

Care, Normativity and the Law

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Care ethics can provide a valuable conceptual and normative resource for many issues in law, but given the conservative nature of law in general, much work needs to be done before care ethics can explicitly play such a role. In this paper I survey the landscape of law, discuss two attempts to incorporate care ethics into the normative framework of law, and suggest other avenues for incorporating care ethics in law and legal reasoning. I close with some examples of care ethics in judicial decision making. In this final section, I will first show the way care is used in Justice Kennedy's decisions in *Lawrence v. Texas* 539 U.S. 558 (2003) and *United States v. Windsor* (Defense of Marriage case). These decisions show the value that a care ethics can bring to judicial decision making. This second is a discussion of how the failure to use care ethics illuminates what went wrong in an important health care case.

I. Normativity and the Law

Most discussions of normativity and law focus on the role of moral appeals in judicial reasoning. U. S. law students are taught that they may only appeal to legal authority, and that such authority is exhausted by the following: Constitutions (federal and state), statutes (including administrative regulations), case law and public policy.¹ Nowhere in this list does morality explicitly appear. Part of the reason for this lack can be found in the notion of judicial restraint—the idea that judges should interpret the law and resist imposing their own subjective views, including their moral views. Such restraint is often defended by an appeal to the role of the judiciary in a democracy—legislatures express the will of the people when they make law and are subject to dismissal if the people find their legislating problematic. Judges, especially

federal judges, are immune to politics and thus from democratic constraints. If we think it is important to defer to the will of the people, while protecting individual rights, we will want our judges to defer to the legislature unless doing so is incompatible with their role as arbiter of the law and protector of individual rights.

There is, of course, a long and spirited debate about the role of morality in judging. Ronald Dworkin, for example, argues that judges cannot dodge appeals to morality, especially in hard cases.² While I am inclined to agree with Dworkin, it is important to recognize the reality that legal culture, as it is transmitted to law students, does not allow for an explicit role for moral considerations in judicial reasoning. However, I am also inclined to agree with Waluchow that while moral reasoning plays no explicit role in judicial reasoning, it is embedded in all the other legal authorities that do play such a role.³

Hence, rather than argue for adding moral appeals to the list of legal authority, I think it is a more promising strategy to look at the ways that moral perspectives, including care ethics, might play a valuable role within the accepted legal authorities, and within normative conceptions of judging.

II. Care and the Law: Robin West and Carrie Menkel-Meadow

Robin West and Carrie Menkel-Meadow are two of the lone voices in the legal academy who argue for the importance of care ethics in the law. Menkel-Meadow focuses primarily on a process of legal dispute resolution and the legal education that would facilitate such a process. West is more concerned with legal theory and how such theory could be structured to avoid harms to women. She argues that only an integration of care and justice can protect women from such harms.⁴

West holds a relational view of the self, but also argues that an excessive focus on others is neither caring nor prudent. She shares with many care ethicists the view that care is best exemplified in caring interactions between intimates and that maternal caring is the paradigmatic example. In contrasting the traditional role of the judge as impartial arbiter of the rule of law, she describes the caring judge as a maternal figure.

As the tree provides shade not with its erect trunk but with its gracefully curved branches, the mother provides care, protection, warmth, comfort and love through the interwoven, interdependent strength of the circle of care, not through the independent linearity of the erect, principled, morally upright pillar of strength.⁵

Second, West sees both justice and care as virtues, and as equally necessary in doing legal justice.

The work of doing legal justice—of remaining true to a judicial oath, of applying the law, of treating like cases alike, of insisting on institutional consistency, and so on—must be in the service of values which are life affirming...⁶

Justice is not the *result* of the accurate application of law, the ascertainment of which requires the censoring of compassion. Rather, justice must *inform* our ascertainment, and hence our application of law . . . And the capacity for justice...must in turn be informed by our capacity for compassion.⁷

She uses examples of judging to illustrate how both care and justice are necessary.

