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Editorial Note

The Journal of Applied Ethics and Philosophy is an interdisciplinary periodical covering diverse areas of applied ethics. It is the official journal of the Center for Applied Ethics and Philosophy (CAEP), Hokkaido University. The aim of the *Journal of Applied Ethics and Philosophy* is to contribute to a better understanding of ethical issues by promoting research into various areas of applied ethics and philosophy, and by providing researchers, scholars and students with a forum for dialogue and discussion on ethical issues raised in contemporary society.

The journal welcomes papers from scholars and disciplines traditionally and newly associated with the study of applied ethics and philosophy, as well as papers from those in related disciplines or fields of inquiry.

Shunzo Majima
Editor-in-Chief

Professional Ethics without Moral Theory

A Practical Guide for the Perplexed Non-Philosopher

Michael Davis

Illinois Institute of Technology

Abstract

My thesis is that *any course in professional ethics—even in a philosophy department—is, all else equal, better without moral theory than with it*. In defending this thesis, I shall return to a debate I had with Bernie Gert and Ed Harris a few years ago, itself the culmination of almost four decades of teaching professional ethics and more than two decades of teaching others to do the same. I am, I should make clear, not against moral theory (the attempt to understand morality as a reasonable undertaking). Indeed, not only do I enjoy teaching a course in moral theory every few years and publish on the subject now and then, I would agree that, *in principle*, moral theory can not only enlighten students but also be useful to them, helping them to identify moral issues they might otherwise overlook, seek information they might otherwise not think relevant, and formulate courses of action that might otherwise not occur to them. My thesis is entirely practical: *Given the time normally allotted to a course in professional ethics* (45 or so classroom hours), moral theory will never be useful enough. There is always a less-time-consuming way to do what moral theory can also do, leaving more room for other topics that a course in professional ethics should include. Moral theory is, therefore, always a waste of time in a professional-ethics course.

Key words: Ethics, Morality, Moral theory, Profession, Teaching

But at my back I always hear
Time's wingèd chariot hurrying near.

—Andrew Marvell, "To His Coy Mistress"

My thesis is that *any course in professional ethics—even in a philosophy department—is, all else equal, better without moral theory than with it*. In defending this thesis, I shall return to a debate I had with Bernie Gert and Ed Harris a few years ago, itself the culmination of almost four decades of teaching professional ethics and more than two decades of teaching others to do the same.¹

1 C.E. Harris, "Is Moral Theory Useful in Practical Ethics?" *Teaching Ethics* 10 (Fall 2009): 51-68; Michael Davis, "The Usefulness of Moral Theory in Practical Ethics: A Question

I am, I should make clear, not against moral theory (the attempt to understand morality as a reasonable undertaking). Indeed, not only do I enjoy teaching a course in moral theory every few years and publish on the subject now and then², I would agree that, *in*

of Comparative Cost", *Teaching Ethics* (Fall 2009): 69-78; C.E. Harris, "Response to Michael Davis: The Cost is Minimal and Worth it", *Teaching Ethics* 10 (Fall 2009): 79-86; Bernard Gert, "The Usefulness of a Comprehensive Systematic Moral Theory", *Teaching Ethics* 11 (Fall 2010): 25-38; C.E. Harris, "A Reply to Bernard Gert", *Teaching Ethics* 11 (Fall 2010): 39-50; Michael Davis, "The Usefulness of Moral Theory in Teaching Practical Ethics: A Reply to Gert and Harris", *Teaching Ethics* 11 (Fall 2010): 51-60.

2 See, for example, the following recent articles: "Imaginary Cases in Ethics: A Critique", *International Journal of*

principle, moral theory can not only enlighten students but also be useful to them, helping them to identify moral issues they might otherwise overlook, seek information they might otherwise not think relevant, and formulate courses of action that might otherwise not occur to them. My thesis is entirely practical: *Given the time normally allotted to a course in professional ethics* (45 or so classroom hours), moral theory will never be useful enough. There is always a less-time-consuming way to do what moral theory can also do, leaving more room for other topics that a course in professional ethics should include. Moral theory is, therefore, always a waste of time in a professional-ethics course. Unfortunately, before I can defend this thesis, I must clarify what I mean by “professional ethics”. Confusion about what professional ethics is seems to have much to do with what makes moral theory seem something a course in professional ethics should have.

Professional Ethics

The term “professional ethics” is systematically ambiguous. On the one hand, it names a subject of philosophical (and sociological) study; on the other hand, it names the social practices that constitute the subject of that study (that is, the ways in which auditors, judges, psychotherapists, or other professionals should, and generally do, conduct themselves, work with each other, and evaluate what any of their number do). One reason non-philosophers think they must teach moral theory when they teach professional ethics is that they think the term “ethics” in “professional ethics” must refer to the philosophical study. They fail to appreciate that teaching professional ethics is (primarily at least) teaching a social practice (the art at which the profession is proficient), not merely teaching about that practice (a “science” that would leave much more room for philosophy).

There are doubtless other reasons for misunderstanding, however. One is confusion between the terms “morality” and “ethics”. That confusion is not surprising. Two of the common names for moral theory in philosophy departments are “ethical theory” and “ethics”.³ Indeed, when I teach moral theory, the official name of the course is *Ethics*. So, it is important to begin any discussion of teaching professional ethics by distinguishing “ethics” (as used in the social-practice sense of “professional ethics”) from both morality and moral theory. To make doing that harder, some who teach professional ethics

think of their subject as just morality applied to the professions—“morality” consisting of those standards of conduct that apply to all moral agents—don’t kill, keep your promises, help the needy, and so on.⁴ When self-declared teachers of professional ethics describe what they teach as “integrity”, “virtue”, “character”, or simply “the difference between right and wrong”, they generally have the ethics-as-morality sense of “ethics” in mind.⁵ Since academics have a predisposition for theory anyway, they find it hard to resist the slide from ethics-as-morality to ethics-as-moral-theory.

I therefore want to stress that professional ethics is not merely ethics-as-morality. Like the content of promises, the content of professional ethics consists—in large part at least—of standards otherwise absent from morality. Professional ethics includes special, morally permissible standards of conduct applying to members of a profession simply because they are members of that profession—standards that may (and often do) differ not only from ordinary morality but from profession to profession. These are the “higher standards” that professions typically claim to follow. It is in this sense of “ethics” that architecture ethics applies to architects and no one else; nursing ethics, to nurses and no one else; and so on. So, for example, it is in this sense that architects have an *ethical* obligation to “advocate sustainable building and site design” while nurses do not.⁶ Among terms more or less equivalent to ethics in this special-standards sense are (depending on the discipline in question): “professionalism”, “professional

4 Text writers can be quite explicit about this. See, for example, Mike W. Martin and Roland Schinzinger, *Ethics in Engineering*, 4th Ed. (McGrawHill: Boston, 2005), pp. 7-8: “The word *ethics* has several meanings. In the sense used in the title of this book, ethics is synonymous with morality.”

5 For an extended critique of claiming to teach integrity, virtue, or the like, see my “What’s Wrong with Character Education?” *American Journal of Education* 110 (November 2003): 32-57.

6 Compare the following codes: The American Institute of Architects, Code of Ethics and Professional Conduct (2012), <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia074122.pdf> (accessed July 29, 2013), E.S. 6.3, with American Nurses Association, Code of Ethics for Nurses (2001), <http://www.nursingworld.org/MainMenuCategories/EthicsStandards/CodeofEthicsforNurses/Code-of-Ethics.pdf> (accessed July 29, 2013). Of course, biomedical ethics texts tend to ignore codes of professional ethics in favor of certain “principles” (typically, beneficence, non-maleficence, justice, and respect for persons). Advocating sustainable building might then be conduct that beneficence suggests or even urges—but the essential point would remain. Advocating sustainable building would not be obligatory for nurses while it is for architects—since beneficence is not generally obligatory and there is nothing about nursing (such as its code of ethics) to make it so for nurses.

Applied Philosophy 26 (Spring 2012): 1-17; and “Gert on Law and Duty”, *Teaching Ethics* 14 (Fall 2013): 71-81.

3 Occasionally, among certain philosophers (“continentals”), moral theory may also go by the name “deontology” or “axiology”.

responsibility”, and “responsible conduct”.

