk about when we use the words 'freedom' and 'responsibility': Keeling, above n 14, 49.

84 Indissolubility, above n 1, 9.

85 Matt 7: 1-5.

86 Hauerwas, above n 80, 60-1; Foundations, above n 34, 19-20, 39-41.

87 Cf Keeling, above n 14, 45-6.

88 Jas 1: 19.

In conclusion, the Christian claim to exercise autonomy in moral judgment rests on man's limited epistemic and ethical capacities. As a consequence, the believer must recognise that this autonomy simultaneously embodies his choice to respond in obedience to Christ, and his inherent capacities to misunderstand even what that might entail. Furthermore, the believer's obedience to Christ necessarily entails the priority of his duty to care for the other. The result is that the believer should be able to claim the freedom to transcend, albeit imperfectly, the discontinuities of the different roles he will assume in a liberal society. In those roles he does have an obligation to 'seek first his kingdom' and, it would seem, to give careful - in the sense of 'care-full' - moral input to the tasks assigned to those roles. Throughout, nevertheless, the consciousness of his human imperfection and his chronic deafness to the voice of God should, despite the obligation to give careful moral input, reinforce a reluctance to assume too quickly the role of moral judge.

### Careful moral input and divorce practice

In Australia, the 12-month separation rule generally makes an application for divorce straightforward. There is often no need for a lawyer to be involved, let alone to navigate questions of law or contested evidence for the client. The reported cases show that there is litigation over contested questions of jurisdiction<sup>89</sup> and capacity,<sup>90</sup> and nominal prerequisites to a divorce like counselling<sup>91</sup> or arrangements for children.<sup>92</sup> Soon after the 12-month separation rule was introduced, the Family Court had to answer questions as to what amounted to 'separation'.<sup>93</sup> But, as these questions were resolved the proportion of

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89 *In the Marriage of Woodhead* (1997) 23 Fam LR 559; *In the Marriage of Ferrier-Watson and McElrath* (2000) 26 Fam LR 169.

90 *In the Marriage of D* (2001) 27 Fam LR 736.

91 *In the Marriage of Phillipe* (1977) 4 Fam LR 153; *In the Marriage of Kelada* (1984) 9 Fam LR 576.

92 S 55A *Family Law Act 1975* (Cth); *In the Marriage of Warne* (1976) 1 Fam LR 11,602; *In the Marriage of Potter* (1976) 2 Fam LR 11,554; *In the Marriage of Cusano* (1976) 2 Fam LN 28; *In the Marriage of Opperman* (1978) 4 Fam LR 135; *In the Marriage of Maunder* (1999) 25 Fam LR 579.

93 *In the Marriage of Wiggins* (1976) 1 Fam LR 11,101; *In the Marriage of Zureb* (1976) 1 Fam LN 9; *In the Marriage of Todd* (No 2) (1976) 1 Fam LR 11,186; *In the Marriage of Tye* (1976) 1 Fam LR 11,235; *In the Marriage of Fenech* (1976) 1 Fam LR 11,250; *In the Marriage of Franks* (1976) 1 Fam LR 11,341; *In the Marriage of Pavey* (1976) 1 Fam LR 11,358; *In the Marriage of Lane* (1976) 1 Fam LR 11,385; *In the Marriage of McLeod* (1976) 1 Fam LR 11,280; *In the Marriage of Quigley* (1976) 1 Fam LR 11,526; *In the Marriage of Ikonomou* (1976) 1 Fam LN 17; *In the Marriage of Hodges* (1977) 2 Fam LR 11,524; *In the Marriage of Stokoe* (1976) 2 Fam LR 11,151; *Clift v Clift* (1976) 2 Fam LR 11,369; *In the Marriage of Potter* (1976) 2 Fam LR 11,554; *In the Marriage of Birch* (1976) 2 Fam LN 8; *In the Marriage of Cusano* (1976) 2 Fam LN 28; *In the Marriage of Hunt* (1977) 3 Fam LR 11,144; *In the Marriage of Falk* (1977) 3 Fam LR 11,238; *In the Marriage of Caretti* (1977) 3 Fam LR 11,374; *Velterop v Velterop* (1977) 3

cases that raise legal and factual disputes about divorce itself became negligible. The importance in Australia of instructing a lawyer for a divorce is that, in a minority of cases, it is an early step in dealing with the more complex questions of parenting, property division and ongoing maintenance. It is therefore likely to be within the broad context of comprehensive family breakdown that the lawyer might be confronted with the moral question of divorce.