Justice Blackmun was quite right, in *DeShaney*, to implicitly insist, in his dissent, that the just outcome in that case must be grounded in a compassionate response to Joshua's plight...The Court's failure in *DeShaney*... [is a failure to see that] justice, divorced from compassion is lethal.⁸

West also argues that the law should take the "gendered harms" to women as seriously as it takes harm to men, and she conceptualizes some of these harms as involving a commitment to justice with the exclusion of care, or a commitment to care to the exclusion of justice and she focuses on reproductive issues in law to illustrate both appropriate and inappropriate uses of care ethics.⁹

Carrie Menkel-Meadow appeals to care ethics in defending a fundamental change in legal focus. The law, she writes, must “develop theories, strategies, and programs for encouraging . . . obligations (laws?) and behaviors to deescalate conflicts and search for better and more peaceful solutions to a myriad of human difficulties and “injustices.”¹⁰

This solution will require that we interact in a caring way, “promoting the possibility of mutual understanding, empathy, sympathy, and “fellow-feeling.”¹¹

A change to this model of law will require legal education that involves the conscious inculcation of the virtue of care.

Can we in a law school environment teach such *processes* as:

1. How to approach each other with *grace, generosity and true curiosity*, instead of the competitive adversarial mode so common now in legal discourse? Our language and orientations to each other must be trained to be ‘non-violent’ in our daily lives, as well as in our legal ones?
2. How to *listen to learn* from each other about our differences, commonalities and where we can come together?
3. How to *solve the problems* of allocation of resources, material and human, in equitable ways?
4. How to *create new forms of human collaboration* to work together to literally make the world a better place?¹²

III. Finding Care in Legal Authority

A. Constitution

Constitutions play a fundamental role in the United States, and they change very slowly. Constitutional interpretation, on the other hand, is an ongoing activity. While there are a variety of views about such interpretation, we can arrange them on a continuum with strict interpretation (e.g. originalism¹³ and textualism) on one end and loose construction on the other. Care ethics is unlikely to prove persuasive to strict constructionists largely because they will claim that it does not appear in the writings of the founding fathers. Those who see the Constitution as a living document which provides a blueprint for resolving our current problems, would be much more

likely to find care ethics congenial. Justice Cardozo, for example, noted that when trust is the standard, one should be “held to something stricter than the morals of the market place,”¹⁴ and care ethics helps us to think through precisely what that stricter standard might be. Akhil Reed Amar, a Constitutional scholar, argues that constitutional interpretation should take place against the backdrop of what he calls eleven unwritten constitutions, including a feminist constitution.¹⁵ There is certainly room to explore care ethics here.

B. Public Policy

Appeals to public policy are often made in consequentialist terms, but this catch all category is fertile ground for other moral perspectives, including care ethics.

C. Statutory Law

Statutes can be grouped in terms of doctrinal areas (e.g. property, contracts, criminal law, torts) and policy areas (e.g. health law, environmental law, family law) and there are moral notions embedded in each area. Criminal law, for example, rests on a deontological framework as it sorts liability in terms of mens rea consideration. Justifications of punishment rest on retributive and deterrence models. Restorative justice would benefit greatly from an analysis in terms of care ethics. Family law is understandably rich in moral appeals and can profitably be mined for its inclusion of care ethics. This model might then be extended to other areas of the law which have implications for families: e.g. immigration law.

IV. Care and Case Law

A. Justice Kennedy use of Care Ethics in *Lawrence* and *Windsor*

Jason Pierceson, *Courts, Liberalism, and Rights: Gay Law and Politics in the United States and Canada* describes Kennedy’s view in *Lawrence* as a variety of liberalism that he calls “rich liberalism.” Under this view, “the individual as more socially situated and reliant on the

state and society to develop fully in individual. It differs from other versions of liberalism in emphasizing positive, rather than negative liberty.” (34) I think another way to view Justice Kennedy’s reasoning in these decisions is to see him as invoking an ethic of care. In both cases, Justice Kennedy invokes a relational ontology and notes the importance of protecting relationships and not just individual liberty interests. This is striking when noting that in both cases the constitutional framework was liberty interests. In *Windsor*, the Court ruled that the Defense of Marriage Act (DOMA) was an unconstitutional deprivation of the equal liberty of persons that is protected by the Fifth Amendment. In *Lawrence*, the Court ruled that the petitioners’ right to liberty under the Due Process Clause (14th amendment) gives them the full right to engage in private conduct without government intervention and that the Texas statute furthers no legitimate state interest which can justify its intrusion into the individual’s personal and private life.