If “professional ethics” is understood in this way—that is, as morally permissible standards of conduct applying to members of a profession simply because they are members of that profession—, ethics is not something to be learned from parents, childhood playmates, one’s religion, or any similar source of ordinary moral learning. It is the special preserve of those who know how to practice the discipline in question or who have at least studied that practice in depth. Because this special-standards sense seems to be the one used by members of most professions when discussing their professional ethics, I shall hereafter use “ethics” exclusively in this sense (reserving “moral theory” and “morality” for the other two senses respectively).

There are at least three varieties of special standard that might be relevant to teaching professional ethics so understood: First are *organizational* standards, for example, those special standards adopted by a university, government, or business. Many professionals work in organizations that have such special standards (standards such as Toyota’s Code of Conduct).⁷ Second are standards of an *institution*—that is, a site, for example, a law court or research library, where individuals who belong to more than one profession or organization rely on one another while carrying out some task. Professionals often work in institutions (as well as in organizations). Physicians, scientists, and engineers may, for example, use the same computer network (even if they have different employers). Third are standards of the *profession* itself, for example, standards defining the proper way to practice actuarial science, dentistry, law, or physical therapy.⁸ Strictly speaking, only the last of these standards are standards of *professional* ethics; the other two are simply standards relevant to professional decisions.

Any of these special standards may appear in a document called “a code of ethics”, “standards of conduct”, “professional guidelines”, “statement of values”, or the like. So, for example, the “ACM Code of Ethics and Professional Conduct” applies only to ACM *members*.⁹ Since that code applies only to

ACM members, it is (in form at least) a statement of *organizational* ethics (even though its title includes the term “professional”). In contrast, the “Code of Ethics of the Japan Society of Civil Engineers” is a true professional code; it applies to “civil engineers” as such (whether or not members of the Society).¹⁰ Unlike these, the “Ten Commandments of Computer Ethics” is an institutional code, since it applies to anyone using a computer, whatever the organization or profession, indeed, whatever the age, education, or citizenship.¹¹

In addition to such formal standards, there may be “unwritten codes”—whether unformulated but generally understood (“the hacker’s code” before 1984¹²), formulated only in scattered documents (as much of professional courtesy is), or formulated only orally (as “Murphy’s laws” once were).¹³

In addition to these informal standards, written or unwritten, are *interpretations*. An interpretation applies a standard to a situation that the standard only arguably covers. Since few standards can clearly cover all situations in a reasonable way, interpretation is unavoidable—or at least very desirable. A skilled accountant, engineer, psychologist, or other professional is generally more skilled at interpreting the relevant special standards than is a novice or outsider. Interpretation is also *part* of what we mean by “ethics” when we talk about teaching professional ethics.

Ethics in this special-standards sense is distinct from law, private regulation, and custom. Law, private regulation, and custom apply to people whether they want it to apply or not. That is why law, private regulation, and custom tend to rely on external reasons for obedience—punishment, supervision, taxation, positive incentives (such as salary, commission, or profit), and so on. In contrast, ethics (in our special-

officially the “Association of Computer Machinery”, a name at once seldom used and no longer accurate.

10 <http://ethics.iit.edu/ecodes/node/3253> (accessed July 21, 2013).

11 <http://computerethicsinstitute.org/publications/tencommandments.html> (accessed July 21, 2013).

12 Steven Levy, *Hackers: Heroes of the Computer Revolution* (Anchor Press/Doubleday: Garden City, NY, 1984), who seems to be the first to put the code in writing.

13 I have used these farfetched examples because I have no clear example of an unwritten code of *professional* ethics (properly so called). Often what might seem to some members of a profession to be an “unwritten rule” may seem to others to be an “interpretation” of a written rule. The line between unwritten rule and interpretation is certainly fuzzy in practice. The best examples of “unwritten ‘professional codes’” are *not* ethical (and therefore not professional, strictly speaking), for example, “the code of silence” among police or the Cosa Nostra’s *omertà*.

7 Toyota Motor Corporation, Code of Conduct (2006), http://www.toyota-global.com/company/vision_philosophy/toyota_code_of_conduct.html (accessed August 2, 2013).

8 For those wondering what I mean by “profession”, the short answer is: *a number of individuals in the same occupation voluntarily organized to earn a living by openly serving a moral ideal in a morally-permissible way beyond what law, market, morality, and public opinion would otherwise require*. For most recent defense of this answer, see my “Is Engineering a Profession Everywhere?” *Philosophia* 37 (June 2009): 211-225.

9 <http://www.acm.org/about/code-of-ethics> (accessed July 21, 2013). “ACM” is the common name for what is still

standards sense) consists of those morally permissible standards of conduct everyone in the relevant group—the members of the relevant organization, institution, or profession at their rational best—wants everyone else in the group to follow even if their following the standards would mean having to do the same. Everyone in the group thus has a *moral* reason to follow the standards if the group's standards are generally followed (a reason internal to the practice itself). That reason is fairness, that is, not taking unfair advantage of a voluntary practice from which one benefits (in large part at least) because other participants generally accept its burdens. There is much less need for external enforcement.

Teaching Professional Ethics (In This Third Sense of Ethics)?

Given this understanding of the subject, what objectives should teaching professional ethics have? There are at least three.

First, there is increasing ethical *sensitivity*, that is, the ability to identify ethical problems in context, for example, the ability of engineers to see a certain variation in the temperature of an oven as raising issues of safety, reliability, or waste.

Second is increasing ethical *knowledge*. Some ethical knowledge is propositional (“knowing that”), for example, knowing that one’s conduct is governed by law, organizational regulation, and professional code, that double-checking certain calculations is an ordinary precaution, or that members of one’s profession are supposed to know such things. But much ethical knowledge is skill, for example, knowing how to interpret a code of ethics or how to file an ethics complaint safely with the appropriate authority.

The third reasonable objective of teaching ethics is improving ethical *judgment*. By “ethical judgment”, I mean the ability to design an acceptable course of action for the ethical problem identified (acceptable to competent members of the profession). Ethical judgment turns knowledge into an (appropriate) plan.¹⁴

Many teachers of professional ethics are tempted to add a fourth objective to this list: increasing ethical *commitment*, that is, increasing the relative frequency with which students turn ethical plans into acceptable

professional conduct. While I believe, or at least hope, that teaching professional ethics can increase ethical commitment, I also believe that it is a mistake to claim to teach such commitment. We should not claim to teach what we cannot show that we have taught; we do not want to give those skeptical about teaching professional ethics a bigger target than necessary. There are at least three reasons to doubt that teachers of professional ethics can show that they have taught ethical commitment.

First, ethical commitment is easily faked in an academic setting, that is, when using ordinary forms of academic assessment (problem sets, term papers, in-class exams, lab reports, and the like). A student need only say or do what judgment says she should say or do. She may do that whatever her actual reason for saying it or doing it (that is, without the appropriate commitment). In this respect, commitment differs from sensitivity, knowledge, and judgment. It is hard to fake sensitivity, knowledge, or judgment (except by such ordinary methods of cheating as copying the answer from a better student). How (apart from cheating) is one to *seem* to see a problem if one cannot see it, to *seem* to know what one does not know, or to *seem* to develop a reasonable plan without developing one?

Second, assessing ethical commitment in an academic setting is impractical. Right now, the best tool available for assessing commitment is a survey in which students report their perceptions of their own conduct or that of those around them.¹⁵ Such surveys seem to give a reasonably good indication of academic atmosphere but reveal little, if anything, about actual academic conduct, much less about professional conduct in years to come. Too many variables intervene.

Third, professional ethics is primarily about what students should do after graduation (that is, when practicing their profession). We would have failed if, as a result of our teaching, our students conducted themselves properly in the classroom but became scoundrels the day after graduation. Yet, we are in an even worse position to know how they are conducting themselves after graduation than while they are in the classroom. Of course, over several decades, employers may develop the sense that graduates of certain programs are more trustworthy than others. That, in fact, is an important way to assess what goes on in the classroom. Unfortunately,

14 What is sometimes called “moral imagination” is either an aspect of sensitivity or an aspect of judgment, depending on whether the term is understood as referring to the ability to appreciate the consequences of one’s choice (sensitivity of a sort) or the ability to invent good alternatives to the choices with which one has been presented (part of judgment). Given its ambiguity, it is a term to avoid. For more on judgment, see my “A Plea for Judgment”, *Science and Engineering Ethics* 18 (December 2012): 789-808.