Family breakdown can raise many other painful moral questions for the lawyers involved. Among these, the plight of children and the fair distribution of property are prominent. Increasing attention is being given to the problem that the liberal structure of the legal system compels the lawyer to consider only the interests of her individual client, even when that may injure the family as a whole.<sup>94</sup> And, there is a dilemma for lawyers that even reasonable legal costs can swallow a large proportion of the property left over for members of a family on average household income after the family has disintegrated.<sup>95</sup> In comparison, the question of divorce itself could seem insignificant, and to many of a secular mindset also a bit quaint or *passé*. However, for Christians it remains a moral question and one that, at times, is capable of conceiving all of the other moral questions that arise in family breakdown.

So far as divorce is concerned, the demarcation of a moral question will be clearer for the believer, most likely a Catholic or Anglican, who holds to the indissolubility of marriage. It becomes less distinct for Protestants, especially those who edge towards the belief that divorce can be morally justified even when no spouse is at fault. But assuming that, on the basis of her own understanding of God's will, the Christian lawyer does have moral misgivings about a divorce sought by a potential client, the question is again: should she arrange the divorce?

The liberal account of the lawyer's role suggests that the Christian's misgivings be discounted, and the divorce arranged. This may well be the real assumption underlying the thinking of those who dismissed the papal statement on indissolubility as intruding on a 'state issue'.<sup>96</sup> The lawyer might sincerely believe, say, that her own marriage is indissoluble, but either is unprepared to extend that belief to her client's marriage or, if she does think that the client's marriage is essentially indissoluble, believes that her work as a lawyer precludes her giving any moral input to her client's circumstances. In these cases, the lawyer commonly explains the discontinuities of her moral world by appealing to her

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Fam LN 3; *In the Marriage of Bates* (1977) Fam LN 10; *In the Marriage of Manning* (1978) 4 Fam LR 173.

94 Eg, TL Shaffer, 'The Ethics of Radical Individualism' (1987) 65 *Texas Law Review* 963 ('Ethics of Individualism'); RHS Tur, 'Family Lawyering and Legal Ethics' in S Parker & C Sampford, *Legal Ethics and Legal Practice: Contemporary Issues* (1995) 145.

95 Tur, above n 94, 147-51.

96 Lane, above n 2; Murray, above n 2.

client's sole right to decide the rights and wrongs of the divorce, or to the client's right to have access to law.<sup>97</sup> However, these reasons are a species of *liberal* justification for her behaviour. It is only in a rare case, where cab-rank duties might apply, that these reasons could amount to a strict appeal to legal or professional rules.

A greater recognition of Christian autonomy suggests that, when a lawyer has misgivings about a moral question like divorce, those misgivings must at least be expressed. Family law is well structured for allowing moral input throughout the course of a lawyer's representing a client. There is also strong evidence to show that family lawyers prefer negotiation and compromise, where moral input and outcomes developed by reference to moral choices are more likely.<sup>98</sup> The law, especially concerning children, is less determinate than, say, revenue or corporate law, and leaves larger spaces for choice and moral judgment in negotiating lawful outcomes.<sup>99</sup> However, the question concerning the initial application for a divorce is of a different kind to that raised by parenting and property disputes, as divorce raises the prospect of 'cooperation' in - as the lawyer concerned may see it - what could be an immoral purpose at the threshold of the retainer. As acceptance of instructions is the critical point at which the ethical question of a lawyer's cooperation in another's cause arises, it is also important that those misgivings are expressed and explored at the initial interview.