Justice Kennedy’s majority opinion in *Lawrence*:

The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals... adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice...

Here while Kennedy prioritizes the personal relationship over the liberty interest of individuals because the very reason that this liberty interest is protected by the Constitution, and other interests might not be, is because of the importance of the personal relationship and personal bond.

Justice Kennedy's majority opinion in *US v Windsor* makes a similar appeal to the importance of relationship, family and community:

DOMA's principal effect is to identify a subset of state sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect. By this dynamic DOMA undermines both the public and private significance of state sanctioned same-sex marriages; for it tells those couples, marriages are unworthy of federal recognition. This places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, see *Lawrence*, 539 U. S. 558, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.

One criticism of my claim that Justice Kennedy was making an appeal to care ethics in these two decisions is that he failed to make this appeal in other cases.¹⁶

Perhaps the most infamous case that comes to mind is *Gonzalez v. Carhart* 500 U.S. 124 (2007). There Justice Kennedy makes two glaring errors, both of which were central in the Court's argument. The first was an inclusion in the decision of a graphic, emotionally loaded description of fetal distress as a necessary part of the abortion procedure (the so-called partial-birth abortion, or dilation and extraction) that was the central issue in this case. The second was Justice Kennedy's claim that some women "come to regret their choice to abort the infant life they once created and sustained," and that severe depression and loss of esteem can follow. Rather than see these two claims as a failure to apply an ethic of care, I think we can view them as a failure to apply this ethic correctly.

The first failure is that Justice Kennedy focuses so much attention on the fetus that he fails to see that pregnant woman and their doctors are also crucially affected by the choice of this procedures. Their doctors want the freedom to use the procedure that is most protective of the lives of their maternal patients, and the women themselves have an interest in surviving this procedure with their lives and healths intact. Hence Justice Kennedy is guilty of a failure of empathy—he focuses on the fetus (the “near and dear”) to the exclusion of these other parties. The second failure is that he asserts a questionable empirical claim whose plausibility depends on an outmoded view about the role of women as primary caregivers whose very identity is constructed through their caregiving activities. While he made mistakes in both cases, these cases can be construed in mistakes in applying care rather than a failure to use a care perspective. This is not the case for my next case, where the Court’s failure was a failure to apply anything like a care ethic. Indeed, this case is an example of a failure to apply any moral perspective fairly and consistently in addition to being a decision which could not have been defended had the Court also considered an ethic of care.

B. *Moore v. Regents of the University of California*

*Moore v. Regents*¹⁷ is useful for illustrating the way care ethics can be brought to bear in the multiple doctrinal and policy areas involved in this case: property, contracts, tort, and health law. This was a decision by the California Supreme Court in 1990, and the U. S. Supreme Court denied certiorari in 1991 so Moore essentially remains the law of the land. In *Moore*, the Court held that while Moore did have a claim against Dr. Golde and the UC Regents for a violation of informed consent, he had no property interests in the bodily tissue removed by Dr. Golde under cover of the defective consent.