15 Donald McCabe has done substantial research assessing academic environment in this way. See, for example, D. McCabe, L.K. Trevino, and K.D. Butterfield, “Honor Codes and Other Contextual Influences on Academic Integrity,” *Research in Higher Education* 43 (2002): 357-378. For similar research directly related to professional ethics, see B. C. Martinson, M. S. Anderson, and R. De Vries, “Scientists’ perceptions of organizational justice and self-reported misbehaviors”, *Journal of Empirical Research on Human Research Ethics* 1 (2006), 51-66.

few today seem willing to wait that long to assess instruction in professional ethics. So, in practice, that slow method is not available as a way to show that teachers of professional ethics have succeeded in raising ethical commitment.

Nevertheless, teachers of professional ethics need not apologize for that inability to achieve this fourth objective in the classroom—or even in the university as a whole. Teaching professional ethics is no worse off in this respect than teaching the technical side of biology, history, mathematics, pharmacology, or any other academic subject. We can give students the technical tools to do what they should (technical sensitivity, technical knowledge, and technical judgment) but cannot guarantee that they will use those tools, much less that they will use them as they should. For example, we cannot guarantee that an engineering student who has done well in first-year chemistry will, after graduation, ever use what she learned—even on problems where using that knowledge might be helpful.¹⁶ When it comes to likelihood of proper use, we should not hold professional ethics to a higher standard than other academic subjects.

Given that the objective of teaching professional ethics is to give students the appropriate sensitivity, knowledge, and judgment, a course in professional ethics should, it seems, include: 1) teaching students to recognize ethical problems that members of the profession typically encounter; 2) teaching students about the context in which they must address those problems (typical employer practices, the profession's organization, the profession's social functions, and so on), the special standards that members of the profession should consider when trying to develop reasonable solutions to those problems, ways to develop reasonable solutions (a decision procedure), and arguments that might be used to defend those solutions; and 3) giving students opportunities to practice judgment by explaining realistic ethics problems typical of their profession, resolving them, and defending their resolution. A course in professional ethics should, in effect, be an introduction to the practice of the profession in question.

Three Arguments for Omitting Moral Theory

Having clarified what it is to teach professional ethics, I can now defend the thesis that teaching moral theory in

a course in professional ethics is a waste of time. I have three (related) arguments. The first concerns the teachers of professional ethics; the second, the students; and the third, one alternative to moral theory.

The teacher. Who might use moral theory to teach professional ethics? There seem to be only three significant possibilities: 1) qualified moral theorists; 2) philosophers, religious ethicists, or the like who have taken some moral theory courses (whether graduate or undergraduate) but cannot claim to be qualified moral theorists (“knowledgeable non-experts”); and 3) ordinary professors of astronomy, climatology, education, social work, zoology, or the like who have picked up a little moral theory along the way (generally, from independent study, teaching the course before, or from reading the text). For purposes of argument, we may assume that teachers in categories 1 and 2 will know enough to teach a few of the major theories: utilitarianism, non-utilitarian consequentialism, deontology, virtue theory, self-realization, egoism, divine command, relativism, or the like. We cannot, however, assume the same for category 3—perhaps the majority of teachers of professional ethics. So, we may begin our critique of teaching moral theory by asking why we should suppose that those in category 3 (those with little or no training in moral theory) could do an acceptable job of teaching even a few moral theories.

The only answer seems to be that the teachers in question will use a textbook that includes enough instruction in moral theory to overcome any lack of knowledge on the teacher's part. Consider then a classic text in professional ethics, one that has gone through four editions and been translated into several languages (including Japanese): the Harris, Pritchard, and Rabins text, *Engineering Ethics*.¹⁷ The fourth edition has ten pages on moral theory—five on utilitarianism and five on what it calls “PR theory”, a kind of deontology, “PR” standing for “respect for persons.”¹⁸ The discussion of utilitarianism offers three versions of that theory: cost-benefit analysis (apparently to serve as a bridge from common engineering practice to moral theory proper), act-utilitarianism, and rule-utilitarianism. The book does much the same for PR theory, distinguishing three versions: the golden-rule approach, the self-defeating approach, and the rights approach. Harris, Pritchard, and Rabins have, in other words, reduced an enormous literature to ten pages.

16 Of course, an engineer who doesn't use chemistry when he should, may soon be out of a job; but the same should be true of an engineer whose conduct on the job is obviously inconsistent with the professional ethics learned in school.

17 Since writing this, a Fifth Edition has appeared. Nothing I say here depends on the (significant) differences between the two editions.

18 Charles E. Harris, Michael S. Pritchard, and Michael J. Rabins, *Engineering Ethics: Cases and Concept, 4th Edition* (Wadsworth: Belmont, CA, 2009), 58-69.

Given the space assigned, the exposition is impressive. But much has been sacrificed. For example, there is far too little about how to measure utility if not in money (as cost-benefit analysis typically does). All the text says is “greatest good”. A survey of proposed measures of the “greatest good” could easily be the work of a semester-long graduate philosophy seminar, indeed, even a survey of proposed ways to make interpersonal comparisons of utility could be. I am not condemning the text for failing to say more. I am simply pointing out how limited the exposition of moral theory is in fact—and must be if the text is to serve the objectives we identified without exceeding reasonable length for a semester course (say, about 300 pages).

Judging by space assigned (half a page to act-utilitarianism against one-and-a-half pages to rule-utilitarianism), Harris, Pritchard, and Rabins prefer rule-utilitarianism. Yet, in the form the text gives it, rule-utilitarianism is generally thought to be equivalent to act-utilitarianism. So, why bother with the distinction? The answer seems to be that the rule-utilitarianism presented is valuable as a heuristic (a tool for thinking about ethical problems) even if not valuable as an independent theory: “The rule utilitarian approach to problems brings to our attention an important distinction in moral thinking [the distinction between thinking about the solution of an individual problem and thinking about the cumulative effects of solutions like that]”.¹⁹

I could say more concerning how limited is the text’s treatment of utilitarianism—and the same for its treatment of deontology. But I will not because I have, I believe, already made my point. Whatever the typical teacher of professional ethics will learn from the short presentation of “moral theory” in a text like *Engineering Ethics*, it is not moral theory in the sense necessary to a defense of using moral theory to teach professional ethics. What a teacher will learn from such a text is something much less subtle, several rough decision rules or questions with which to approach a problem of professional ethics. A teacher who does not know much more about utilitarianism or deontology than *Engineering Ethics* tells her is in no position to teach the theory, only to teach those few rules or questions drawn from the theory.

Those teachers who, though not moral theorists, know more of moral theory than the self-taught, that is, those philosophers, religious ethicists, or the like who have taken some advanced moral theory courses, should be able to teach more moral theory than the self-taught. There are, however, at least two questions remaining about what even they can teach. One is how much moral theory the classroom allows them to teach. I will

deal with that question soon. The other question I shall address now: *what reason is there to believe that such knowledgeable non-experts will do an acceptable job of teaching the moral theory they undertake to teach?*

Most moral theorists have, I think, noticed how often those who know something of moral theory but are not expert get the moral theory wrong or, at least, fail to appreciate how problematic are the common interpretations of it. Any defense of moral theory’s usefulness in a professional ethics classroom seems to assume some quality control on the theory taught. But, where moral theory is taught by those not expert, there is generally *no* quality control (as there would be if, say, the course were team-taught with an ethics expert present throughout to correct the knowledgeable non-expert). Someone who begins with a respectable textbook may not stop with what is in the text, indeed, may even misunderstand the text. Given how thin explication is even in a classic text like *Engineering Ethics*, there must often be a temptation to say more when a teacher thinks he knows more (whether he in fact knows more or not). Indeed, there is also the likelihood both of overlooking qualifications the text includes without enough emphasis and making a mistake in choice of text, choosing one that itself does a poor job of presenting moral theory.²⁰

The students. That is enough about the teacher. Now, what about the students? Let us take the best case: suppose that the students have a teacher like me, someone who actually understands moral theory (or, at least, has good reason to think so). How much moral theory can such a teacher teach typical students enrolled in *Engineering Ethics*, *Medical Ethics*, *Responsible Conduct of Research*, or another such course? That question will have a somewhat different answer depending on the amount of time the teacher is willing to assign to teaching moral theory. The Harris, Pritchard, and Rabins text suggests that the teacher assign about two classroom hours in a semester course to teach the basics of utilitarianism and PR theory [(10 pages/229 pages) x 45 hours = 1.96 hours].²¹

20 For some idea of how poor can be the presentation of moral theory in an otherwise respectable text in professional ethics, see Charles B. Fleddermann, *Engineering Ethics*, 2d ed. (Upper Saddle River, NJ: Pearson Education, 2004), esp. pp. 31-40 (the work of an electrical engineer who had studied under Harris).