It should be evident that, framed by an awareness that there is a Christian responsibility to care for the other but that the Christian's moral judgment might simply be wrong, the lawyer giving moral input to a question of divorce should be sensitive to avoid preaching, self-righteousness and Pharisaism. The risk that the potential client might perceive that moral input is a judgmental attitude is especially pronounced in family law, even if lawyers in the field are reputed to have a higher degree of personal sensitivity to their clients' emotional conditions.<sup>100</sup> However, moral judgment would be even more Pharisaic and careless if the lawyer were to decide that the cause was immoral, without any discussion or mutual examination of the problem with the potential client. That degree of lawyer paternalism also denies the client's moral autonomy, and

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97 As a Catholic lawyer in Melbourne said: 'I don't believe in divorce for myself ... but there are a lot of people who get divorced ... As lawyers we are supposed to uphold the law and if part of the law is you can get a divorce, then it would be hypocritical not to represent them': Farrant, above n 6.

98 R Ingleby, *Solicitors and Divorce* (1992) 156-61; Kressel, above n 48, 166-7. Cf A Sarat and WLF Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (1995) 145, who suggest that lawyers are reluctant to discuss the causes of a marriage failure with a client. The no fault law of divorce may well discourage that conversation.

99 Tur, above n 94, 167-8.

100 Ibid 164; Sarat and Felstiner, above n 98, 151-2.

assumes a certitude of moral knowledge that, after the Fall, a Christian should not be claiming.

Interestingly, the most influential of contemporary Christian accounts of the lawyer's role - Shaffer's - puts discussion about morals at the centre of an ethical response to any potential collision between the lawyer's personal morals and those of the client. Shaffer variously describes this as moral 'discourse',<sup>101</sup> 'counselling'<sup>102</sup> or 'conversation'.<sup>103</sup> However, the reason for a discussion about morals is to give expression to the Christian lawyer's duty *to care*.<sup>104</sup> Shaffer eschews the poles of the agency ethic and paternalism and values the creation of a deep personal relationship that transcends the socially constructed roles of lawyer and client, though with a more communitarian bent than I have been prepared to develop.<sup>105</sup> He adopts the idea of the lawyer as a 'friend'.<sup>106</sup> This may rest on an optimistic assessment of the time available for the development of deep personal relationships in legal practice and of the client's motives in wanting to pay a lawyer to represent him, but the primary goal is to deal with another's moral issues *as if* one were the other's friend.<sup>107</sup> The priority of care does demand a rejection of both client-control and lawyer-control of decisions about the morals of the lawyer's work, and, I have argued, this is reinforced by the Christian lawyer's consciousness that she may misunderstand the moral obligations entailed in being faithful to Christ.

It therefore seems that Christian autonomy is generally not exercised if instructions are bluntly refused simply because, in the lawyer's genuine belief, the

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101 *A Christian and a Lawyer*, above n 24, 28, 30, 32; Shaffer and Cochran, above n 47, 48, 50, 52.

102 Shaffer and Cochran, above n 47, 45.

103 *A Christian and a Lawyer*, above n 24, 32; Shaffer and Cochran, above n 47, 50.

104 *A Christian and a Lawyer*, 21-33. Shaffer and Cochran suggest that moral discourse must be conditioned by reflectiveness, tolerance, honesty and care: Shaffer and Cochran, above n 47, 52-3.

105 *A Christian and a Lawyer*, above n 24, 28-30; Shaffer and Cochran, above n 47, 44-7; TL Shaffer and M Shaffer, *American Communities and Their Lawyers: Ethics in the Legal Profession* 20-5.

106 *Ethics of Individualism*, above n 94, 982; Tur, above n 94, 170; cf C Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship' (1976) 85 *Yale Law Journal* 1060. For a small sample of critiques of the idea of the lawyer as friend, see RT Begg, 'The Lawyer's License to Discriminate Revoked' (2000) 64 *Albany Law Review* 153 (agency ethics); CA Gear, 'The Ideology of Domination: Barriers to Client in Legal Ethics Scholarship' (1998) 107 *Yale Law Journal* 2473 (agency ethics); JL Sammons, 'Rank Strangers to Me: Shaffer and Cochran's Friendship Model of Moral Counselling' (1998) 18 *University of Arkansas Little Rock Law Journal* 1; WB Wendel, 'Public Values and Professional Responsibility' (1999) 75 *Notre Dame Law Review* 1.