John Moore was diagnosed with hairy cell leukemia in 1975 and sought treatment from Dr. Golde at the UCLA Medical Center.¹⁸ Dr. Golde did various tests, some of which involved drawing blood, and strongly recommended that Moore undergo a splenectomy (spleen removal), to which Moore consented. Unbeknownst to Moore, Dr. Golde had recognized, before recommending the surgery, that Moore's tissue, including his spleen, was potentially valuable both for his own academic research and for commercial use. Dr. Golde never told Moore about this. Between 1976 and 1983, Moore made several trips to UCLA from his home in Seattle to have various fluids and other samples, including skin, bone marrow and sperm, collected, under the misrepresentation by Dr. Golde "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship" ¹⁹ In fact, these tissue withdrawals were primarily for Dr. Golde's research and financial interests. In the meantime, the U. C. Regents patented the cell line Dr. Golde developed using Moore's tissues, naming Dr. Golde, and Shirley Quan, a UCLA researcher, as inventors. They then made arrangements with Genetics Institute, Inc. and Sandoz Pharmaceuticals Corp. for commercial development of the cell line and products to be derived from the cell line. Both Golde and the Regents benefitted handsomely from these financial arrangements. Golde became a paid consultant whose remuneration included common stock. Genetics Institute agreed to pay Golde and the Regents at least \$330,000 over three years for exclusive access. Sandoz joined the agreement in 1982 and the payment to Golde and the Regents was increased by \$110,000.²⁰

A. How the Court used moral perspectives to decide *Moore*

While the Court appealed to case law to guide its decision about the failure of informed consent,²¹ the court noted that there was no law that guided their decision about whether to

extend the tort of conversion to this case. The Court appealed to both patient autonomy and the effects on “innocent” researchers of allowing patients a right to their body parts.²² While it was couched in the language of public policy, this argument involved an implicit appeal to and application of the two moral theories that are most often appealed to in Anglo-American law: deontology and consequentialism. In *Moore*, the concern for patient autonomy is expressed in terms of the foundational value of protecting patients’ decisions about their own body parts. This is a quintessentially Kantian appeal.²³ The other policy concern expressed by the Court is that “innocent” researchers will face unlimited and unexpected tort liability.²⁴ This can be explicated in both Kantian and consequentialist terms. The Kantian argument is that one should only face liability when one is in some way guilty or at least able to foresee such liability. Failure to limit liability in this way treats the innocent researchers as mere means to advance an end that is not their own. There is also a straightforward consequentialist appeal here. The *Moore* majority is concerned that holding researchers liable in this way will undercut academic research and the “infant biotechnology industry.”²⁵ The concurrences are also couched in moral language, and include substantive concerns that can be explicated in terms of moral theory.

B. How the Court might have applied moral theory in *Moore*

My discussion in this section will proceed in three parts. In section one, I will discuss the case using a Kantian framework. Section two involves a consequentialist analysis. In the closing section, I will apply care ethics.

1. A Kantian analysis

In his dissent, Justice Broussard points out that in this case the Court need not settle the issue of whether one’s rights over one’s body parts end when they are removed from one’s body because in *Moore* the deception and the treatment of Moore as a mere means begins while the

body parts are still in his body, since the defendants began the plan to use his tissue for research and financial gain before the splenectomy.²⁶ They compounded this failure to treat him as an end in himself by telling him that his health required the collection of further body tissue that could only be done at their facility in Los Angeles. This required that he make frequent trips from his home in Seattle.²⁷ The majority thus failed to offer a consistent Kantian analysis of this case because they failed to consider Moore's interest in his body parts while they were still in his body. In so doing, they acquiesced in the policy that allows researchers to treat humans as a crop to be harvested at will. Further, the Court was insufficiently attentive to the fact that the treating physician's and researchers' deception extended to involving Moore in supporting the cost of their harvesting of his tissue by making many trips from Seattle to Los Angeles. In so doing, the treating physician and researchers were dismissive of Moore's status as an end in himself.

This was not the only failure here. They also failed adequately to consider the "innocence" of researchers. If it is wrong to treat someone as a mere means, and exemplary to treat someone with respect, then actions, policies, practice and institutions are to be praised or blamed by appeal to how they treat persons. We can now ask how innocent are the researchers? If this reference is to the doctor, researchers and institutions named in *Moore*, the majority agrees that they are at least liable for the failure of fiduciary duty and the failure to disclose which began while the body parts were still in Moore's body.²⁸ The Court further describes the failure to disclose as a violation of patient autonomy, a value deeply rooted in Kant's view of humans as ends in themselves. If the reference to "innocent" researchers includes future researchers, we can ask what policies and practices would ensure that they would indeed be innocent. Here, I would argue that treating patients whose body parts are used in research as ends in themselves and never merely as means requires both disclosure and at least the option of being consulted

about their future use in commercial endeavors. In refusing to recognize Moore's claim to his tissue, the Court foreclosed this latter possibility. If patients have no property interest in their cells after their removal, then no patient will be able to assert control over their use.