21 This seems to be a relatively modest allocation of time to moral theory. Compare the three leading rivals of Harris, Pritchard, and Rabins (omitting index, bibliography, codes, and the like): Martin and Schinzinger, 30 pages out of 295—suggesting 4.5 classroom hours; Fleddermann, 14 pages out of 121, suggesting five classroom hours; and Ibo van de Poel and Lambèr Royackers, *Ethics, Technology, and Engineering: An Introduction* (Chicester, UK: Wiley-

19 Harris, Pritchard, and Rabins, 63.

When I teach an advanced undergraduate course in moral theory, I devote at least twelve classroom hours to utilitarianism and about as long to Kantian ethics (a close relative of PR theory). That is about twelve times as much as *Engineering Ethics* suggests be allocated to the same project. Perhaps I am a bad teacher. But after so much more time trying to teach the two moral theories (to students who have volunteered to learn moral theory), my students still have only a rough grasp of the two theories. Though I would trust my life to most of those students, I would not want my life to depend on their understanding of either theory even at the end of the semester (much less on their understanding of any of the other theories covered less extensively in the course). My experience with students who take no course in moral theory but instead take Architecture Ethics, Business Ethics, Engineering Ethics, or Medical Ethics is even less happy. Most of them go blank as soon as I start to explain a moral theory. Are other experts in moral theory significantly more successful at teaching moral theory than I am?

One conclusion that might be drawn from this discussion of time constraints is that students need more moral theory, not less, say, a whole course or two before they take Architecture Ethics, Engineering Ethics, or the like. I reject that conclusion. There may be reasons to require students to take one or two courses in moral theory (enlightenment, contact with great minds, and so on). That the moral theory learned will help them with professional ethics is, however, not one of those reasons. There is no evidence that students who take even several courses in moral theory are, all else equal, better prepared for a course in professional ethics than students who have taken none (except, of course, insofar as the professional ethics course includes moral theory).²² We should, I think, have substantial evidence that moral theory does benefit students enough in the way required before requiring them to take such a course. An academic requirement should rest on more than a well-meant belief

Blackwell, 2011), 44 pages out of 300, suggesting 6.5 classroom hours. All but Martin and Schinzinger also have a separate chapter of about equal length on ethical decision-making.

22 So far, evidence seems to be against moral theory having any significant effect on moral judgment (much less ethical judgment). See, for example, Andre Schlaefli, James R. Rest and Stephen J. Thoma, "Does Moral Education Improve Moral Judgment? A Meta-Analysis of Intervention Studies Using the Defining Issues Test", *Review of Educational Research* 55 (Autumn 1985), pp. 319-352 (which includes a comparison of humanities courses that deal with "ethical dilemmas" and humanities courses that do not). I know of no studies showing that moral theory has any positive effect on ethical decision-making beyond that almost any decision procedure has.

that the course will do some good.

An alternative. The third argument against teaching moral theory in a professional ethics course is that there is at least one alternative that is clearly better. We have already noticed that what a typical text in professional ethics, *Engineering Ethics*, in fact teaches is not so much several moral theories as several rough but useful ways to think about an ethical problem. The time allotted to moral theory allows nothing more. We might then try to boil down other moral theories in the same way that *Engineering Ethics* boiled down utilitarianism and PR theory. Indeed, we might even try to boil down those two theories further (turning them into several questions, directives, or tests). What we would then have is a list of questions, directives, or tests to help students think through ethical problems. Here is such a list—one I have used (as part of a larger decision procedure) in place of moral theory when teaching Architecture Ethics, Engineering Ethics, and the like:

- **Harm test**—does this option do less harm than any alternative?
- **Rights test**—would this option violate anyone's right, especially a human right?
- **Publicity test**—would I want my choice of this option *published* in the newspaper?
- **Defensibility test**—could I *defend* my choice of this option before a Congressional committee, a committee of my peers, or my parents?
- **Virtue test**—what would I become if I choose this option *often*?
- **Professional test**—what might my profession's *ethics committee* say about this option?
- **Colleague test**—what *do* my colleagues say when I describe my problem and suggest this option as my solution?
- **Organization test**—what *does* the organization's ethics officer or legal counsel say about this?

This is neither the only list of questions possible nor necessarily the best.²³ All I claim for it is that it will serve in place of moral theory—doing pretty much *everything* moral theory is supposed to do in a professional-ethics course but more reliably and with less time devoted to teaching it. Students will generally be proficient in the use of all these tests after less than an hour of class

23 I have made a number of changes in the list over the years. See, for example, the early list in: "Developing and Using Cases to Teach Practical Ethics", *Teaching Philosophy* 20 (December 1997): 353-385.

For several other lists, see commfaculty.fullerton.edu/lester/courses/517/decision_making.doc (accessed July 21, 2013).

time. (Indeed, that hour will include introducing them to the whole decision procedure, seven steps of which the “tests” are only one.)

That these questions correspond (roughly) to several popular moral theories should, I think, be obvious to theorists. The harm test asks about the consequences of a particular act. It is, then, act-utilitarian (though silent about benefits—a good thing since that silence avoids the classic problem of trading off negative and positive consequences). The publicity test asks a question that a typical deontological theory would suggest, since what we do not want others to know is generally (but not always) something that fails to respect their agency. Something similar would be true of the defensibility and rights tests. The virtue test asks a question that both rule-utilitarianism and virtue theory suggest (do the bad consequences that flow from the practice cancel the good consequences of the act?). The last three tests (professional, colleague, and organizational) ask questions we might associate with relativist theories. Those three tests explicitly call attention to the place that special standards have in professional ethics (something most moral theories tend to obscure). For those who think care represents a distinct category of moral theory, a “care test” might be added (say, “Does this option damage any relationship I should care about?”). The same for feminist theory, natural law theory, intuitionism, particularism, or any other moral theory the teacher happens to like.

What makes these tests easier to teach than moral theory is that they are drawn directly from common sense. Students can apply them with reasonable reliability almost as soon as they have read them. They can so apply them because they have in fact already been applying them more or less (though generally using only one test to make a decision and unwisely forgetting the others). The problem with my method, if it is a problem, is that there is no simple routine for dealing with an option that passes some tests but not others—except to develop a new option that does better. I deny that that is a problem for at least three reasons.

First, while all moral theories aspire to completeness, none in fact achieves it. That is why most texts in professional ethics discuss two or more moral theories. The other theory or theories are to light up relevant considerations that the first obscures. None of the theories is to be treated as decisive. Thus the problem of *choosing* among “tests” is not a feature distinguishing my approach from most approaches that teach two or more moral theories as part of teaching professional ethics. Indeed, it is not a problem at all but part of a strategy by which to compensate for the (actual) incompleteness of all moral theories. The students in a professional-ethics course are supposed to use the theories as tools for learning more about the problem before them; they

are not to let any theory make the decision for them. The same is true for my “tests”.

A second reason that disagreement among the tests is not a problem is that, insofar as my approach differs from the moral-theory approach, mine is more likely to catch relevant considerations. After all, the moral-theory approach typically relies on two or three major theories (with variations mentioned). My approach, however implicitly, relies on at least four tests that differ in fundamental ways. Insofar as moral theories are in fact imperfect guides to conduct, my approach should be better. All else equal, four fundamentally different screens should catch more of what we want to catch than two or three.

Third, worrying about test results disagreeing may itself be the product of thinking of the tests as (nascent) theories. When theories disagree, we must choose between them (or suspend judgment). They cannot all be right. Insofar as all are moral theories, they are all competing for the same title, *The Correct Moral Theory*. Each includes the implicit claim that all other moral theories, or at least all others interestingly different, are inadequate (if not simply wrong). Thinking in terms of moral *tests* rather than moral *theories* does not carry that implicit claim. Each test can be relevant without being decisive. We are used to having more than one imperfect way to check for something (say, where to drill for oil or the best mutual fund to invest in). If all the tests that we have tried point in the same direction, we are relatively confident. If some point in one direction and some in another and we have time, we may do more tests or look for an option passing all the tests. If we lack time, we use the test results we already have, aware that we might do better if we had the time.

If (as rarely happens) a student in a professional-ethics course asks why a certain test should matter, we need not sketch the moral theory that it stands in for (though we could—perhaps after class to avoid putting other students to sleep). We may instead advise the student to take Moral Theory next semester and, in the meantime, not to use the test if she does not see the point. We might even ask her to suggest a replacement. No test is sacred. What is important is that they differ in fundamental ways and that there be enough of them.