107 Shaffer and Cochran, above n 47, 45.

work is of an immoral kind.<sup>108</sup> In the case of divorce, a Protestant lawyer who believed that a situational assessment had to be made before deciding whether a divorce were morally justified probably would be deeply engaged in 'moral discourse' with a client before misgivings about a particular divorce could arise. In the Pope's more morally determinate statement on indissolubility, some discussion between lawyer and potential client about the rights and wrongs of divorce would seem to be implied in the lawyer's need to know whether she would be directing her efforts at the break-up of the marriage.<sup>109</sup> However, careful moral input demands more. In these examples, both the Protestant lawyer's situation ethics and the Catholic's tenet of indissolubility would, if both lawyers were morally serious people, themselves be subjected to testing in the course of the discussion. As a result of this kind of discussion, the lawyer may adjust her position, the client may change his, they may both realise that they only have a reasonable disagreement about the application of an agreed moral standard, or each may remain unconvinced by the other. Shaffer, again emphasising the personal relationship, values the discussion itself. 'And it is possible, given a mutual commitment to be honest . . . , to seek my client's growth, and to seek my growth as well as I deal with my client'.<sup>110</sup> It remains that, even where the greatest care is expressed, the lawyer's personal morals and those of the client could continue in collision. In a liberal society, this is inevitable. There might be a point where the lawyer thinks that her expertise is being used for an unjust end, as she sees it. Even Shaffer, a Catholic who believes that the family's interests should prevail over the individual's, apparently recognises that an extended moral conversation can take place between a lawyer and a client in a family law matter, but seems to balk at suggesting that the lawyer should formalise the family's breakdown by divorce.<sup>111</sup> Where the lawyer and client cannot reach a mutually acceptable compromise through moral discourse, Christian autonomy demands that the retainer be declined.<sup>112</sup> That is naturally a weighty decision for a morally serious lawyer to make. It is also one that, given the lawyer's limited epistemic and ethical capacities, should only be carefully and reluctantly made. Even then, it will be no placebo for the common feeling of guilt.

While discussion between a lawyer and potential client about morals can be consistent with the agency ethic, it is when the lawyer refuses to represent

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108 The ethical quality of the decision will differ if, eg, divorce work is refused because the lawyer only practises in, eg, criminal defence or takeovers and acquisitions.

109 Furthermore, in Australia the Catholic Church demands that a civil divorce be obtained before applying for an annulment in the church courts: Editorial *op cit*. If a divorce is sought for this reason, a Catholic lawyer could have fewer moral qualms about arranging it.

110 A Christian and a Lawyer, above n 24, 31. Sarat and Felstiner suggest that, given the push and pull of professionalism and client-control, the power that lawyer and client can exercise over each other is 'fragile and contingent': above n 98, 151.

111 *Ethics of Individualism*, above n 94, 974, 988.

112 Shaffer and Cochran, above n 47, 26, 52.



another because of the morals of the cause that a Christian conception of autonomy proves to be differently positioned and differently defined to the standard conception of the lawyer's role. It is no extension of this point to conclude that, in the rare case that the cab-rank rule were to apply and be insisted upon, civil or professional disobedience could be demanded.<sup>113</sup> But, as with the cab-rank rule itself, the real significance of a lawyer being prepared to give careful moral input to her work is more likely to be symbolic. The papal statement on indissolubility has reiterated, for all Christian lawyers, the importance of the Christian lawyer's own judgments about the justice or moral worth of her own legal work. As a symbol of the immanent Christ,<sup>114</sup> the believing lawyer can transcend powerful social expectations that she exemplify the liberal individual and, instead, show that even being a lawyer is a God-given vocation.

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113 Cf Dal Pont, above n 21, 58-9.

114 Cf Zech 3: 8.