



HOKKAIDO UNIVERSITY

Title	Challenges for Professional Loyalties
Author(s)	Kleinig, John
Citation	Journal of Applied Ethics and Philosophy, 6, 10-17
Issue Date	2014-09
DOI	https://doi.org/10.14943/jaep.6.10
Doc URL	https://hdl.handle.net/2115/60184
Type	departmental bulletin paper
File Information	JAEP6_10-17.pdf



Challenges for Professional Loyalties

John Kleinig

City University of New York, USA

Centre for Applied Philosophy and Public Ethics, CSU, Australia

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.