Conclusion

When I teach a course in moral theory, I stress that the theories are *designed* to be extensionally equivalent (that is, to yield the same decisions as the others at least in cases generally considered clear)—even though they approach decisions in fundamentally different ways. Any theory not extensionally equivalent to the others will, in that respect at least, be open to counter-example, and

every counter-example makes a theory less appealing. The great moral theorists are great in part at least because they found ways for their moral theory to absorb (or otherwise disarm) many of the supposed counter-examples (and related objections). Moral theory is a sort of arms race between theorists who develop new counter-examples (or related objections) and theorists who find ways to absorb them into the theory. The theories as such, the few simple principles that constitute their opening statement, are not what interest moral theorists. The simple principles generally come from common sense, theorists contributing little more than clarity and precision. What makes moral theory interesting to theorists is the arms race. Can we find a counter-example that will shake up those who defend this or that theory? Can we absorb this or that supposed counter-example that now seems to threaten our theory? For anyone else but a moral theorist, the arms race is *unlikely* to be interesting (which probably explains the blank look on so many students in a professional-ethics course when I drift into a discussion of moral theory).

What often does interest non-theorists is a moral theory when understood as a decision procedure rather than as an attempt to understand morality. What interests the non-theorist about the theory so understood is typically something striking about the decisions it seems to yield, for example, a clear decision where the usual ways of thinking about a problem do not—the very feature that, for a theorist, is a sign of trouble (that is, a

feature likely to open the theory to embarrassing counter-examples). For that reason alone, I think a little moral theory, say, a classroom hour or two, indeed, even 45 classroom hours, is dangerous—dangerous because so little exposure is more likely to mislead students than to lead them to a good decision. I always worry when a student begins a response to a practical question with some such words as: “I am a utilitarian and *therefore* I would....” What I want from students instead—in a class in professional ethics, and in later life—is something more like, “All things considered, including the consequences, our purposes, what my colleagues would do, and so on, I would....” My experience is that the test approach defended here is more likely to yield that all-things-considered judgment than the moral-theory approach, however boiled down the theory. For students of professional ethics, the less said about moral theory, the better.

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Challenges for Professional Loyalties

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Abstract

The paper develops a conception of “professional loyalties” and then reviews several challenges that professional loyalties encounter. The conception of professional loyalty is developed against George Fletcher’s attempt to marginalize such loyalties. Instead of being viewed primarily as loyalty to clients, it is characterized as loyalty to the ends of the profession. That conception gives rise to several challenges, which are then discussed in turn: (1) whether professions have enough unity to enable a coherent account of professional loyalty to be given; (2) whether the loyalty that professions warrant is only contingent or should be seen as integral to their nature; (3) whether professional loyalties have characteristics that undermine the moral accountability of their subjects; and (4) how normative tensions arising out of institutionally embedded professional loyalties may be resolved.

Key words: Code of silence, Identity, Institutionalization, Loyalty, Profession

In 1993, George Fletcher sought to revive philosophical interest in a virtue that had largely fallen into philosophical desuetude—loyalty. Although of some significance for political theorists concerned with nationalism and patriotism, there had been few serious philosophical discussions of loyalty since Josiah Royce’s 1908 opus, *The Philosophy of Loyalty*. Fletcher had his own diagnosis of this neglect—liberal individualism, with its focus on the primacy of contract as a basis for human interaction rather than, as he saw it, the human self’s historical rootedness in relationships—“familial, institutional, and national”—a somewhat more communitarian notion.¹ Loyalty, Fletcher argued, involves a commitment to the constitutive sources of our historical being, to those relationships and communities

that define us as the particular individuals we are—not just generic persons but as members of particular familial, ethnic, religious, and national groups.

When it came to “professional loyalties,” however—the loyalties that lawyers owe their clients, that physicians owe their patients, and that corporate managers owe their firms—Fletcher was dismissive. Such professional loyalties, he states, “derive solely from contract, from voluntary commitments, not from an historical self.”

This, then, is one of the challenges for professional loyalties—whether they are to be given the weight of other loyalties or only marginal status. You may also have noted that in including the loyalties of corporate managers to their firms Fletcher runs together professional and organizational loyalties. He sees both as essentially contractual and therefore as degenerate forms of loyalty. In addition, though, his conflation may reflect the fact that many professionals work within organizations, and that there are often tensions between the two. This represents a further challenge for professional loyalties and one to which I will later turn.

¹ Fletcher, *Loyalty: The Morality of Relationships*, 22. I believe that Fletcher’s understanding of liberalism is much too narrow. Although there have been somewhat atomistic versions, liberalism has long had a communitarian wing. See Gerald F. Gaus, *The Modern Liberal Theory of Man* (New York: St Martin’s Press, 1983).

The Status of Professional Loyalties

First, however, I want to address the question of the status of professional loyalties. Are they, as Fletcher suggests, merely contractual, or is there something more that we can say about them? I want to indicate two ways of thinking about professional loyalties.

For simplicity's sake I will focus mainly on the professional loyalties of lawyers and, to a lesser extent, medical personnel, though I believe that much of what I say can be translated into other professional contexts—those of engineers, architects, professors, and so on, depending on how widely one wishes to cast the net of professional activity.²

There are, I indicated, two ways of conceiving professional loyalties, and it is because of this that professional loyalties tend to be marginalized. As Fletcher expresses it, “professional loyalty is expressed in the intensity of care and attention [shown] to the client or patient.”³ In this he is followed by many others who speak of the lawyer's professional loyalty. To take just one other legal example, Geoffrey Hazard writes that “[i]n the relationship with a client, the lawyer is required above all to demonstrate loyalty,”⁴ a loyalty that is shown in zealously advocating the client's position even in the face of personal doubts about the client's innocence. We find a similar tendency in the medical sphere. Paul Ramsey, who makes use of the language of covenant to characterize the relationship between physician and patient, speaks of this covenant as involving certain “canons of loyalty,” chief of which is to secure a “reasonably free and adequately informed consent” to any medical procedure.⁵ In both cases, the loyalty in question, whatever instrumental value it is intended to have, is a gesture to the dignity of the client or patient.

If we conceive of professional loyalties in this way, it is not difficult to see why Fletcher is able to marginalize them. For these objects of loyalty lack the self-defining importance that he ascribes to other loyalties. The lawyer's self is not rooted in loyalty to the client in the same way as it is rooted in familial and national ties.

But there is a different—often unspoken—way to characterize professional loyalties. We may and, I

believe, ought to characterize them as holding between the members of a particular profession, as part of their group identity. This understanding of loyalty is one in which the members of an occupational group are joined or held together by certain aspirations, standards, and values, a communal bond of shared concern and support. This form of professional loyalty is loyalty to a certain collective defined by its commitments—to certain social goals, standards of competency, ethical constraints, and dedication to clients. Often these professional loyalties will be institutionalized through some professional association such as the American Bar Association or the American Medical Association—though that may become problematic when and as professional associations become politicized.

In this view, informing professional loyalties is a sense of interdependent community, one that promotes a solidarity that is necessary and sometimes sufficient to shield its members against external threat and misunderstanding. This, I believe, is the view that we should take of professional loyalties, seeing what are otherwise designated as such loyalties (to clients and patients) as derivative of more general professional commitments.

Professions are privileged occupations. They serve broad and important social ends—such as health, public safety, education, the advancement of knowledge, justice, and general well-being. Serving those ends in an appropriate manner requires superior knowledge and skill, and members of the professions ordinarily undertake significant educational preparation. Very often there is considerable public investment in providing the infrastructure for professional education, certification, and development.

In return, at least on my understanding of professional roles, professionals are bound by a set of ethical standards or expectations designed to moderate their relations to the public they serve as well as their relations to each other.⁶ These standards are structured by the ends, purposes, or ideals that drive the profession and the technical and delivery standards that need to be observed if the public trust vested in the profession is to be sustained. Such professional ethics are not simply ethics-in-general. As Lon Fuller once put it, a code of professional ethics “must contain a sense of mission, some feeling for the peculiar role of the profession it seeks to regulate. A code that takes the whole of right and wrong for its province breaks down inevitably into a mush of platitudes”⁷ Even though the ethics of

2 There is considerable social desire for professional status, as “occupations” vie for upgrading to “professions.” See Harold L. Wilensky, “The Professionalization of Everyone?” *American Journal of Sociology* 70, no. 2 (1964): 137-158.

3 Fletcher, *Loyalty*, 23.

4 Geoffrey C. Hazard, Jr., “Triangular Lawyer Relationships: An Exploratory Analysis,” *Georgetown Journal of Legal Ethics* 1 (1987): 21.