2. A consequentialist analysis

One of the constraints of applying a consequentialist analysis in *Moore* was that the decision was written at a very early stage of the litigation--the Court was merely determining whether the plaintiff had stated a cause of action.²⁹ Thus we do not have the evidence and argument that would have emerged if this were an appeal of a motion at the end of the trial. Still, in its discussion of whether the conversion of tort should be extended to this case, the court did adopt an analysis that can be characterized as consequentialist.

In *Moore*, the Court balances the interest in patient autonomy against the following interest: "we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes."³⁰ The Court ultimately refused to extend the tort of conversion in this case because "the theory of liability that Moore urges us to endorse threatens to destroy the economic incentive to conduct important medical research."³¹

The first question we can ask here is whether the court adequately considered the consequences likely to follow from a decision to extend the tort of conversion. In defense of its prediction of the dire results of such an extension, the Court cites the Office of Technology Assessment that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the "infant biotechnology industry."³²

I would argue that the outcomes consistent with the extension of the tort of conversion are numerous, but in considering the consequences of extending the tort of conversion to this case, the Court assumes as the only real possibility a world in which researchers have no access to human tissue, and the infant biotechnology industry is strangled in its crib. Moreover, in refusing to extend the tort of conversion, the Court closed the door on promising policy alternatives.

While the Court might have been insufficiently attentive to the possibilities involved in extending the tort of conversion in this case, the Court is not completely indifferent to patients like Moore. They simply argue that they have adequately addressed concerns for the autonomy of patients by allowing the tort of failure to disclose to go forward.

This is an inadequate remedy. A refusal to extend the tort of conversion would affect the cause of action that the court affirmed in this case: fiduciary duty and duty to inform. If researchers and physicians are faced with a conflict between what is best for their patients and their own financial and research interests, the patient is at risk. This risk is not sufficiently addressed by allowing failure to disclose as a cause for action. As Justice Mosk points out, this remedy will not solve the problem because there are serious obstacles to winning such an action.³³ A patient has to show that were it not for the failure to disclose, he or she would not have had the procedure. In this case, one wonders whether Moore would have refused the splenectomy given that he was being treated for hairy cell leukemia, a pretty frightening illness for any patient. Second, the patient needs to show not only that he or she would have refused the procedure in question, but that any reasonable patient in a similar situation would also refuse. Finally, the patient has to show an injury. If conversion is not a cause of action, it is not clear what injury Moore suffered beyond the money spent on airfare.³⁴ If the damages under the

theories of fiduciary duty and duty to disclose are small and the likelihood that they will be assessed remote, there is no reason to suppose that clinicians and researchers will be deterred when the temptation of academic renown and financial reward conflict with good patient care.

3. A Care Analysis of *Moore*

Care is a virtue that guides our interactions with others, and has implications for our social policy, practices and institutions. Caring communities are characterized by the centrality of trust. Persons in caring communities are committed to being morally attentive, sympathetically understanding, and they are also responsive to the need to build and maintain networks of care. They trust that they will benefit from a reciprocal caring attitude from others in their community. Their social practices and institutions support such caring interactions.

We can contrast caring communities with the world of the market. The world of the market is characterized by the centrality of justice which is usually fleshed out in Kantian and consequentialist terms. Market transactions are characterized by the need to constrain persons in their interactions. Contracts must be enforced, property rights must be protected, and potential victims shielded from various harms.

These models are not meant as descriptions of the world. Rather, these are ways of thinking through how we want our practices to be structured. As an aspirational model, there is much to recommend the caring community. However, I would agree with West that the most comprehensive moral assessment in the legal arena involves both care and justice.