5 Paul Ramsey, *The Patient as Person: Explorations in Medical Ethics* (New Haven: Yale University Press, 1970), 2-5.

6 I seek to defend this account of the professions in John Kleinig, *The Ethics of Policing* (Cambridge: Cambridge University Press, 1996), chap. 2.

7 Lon L. Fuller, “The Philosophy of Codes of Ethics,” in *Moral Responsibility and the Professions*, ed. Bernard

a profession must find its ultimate justification in the broader arena of common morality, its own provisions will be governed by the narrower concerns of a particular role and service.⁸ Often they will focus specifically on areas of professional conduct that have proven controversial or problematic so far as the delivery of their services is concerned.

Professional roles frequently become constitutive elements in a person's identity, and therefore the loyalties associated with them can qualify as elements within what Fletcher refers to as the historical self. Membership and shared responsibility within a community of fellow professionals and socialization into a set of values and practices—ways of looking at and doing things—become significant for one's identity. And within these processes of membership and socialization the loyalties that one generally acquires are far more significant than, even if sources of, those that Fletcher seeks to marginalize.⁹

An Objection

In linking professional loyalties to the shared values, aspirations, and expectations of the profession in question, I have, however, opened myself to an objection. It is that whereas some professions, such as engineering, may have reasonably clear and broadly shared standards, others, such as law, do not. Michael McChrystal, for example, argues that whereas there may have been a time when the community of legal professionals had a shared sense of the profession's norms and aspirations, that time has now gone. Corporate lawyers and those who represent individual clients have very different views of what they are about.¹⁰ Added to that, the profession has diversified, not only in its inclusiveness but also in

the development of niche lawyering. There is no shared conception and often a strident polarization, especially over the issue of zealous advocacy.¹¹

Let me expand on this briefly, focusing, however, on the issue of zealous advocacy as it manifests itself within the adversary system in criminal law.¹² A different exposition might be necessary were we to review an inquisitorial system such as is found in European law.

At one extreme are those who see the adversary system as a vehicle for nonviolent combat—a process that has its own “laws of war” but which depends in the end on who is the strongest in court. It satisfies the parties because it meets their need to “have their day in court.” The system is seen in pragmatic terms as a way of bringing bloodless closure to social disputes of one kind or other. *In the middle* are those who take justice as their central legal norm, and see the lawyer's role in larger social terms. On this view there is a premium on truthfulness and rules that maximize its likelihood and, even if they are legally permitted, lawyers are morally bound not to use tactics that would obscure the facts and skew the result away from a just one. *At the other extreme* are those who support a “client centered” (or “pure advocacy”) approach who, taking—at least in the US—the Bill of Rights as their normative touchstone, focus almost exclusively on clients' rights or autonomy. Part of the background to this approach, as in the case of the Bill of Rights, is a belief that because the state (via the prosecution) has power and resources that are unavailable to an individual accused of crime, the individual needs protection against their overwhelming deployment. In large measure that protection is provided by the lawyer. In order to provide that needed counterweight, the lawyer owes the client “complete loyalty and service in good faith to the best of his ability.”¹³ Strict confidentiality is assured. Not only may the lawyer's “zealous” or “vigorous” advocacy allow the use of whatever tactics the law permits (such as trying to discredit weak but not venal witnesses), but to a degree it also enables the lawyer to be less than fully candid.

Given this division in the understanding of professional norms, how can an admonition to invoke shared norms of a community of professionals help to resolve questions about the limits of lawyer-client loyalty? The challenge is a serious one, but not necessarily fatal. One possibility is to argue that

Baumrin & Benjamin Freedman (New York: Haven Press, 1984), 83.

8 This is developed at greater length in Kleinig, *The Ethics of Policing*, chap. 2.

9 Fletcher's distinction between the loyalties that derive from contract, from voluntary commitments, and those that derive from an historical self, tends to break down here. Although we voluntarily commit ourselves to some profession, there are generally various rites of passage associated with the achievement of professional status. Had Fletcher focused more on friendships and loyalty in marital relations, or even on its historical association with the feudal oaths exchanged between the vassal and his lord, than on familial and national loyalties, the contrast would not have seemed so great.

10 “Professional Loyalties: A Response to John Kleinig's Account.” *American Philosophical Association Newsletters*, Newsletter on Philosophy and Law, 98, no. 1 (1998): 83-90. See also John H. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York: Russell Sage Foundation, 1982).

11 Not that this is a new controversy: disputes over the limits of zealous advocacy are of long standing.

12 Some have argued that in civil cases the adversarial system has a different rationale. See David Luban, “The Adversarial System Excuse,” and Murray L. Schwartz, “The Zeal of the Civil Advocate,” in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, ed. David Luban (Totowa, NJ: Rowman & Allanheld, 1984), chaps. 4, 6.

13 *Johns v. Smyth*, 176 F. Supp. 949, 952 (1959).

unanimity about ends is not necessary; all that is required is a dominant view about the profession's shared values. The gladiatorial approach first enunciated has a more limited following than the other two. But there is significant support for both the "justice" and "client-centered" approaches. The latter, in particular, has forceful representation in the work of Monroe Freedman,¹⁴ and though his theoretical position is sometimes viewed as too extreme, it has considerable support in legal practice. David Luban, on the other hand, robustly defends the justice approach.¹⁵ Assume, then, a profession that is divided on how far a lawyer may go in defense of his client.

Viewed more closely, however, the dispute is not about whether a lawyer should vigorously advocate for his client, but over the limits of that advocacy. Neither is it a dispute over whether justice should be served, but rather a dispute over how justice is best served—whether the lawyer, in advocating for his client should go in Freedman's direction or in Luban's. In many cases both accounts will work in tandem. It is, for the most part, only in some hard cases that the two will diverge.

For this reason professional groups such as the American Bar Association, with its motto, "Defending Liberty, Pursuing Justice" can nevertheless produce a *Model Rules of Professional Conduct* that is fairly closely followed by most state bar associations.¹⁶ The current *Rules*, first published in 1983, undergo regular review and revision, as one might hope and expect from a professional body not blessed with either omniscience or moral perfection. For the most part, the point of division comes in the interpretation of the Rules, and in particular the rule concerning vigorous advocacy. Although this rule has always been constrained by the requirement that such advocacy takes place within the bounds of the law, there is dispute about the way in which this should be understood. Some would see a firm distinction between what is legally permissible by way of advocacy and what is morally permissible; others take the view that just as the law itself answers to the somewhat anarchic morality of the state of nature, what the law allows is what a public morality allows. Although that may lead to revisions within the code—because the law itself is always open to critical moral review—at the level of a morality that is not beholden to the vagaries of individual judgment, what the law allows is what the

lawyer is morally permitted to do. The differences are as much interpretative as doctrinal.

As I indicated earlier, I believe the challenge posed by McChrystal is serious without being fatal. There is enough cohesion in the legal professional community for considerable agreement about what the profession stands for, even though there are radical differences about what zealous or vigorous advocacy may permit. In a significant—though not crippling—range of cases, that division is of critical importance. That is something the legal community still has to work through. It is something that other professional communities also have to work through. For the most part, however, such differences do not detract from a solid core of agreement about what professional loyalty requires.

Deeper Issues

There is, I have suggested, an argument for the view that those who offer professional services should not do so only for instrumental reasons—as, say, a way to make a living or acquire a certain social status—but also display a commitment to the *tele* or ends of the professions and thus come to see the services they offer as elements of their identity: their professional identity thus constitutes an ingredient in their personal identity. The argument appeals to both the engagement or commitment of the service provider and the well-being of those the profession serves.¹⁷

Nevertheless, there are moral hazards here, partly a function of the identity-conferring character of professional loyalties and partly a function of the fact that professional communities are not determined simply by the *tele* of the services they provide but are also social institutions with various links to and relations with other social institutions and expectations. Professional associations are often vigorously political, seeking to secure for themselves certain social benefits—such as financial benefits, benefits of access and exclusive provision, and benefits of self-regulation. They may constitute significant political lobby groups.

In the next section I will return to the former hazard. The latter hazard, however, raises a question about the extent to which and how professional loyalties should be developed—especially insofar as these loyalties become institutionally embedded. I want to suggest that *expectations* for professional loyalties should be *no stronger than the values and technical expertise that give shape to the profession*. Although we may believe that the traditional service professions have little to fear on that account, this should not be assumed. Furthermore, the movement toward professionalization

14 See Monroe Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs Merrill, 1975); Monroe Freedman and Abbe Smith, *Understanding Lawyers' Ethics*, 3rd ed. (New York: Matthew Bender, 2004).

15 Luban, *Lawyers and Justice*.

16 Center for Professional Responsibility, ABA, *Model Rules of Professional Conduct* (Chicago: American Bar Association, 2007).

17 See Albert O. Hirschman, *Exit, Voice, and Loyalty*.

that has occurred and is occurring in many occupations should give us pause. We should not assume that what has achieved or is gaining in professional prestige is ipso facto worthy of its pretensions. For example, some would argue that the profession of divinity¹⁸ has passed its “use by” date, and others that we should be less enamored than we have historically been by the “profession of arms” (albeit usually associated with the officer class). Connected with this is the fact that even well-entrenched professions change their character over time. Medicine, for example, is not nearly as authoritarian in its self-perception as it was in the nineteenth century, and even now is evolving in its self-perception—as, for example, it re-assesses some of its attitudes toward alternative therapies. Thus it may be possible to be professionally loyal while constituting an opposition with respect to certain features of the profession as it currently perceives itself to be.

A graphic illustration of the need to look deeper—more powerful because of its apparent remoteness—is provided by Arthur Applbaum’s discussion of Charles-Henri Sanson, the executioner of Paris from 1778-1795.¹⁹ Significantly, Sanson’s tenure covered not only the French Revolution but also the period known as The Terror. A noteworthy feature of his career was the fact that, despite the turnabouts of that turbulent period—turnabouts that had Sanson executing those for whom he had previously carried out executions—Sanson himself survived the upheavals virtually unscathed. A major factor in this appears to have been his complete and utter professionalism—his belief that the task of an executioner was a publicly responsible one that needed to be approached with dedication and a commitment to serving the cause of public order as efficiently as possible.²⁰ The record shows that Sanson took as much

professional care and pride in his work as executioner as any surgeon. His was a work that required both dedication and expertise.

Sanson viewed what he did in the larger context of social good. He saw himself as a servant of law and order, a dike against the pressures of the mob and other forces of social disruption. In every aspect of his work, Sanson was concerned to ensure that the due processes of the prevailing law were carried out in a manner compatible with the maintenance of political security and stability and the avowed purposes of public execution.

We might, nevertheless, reasonably ask whether the larger purposes Sanson served were worth serving or, if so, were well served through the services rendered by his profession. Even if his role was sustained by an appeal to law and order, it does not follow that that appeal was appropriately and best served by activities of his kind. We need to ask whether the larger purposes of law and order justified execution and, if so, whether it was justified in the particular cases in which it was prescribed, or at least under the administration that would be making such determinations. Although he could and should have, Sanson did not address these questions. Even for a professional, concerned not to corrupt the implementation of social policy with idiosyncratic determinations, there must be a way of asking such comprehensive questions about the rationale for and status of one’s profession and, even if not answering them, at least showing that they give one pause.

As it happens, Applbaum’s interest in Sanson is not purely historical but intended to call into question the pure advocacy view of lawyering, and maybe even more than that—the view that the deceptions of adversarial lawyering are morally justified by the rules of the legal game.²¹ The lies of lawyers don’t become something other than that by virtue of the fact that they are constitutive of the way in which the legal game is played. But the questions he raises may be asked more radically to call into question the rationale for whatever presents itself as a profession, and then seeks the loyalty of its practitioners. No professional service that offers itself as contributory to the public good, or seeks to provide that service in certain ways, is immune to moral scrutiny. The established professions represent evolving communities that must engage in self-reflexive

18 Which in the mediaeval and early modern society, constituted, with medicine and law, “the learned professions”—a parochialism that was not noticed while Christendom survived

19 Arthur Isak Applbaum, “Professional Detachment: The Executioner of Paris,” *Harvard Law Review* 109, no. 2 (December, 1995): 458-86. Applbaum gives a detailed description of the serious—indeed, educated—attention that Sanson gave to his role.

20 I note here an important distinction between professionalism and professionalization. The latter refers to the process of securing a certain social status for an occupation (that is, its coming to have the attributes of a “true profession”), whereas the former refers to the manner in which an occupational task is approached (in a way appropriate to a profession). We expect that those who have professional status will act professionally, though some who display professionalism will not have professional status. Professionalism is shown in one’s commitment to the *tele* of an occupation, the competence one shows in carrying out its tasks, and in the

desire to better oneself in their performance. A janitor no less than a doctor can display professionalism, even though few would consider the former as belonging to a profession. So also may a hit-man display great professionalism in how he goes about his task. Sanson believed not only in acting professionally but saw what he was doing as a requiring the same sense of public service, dedication, and knowledge as a profession.

21 See also Arthur I. Applbaum, “Are Lawyers Liars? The Argument of Redescription,” *Legal Theory* 4 (1998): 63-91.

accountability and, even if they pass muster in a general sense, they cannot close themselves off to scrutiny of their internal norms. That is one reason why professional self-regulation has proven so problematic. Occupations that have not acquired professional status, but have room for and show a commitment to professionalism must likewise open themselves to justificatory questioning. The loyalty here may be to high expectations that have no moral credibility. A bomb maker may be known for his professionalism and loyalty both to those for whom he works and to such standards as may operate within the bomb-making community. But such professionalism, like that of the Nazi extermination program, may constitute the fruit of a poisonous tree.

My point is not to cast aspersions on the professions and professional loyalties or even on professionalism. Insofar as the traditional professions display some commitment to social well-being, and professionalism involves a commitment to the standards upheld by an occupational community, we may hope that they can rise to the moral challenges that are put to them. But like friendships and familial and patriotic loyalties, they can also go badly wrong, and the cloak of professional status or professionalism should not be seen as a moral shield.

Codes of Silence

The second moral hazard arises from the identity-conferring character of professional loyalties. Whenever people develop loyalties—be they to friends, families, or ethnic or occupational groups, they are inclined to develop considerable protectiveness toward the associational other. Indeed, the intensity of such loyalties is often proportional to the sense of danger that is felt by members of the group. Police, for example, are notorious for their “blue wall of silence”—a commitment never to say or do anything that would hurt a fellow officer.²² Police who breach the blue wall are often ostracized or harmed in other ways. The intensity of police loyalties is associated with the sense of dangerousness that is cultivated as part of their work environment, along with the view that they must rely on each other if their well-being is to be secured.

Codes of silence also operate in professional contexts. When physicians and lawyers breach the ethical constraints informing their professions, especially insofar as those constraints are directed toward the publics they serve, it is rare to find them willing to testify against each

other. Maybe a rogue lawyer or physician is marginalized in the profession, but it usually takes quite a bit of work to get other lawyers or doctors to report or testify against them. Physicians are a bit more likely to breach a code of silence than lawyers—the profession of medicine is generally held in high regard and doctors are often jealous of maintaining their good communal standing. A doctor who testifies against another doctor, particularly if the latter has breached professional standards, is unlikely to be ostracized, because he thereby maintains the social standing that physicians generally possess. Lawyers are not held in such high repute and attorneys who reinforce that view by testifying against fellow attorneys are likely to be frowned upon. Testifying against a fellow lawyer is likely to be seen as confirming a wider scepticism about the moral status of lawyering. As is the case with all professions, the legal profession would prefer to deal with its problem children quietly and internally, via a professional standards committee.

Codes of silence are an issue with all loyalties, not just professional ones. Some matters are known only among friends; families often expect certain family-related business to be kept within the family; organizations like to say that they wash their own dirty laundry. The problem is not with the code as such—it is understandable why certain matters—say, illness or financial difficulties—might be kept within a family. If known to others, the knowledge may have unwarranted social repercussions—discrimination, ostracism, or a diminished reputation. The problem is that there are sometimes good—sufficient—reasons for others to be made privy to what is kept private or secret as part of a loyal bond. Parents who have good reason to believe that their child is implicated in a gruesome rape-murder (say, bloodied clothes and a knife hidden in the laundry hamper) cannot plausibly argue that the loyalty they owe to their child justifies their complicity in concealing his likely involvement. Police officers who witness another officer shaking down a drug dealer or stealing from the site of a burglary cannot really make a good case for covering up; a physician who botches an operation for which he had no qualifications should not expect other physicians to turn a blind eye. Loyalties come with limits, and though loyalty may be integral or essential to the associative bond (the friendship, the profession), *and the associative bond is part of one's identity*, there comes a point at which the otherwise justifiable support for the associative other loses its moral grip and, painful though it may be, the code of silence needs to be breached.²³

Where that break point should be will to some extent depend on the nature of the association. With

22 See Wickersham Commission Report on Police (Washington, DC: Government Printing Office, 1931), 48. I have discussed the blue wall at greater length in “The Blue Wall of Silence: An Ethical Analysis,” *International Journal of Applied Philosophy* 15, no. 1 (2001): 1-23.