The *Moore* Court did not have care ethics available as a well-developed and articulated moral perspective since care ethics had not yet emerged as a body of systematic legal scholarship. They did, however, have available the moral capacity that underlies care: the ability to empathize. Heidi Li Feldman provides a reason why the Court might have benefitted from

engaging empathy in her discussion of the centrality of virtue theory as a foundation for negligence: “Due care or consideration for other people's safety is a species of benevolence, part of caring about other people generally.”³⁵

a. Failure of Empathy

One of the things that I find striking about *Moore* is the failure to pay moral attention and sympathetic understanding to Moore’s plight, contrasted with the Court’s concern about “innocent researchers”. We see this in the failure of the Court to consider alternatives that might be more sensitive to the plight of Moore and patients similarly deceived by those charged with their care. One might explain this in terms of a failure of empathy. Michael Hoffman describes two ways that empathy can fail that are relevant here.³⁶ First, he notes that one can be empathically over-aroused when one is confronted with someone who is suffering and this “can move observers out of the empathic mode, cause them to be preoccupied with their own personal distress, and turn their attention away from the victims.”³⁷ Moore was a victim in two ways: he was afflicted with a frightening illness and he was betrayed by the doctor who was supposed to be caring for him. Judges are human, and perhaps this response to his suffering is part of the story.³⁸

Hoffman describes familiarity as another way empathy can fail.³⁹ It is natural to feel more empathy for those with whom one can identify. A person with a potentially deadly disease is someone no one wants to identify with. Doctors and researchers, on the other hand, are the educational and social equals of judges so some identification with them and their issues is to be expected.

b. Care and transactions in human tissue

It is helpful here to look more generally at cases of transactions of human tissue. First we can distinguish between types of tissues: renewable tissue (e.g. blood), organs for transplantation, biological materials that can create human life, and tissues that would otherwise be discarded after medical procedures. Second we can distinguish between two different medical settings: clinical and nonclinical. I begin with organs for transplant.

Francis Kane, Grace Clement and Mary Kane argue that live kidney donations, for example, are seldom motivated by a sense of justice-- they are not given to strangers merely because doing so is thought to be a demand of justice.⁴⁰ Rather, “the offer of a live kidney nearly always comes from within a relationship already established.”⁴¹ This suggests that framing live organ donation in terms of caring communities better captures our intuitions about such gifts.

Reproductive technology is another instructive example. In a discussion of third party international egg donation, Carmel Shalev rejects a market model in favor of a care model, in part because reproductive technology is connected to maternal practice, which is a practice that, at its best, is a model for care ethics:

The relationship between the women who collaborate as mothers in third-party reproduction practices is one of mutual interdependence and vulnerability. Ideally, they would be connected in a web of seeing and responding to each other’s needs.⁴²

So far, our examples support framing tissue donation in terms of care ethics. Giving a live organ or an ovum that might result in the birth of a human child are examples that naturally fit this model. But what about less intrusive donations that have a less momentous function? Consider biobanks (collections of biological materials (e.g. blood and/or tissues) and personal data gathered from large numbers of people), for example. Judit Sándor cautions that even in this case framing the issue in the language of banking is problematic:

The widely used term ‘biobank’ not only blurred the boundaries between the human rights based norms in the field of biomedical research and the commercial legal norms, but have also contributed to the transformation of biomedical disciplines into new commerce-oriented fields.⁴³

One might argue that all these examples (live kidney donation, ovum donation and biobanking) illustrate the important insight that care ethics can provide because such an ethic better captures our moral intuitions about how a morally sensitive person would behave in these cases.