23 I have dealt with the limits of loyalty at much greater length in *On Loyalty and Loyalties: The Contours of a Problematic Virtue* (New York: Oxford University Press, 2014), chap. 7.

respect to “natural” bonds, such as friendships, intimate relations, and families, it is likely to be some reasonably serious moral breach (non-serious breaches might be dealt with internally). With respect to professional loyalties, reference will be made to the ends or *tele* of the profession. Corrupt and rogue lawyers subvert the legal system on which a society depends; incompetent or exploitative physicians violate the terms of their loyalty to patients and the healing and alleviation to which their profession commits them. Police often view their fellow officers as friends and family, but their role is not a natural one of the kind that makes friendship and familial bonds so important. The police role is a social artefact born of the need for a certain kind of social order. Where that role is usurped by the supposedly stronger bonds of friendship, the tail of their relationship has begun to wag the dog, and they delegitimize their social role.

The Challenge of Institutionalization

There is a double challenge in the institutionalization of professional loyalties. One, to which I’ve already referred, lies in the institutionalization of the profession—that is, the formation and formalization of professional groupings—such as the American Bar Association and American Medical Association, and so on. These are mixed blessings. On the one hand they provide structure and focus. But on the other hand they often function bureaucratically, hardening the arteries of professions and ushering in or at least signifying a political role for the professions that is ultimately compromising. This does not necessarily follow, of course, but it occurs more often than we might like. The sad debacle of the American Psychological Association and its grappling with so-called enhanced interrogation techniques is a salutary reminder of what may occur.²⁴

But in raising the question of institutionalization I had a somewhat different issue in mind, and that is the fact that though professionals are, by virtue of that status, competent to exercise discretion with respect to the delivery of their services, they often provide those services within the context of other institutions or organizations that employ them. Although employed as professionals, they are also beholden to the expectations of institutions or organizations that have multiple purposes and stakeholders and may not always be willing to accommodate their professional judgments. In some cases—say, medical centers and law firms—

the employing organizations may appear to share the same primary ends as the professions, and it will be important to their success that they do. Even so, the commercialization of health care has often resulted in distorted priorities and corruption, and economic considerations have compromised professional ones. A Health Maintenance Organization (HMO) or medical center might pressure doctors to see four patients or more an hour, or to abandon appointments in favour of walk-in medicine, even though this will lead to hurried and inadequate examinations.

The tension may be more acute and explicit where professionals are employed in organizations whose ends do not claim to be aligned with the professions from which the professionals are drawn. Medical personnel and social workers in prisons or lawyers and auditors employed by large corporations are cases in point. The organizations for which they work may make demands of them that compromise their professional loyalties, loyalties that theoretically should be accorded high standing within the respective organizations. In some cases the tensions are written into the *raison d’être* of the organizations as is the case with prisons, where security considerations usually trump welfare ones: Care, Custody and Control, a well-worn prison mantra, is almost entirely about custody and control. In corporations, the tension between corporate and legal and auditing ends is a temptation to moral line-crossing, as when organizational lawyers or auditors are pressured into exploiting or fudging. Arthur Andersen, the once highly professional auditing firm for Enron, was a prime example.

In themselves such tensions do not constitute an argument for detaching professions or professionals from organizations or for giving either a free rein. That would be unrealistic. We can’t deprive prisons of social workers and psychologists simply because security concerns place constraints on therapeutic measures. There is, however, an argument for developing decision-making strategies that will enable professional loyalties to be brought into an acceptably ordered arrangement with competing considerations. In themselves, such tensions and decisions are not significantly different from those that arise in the ordinary course of life, when loyalty to one friend may conflict with loyalty to family, or a patriotic loyalty may conflict with some universal obligation. In the personal cases, an individual can engage in an internal discourse that results in a—sometimes anguished—prioritization of loyalties or obligations; in the case of professional-organizational conflicts, we are dealing with multiple parties, each with some claim to be considered. In such cases, one of the important ethical questions will involve the identification of who should have responsibility for resolving it. A

24 See, for example, Sheri Fink, “Tortured Profession: Psychologists Warned of Abusive Interrogations, Then Helped Craft Them,” *ProPublica*, May 5, 2009, available at: <http://www.propublica.org/article/tortured-profession-psychologists-warned-of-abusive-interrogations-505>.

social worker in a prison situation or doctor in a hospital is not the only important stakeholder involved in making whatever trade-off decisions have to be made, but one of a number, and a major task in organizational ethics is to develop decision-making procedures that will acknowledge, identify, and accommodate the relevant stakeholders.²⁵

Developing an ethically acceptable decision-making structure is of course distinct from developing an argumentative strategy that will enable a good decision to be reached. But just as in the personal case the various reasons need to be identified before being brought into a judgmental interplay, in the organizational context, the different stakeholders—representing different kinds of reasons—need to have some say or representation in resolving the tensions that arise. Ideally, they will work toward some consensus so that decisions will be reached that everyone can live with. In difficult cases that may not be possible, and where that is the case it is probably necessary to look more broadly so that the decision-making environment can be changed. A recent US Supreme Court decision, *Brown v. Plata*,²⁶ requiring that California empty its prisons of a large number of inmates so that their constitutionally mandated health needs could be attended to, is an example in which an unmanageable tension between security and health concerns needed to be resolved by an external decision-making procedure. Of course, one could argue that insofar as the prisoners' constitutional rights were at stake, the Supreme Court was also a legitimate stakeholder—though that is something that needed to be established and was not something about which all the members of the Supreme Court agreed.

The decision-making procedure that I am suggesting can work at the level of either policy or an individual case. *Plata* was decided fairly narrowly. No doubt the best situation will be one in which the various parties who will be affected meet to develop a policy that all can live with—a policy developed in advance of having to make individual decisions, though no doubt informed by a broader history of cases of such kinds. Eva Winkler provides a useful example of a hospital developing a policy concerning adolescent Jehovah's Witnesses who refuse to sign consent forms permitting blood transfusions. Some doctors will work with such an arrangement and others not.²⁷ It is better to have a policy-

development process that allows all the parties involved and those with relevant expertise to come together to develop a policy that accommodates all their values than to make decisions on the spot that may later be regretted (or, of course, pursued in court). Many of the conflicts that arise between professionals and institutions can be anticipated and policies concerning them may be developed that are transparent and sensitive to the kinds of compromises or provisions that will need to be made.

Of course, a policy may not adequately cover every case that is supposed to fall under its purview, and so there will sometimes be difficult individual decisions that need to be made. Nevertheless, a policy should seek to identify who should be involved in such decisions, as well as provide for its periodic evaluation based on experience with its implementation.

Conclusion

Let me then sum up. Professional loyalties are not marginal but, where developed, may come to have a central place in our conception of who we are. Where we are professionally involved, there is an argument for our having a commitment to the professional activity that counteracts tendencies to self-interested involvement and that obligate us to advancing the *tele* or ends of the profession. What those ends may be, however, can be a matter of ongoing contention. Nevertheless, professional commitment by itself, though often good and obligatory, does get us out of the moral woods, firstly, because there is no internal requirement that the *tele* or practices of a profession are exempt from critical scrutiny, and the legitimate obligations that underwrite a professional community may come into tension or conflict with those of a larger social ordering. Furthermore, even when the ends of a profession are unexceptionable or even admirable, the loyalties that are developed around those ends may be corrupted by their detachment from the underlying *raisons d'être* of those associative bonds. Finally, professionals are often beholden to others and professional integrity requires that they develop ways of pursuing their goals within frameworks that may compete with their own.²⁸

25 See Dennis F. Thompson, "The Institutional Turn in Professional Ethics," *Ethics & Behavior* 9, no. 2 (1999): 109-18.

26 Decided 2011. See <http://www.law.cornell.edu/supct/html/09-1233.ZS.html>.

27 Eva C. Winkler, "The Ethics of Policy Writing: How Should Hospitals Deal with Moral Disagreement about Controversial Medical Practices?" *Journal of Medical Ethics* 31 (2005): 559-66.

28 I appreciate the helpful comments of Shunzo Majima and Michael Davis on an earlier version of this paper.