Care ethics also suggests a resolution to the tension between the interests of patients like John Moore and researchers. Consider, for example, PXE International, which is a patient group that successfully negotiated with researchers and commercial ventures to develop and market genetic tests for pseudoxanthoma, a serious genetic disease.⁴⁴ As a result of PXE’s efforts, such a test has been developed and is available to prospective parents for a modest fee.⁴⁵ In this case prospective parents created a network of care with researchers and all have benefited through PXE’s efforts to actively recruit participants for research and to raise money and awareness about this orphan disease.

c. Care and the failure of Dr. Golde

We can now apply care ethics to John Moore’s treatment by his physician. The Court focused on the clinical setting in the first part of the opinion where the primary issue was the failure of consent.⁴⁶ The issue of conversion was treated by the Court primarily in terms of justice-- whether Moore had a property interest in his cells.⁴⁷ However, this analysis fails to fully capture our intuitions about what was wrong with Dr. Golde’s treatment of Moore. Care ethics provides valuable insight here. Moore was especially vulnerable because he was acutely ill. He depended on his doctor to care for him during this medical crisis. His doctor instead treated him like a tissue farm. This is a fundamental failure on the doctor’s part to be attentive

and sympathetically understanding of Moore's status as a patient in need of care. Dr. Golde also failed to recognize the relationship of physician-patient that calls up a duty to make the patient's health the central focus of the relationship. Given the high bar for damages for a failure to disclose, the Court's decision here places patients in a clinical setting in a difficult position. When they most need to be able to trust their physician, they are most at risk of a conflict between what is best for them and what will further the treating physician's research and financial goals.

One might suggest that the considerations of justice expressed in terms of Kant and consequentialism can do all the work here. While I agree that they are both powerful ways to guide our decision about this case, they are insufficient by themselves because they fail to capture our intuition that Dr. Golde's failure in John Moore's case was not just a failure to treat him with respect or to consider the consequences of his behavior for Moore and all future patients, but a fundamental failure of care. Here we can appeal to Bernard Williams' insightful discussion of the drowning wife.⁴⁸ If one comes upon two people drowning in a lake and one of them is one's wife, one ought to save one's wife, simply because she is one's wife. The demands of care require such a response to the needs of intimates. If one reflects on the justice of choosing one's wife (that doing so could be justified in terms of a lottery principle, or that such a motivation could maximize utility), one is having "one thought too much."⁴⁹ Similarly, patients will find it difficult to put their trust in the physician who needs to be prodded in terms of duty to put patients' needs first.

Caroline Forell and Anna Sortun offer a similar analysis of what went wrong with Moore's treatment at the hands of Dr. Golde and suggest that we need a new remedy in the law, a statutory tort of betrayal of trust:

Such affirmative misconduct is an extraordinary transgression, involving exploitation and deceit. It is an outrageous abuse of the doctor-patient relationship that in no way resembles the negligence claim of lack of informed consent. Betrayal, disloyalty and taking advantage are at the heart of the Moore allegations and merited a specific remedy for the dignitary injury apart from, and instead of, lack of informed consent.⁵⁰

This is not the only legal remedy that has been suggested for Moore, but it is instructive insofar as it illustrates how care ethics can shape our views about the possibility and plausibility of legal remedies.

C. Conclusion

In this paper I have argued that care ethics can be a valuable resource for theorizing about the law and for teaching the next generations of law students. Though law is in many ways a profoundly conservative institution, there are many doctrinal and policy areas that could benefit from a thoroughgoing care ethics analysis.

¹ See, for example, Frederick Schauer, *Thinking Like a Lawyer: a New Introduction to Legal Reasoning*, Harvard University Press, 2012

² Ronald Dworkin, *Taking Rights Seriously* (1977); *Law's Empire* (1986).

³ W.J. Waluchow, *Inclusive Legal Positivism* (1994)

⁴ Robin West, *Caring For Justice*, (1999)

⁵ *Id.* at 31

⁶ *Id.* at 49

⁷ *Id.* at 48

⁸ *Id.* at 49

⁹ *Id.* at 9, 96-8, 100-138

¹⁰ Carrie Menkel-Meadow, "Toward A Jurisprudence Of Law, Peace, Justice, And A Tilt Toward Non-Violent And Empathic Means Of Human Problem Solving," 8 *Unbound* 79 (2012-13) 84.

¹¹ *Id.* at 85

¹² *Id.* at 107

¹³ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)

¹⁴ *Meinhard v. Salmon* 164 N.E. 545, 546 (N.Y. 1928).

¹⁵ Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (2012).

¹⁶ Maxine Eichner pointed out this criticism is a discussion of this paper.

¹⁷ *Moore v. Regents of the University of California*, 51 Cal.3d 120 (1990).

¹⁸ *Moore v. Regents of the University of California*, 51 Cal.3d 120, 125-129 (1990).

¹⁹ *Id.* at 126

²⁰ *Moore v. Regents* was a ruling on a demurrer and therefore the court assumed the facts as described by Moore in its ruling. In this paper, which is a critique of the *Moore* decision, I shall make the same assumption, though a fuller analysis of the moral issues in this case would require a substantial review of all the relevant facts.

²¹ *Moore v. Regents of the University of California*, 51 Cal.3d 120, 128 (1990).

²² *Id.* at 143.

²³ Immanuel Kant, *Groundwork For The Metaphysics Of Morals* (1785) (3rd edition 1993)

²⁴ *Moore v. Regents of the University of California*, 51 Cal.3d 120, 143 (1990).

²⁵ *Id.* at 143.

²⁶ See Justice Broussard's dissent *Id.* at 150.

²⁷ *Id.* at 126.

²⁸ *Id.* at 131-132.

²⁹ *Id.* at 124-125.

³⁰ *Moore v. Regents of the University of California*, 51 Cal.3d 120, 143 (1990).

³¹ *Id.* at 146.

³² *Id.* at 143.

³³ *Moore v. Regents of the University of California*, 51 Cal.3d 120, 179 (1990).

³⁴ See Anne T. Corrigan "Note: A Paper Tiger: Lawsuits Against Doctors For Non-Disclosure Of Economic Interests In Patients' Cells, Tissues and Organs" 42 Case W. Res. 565 (1992).

³⁵ Heidi Li Feldman, "Prudence, Benevolence, And Negligence: Virtue Ethics and Tort Law," 74 Chi.-Kent L. Rev. 1431, 1440 (2000). Legal theorists have also applied virtue theory to other areas of the law. See Lawrence Solum, "The Aretaic Turn in Constitutional Theory," 70 Brooklyn L. Rev. 475 (2004).

³⁶ Martin Hoffman, *Empathy and Moral Development* (2001).

³⁷ *Id.* at 10.

³⁸ Philosophers might describe this move as “psychologizing” or “ad hominem” but I think it is important to note that arguments can go wrong in two ways: in terms of content and motivation. If we never pay attention to motivation (conscious or otherwise) in assessing arguments, we miss details that may turn out to be crucial.

³⁹ Martin Hoffman, *Empathy and Moral Development* (2001) at 11.

⁴⁰ Francis Kane & Grace Clement & Mary Kane, “Live Kidney Donations and the Ethic of Care,” 29 *J Med Humanit* 173 (2008).

⁴¹ *Id.* at 176

⁴² Carmel Shalev, “An Ethic of Care and Responsibility: Reflections on Third-Party Reproduction,” 3 *Medicine Studies* 147, 154 (2012).

⁴³ Judit Sándor, Petra Bárd, Claudio Tamburrini, et al. “The Case Of Biobank With The Law: Between A Legal And Scientific Fiction,” *J Med Ethics* 4, published online September 24, 2011.

⁴⁴ For a fuller discussion of this example, see Donna M. Gitter, “Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in Their Biological Material,” 61 *Wash & Lee L. Rev.* 257, 264-67 (2004).

⁴⁵ <http://www.genedx.com/test-catalog/disorders/pseudoxanthoma-elasticum-pxe/> (accessed 11/11/2013).

⁴⁶ *Moore v. Regents of the University of California*, 51 Cal.3d 120, 128-134 (1990).

⁴⁷ *Id.* at 134-148.

⁴⁸ Bernard Williams, *Moral Luck* (1981).

⁴⁹ *Id.* at 18.

⁵⁰ Caroline Forell & Anna Sortun, “The Tort Of Betrayal Of Trust,” 42 *U. Mich. J.L. Reform* 557, 591 (2009).