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## Professional Norms

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# PROFESSIONAL NORMS

DEAN COCKING

## INTRODUCTION

The notion of professionals who are significantly guided by professional norms, in particular ethical and social norms of service to the community, has taken something of a hammering over the years. Sociological criticisms have long characterised professional associations and professionalisation as self-serving in ways that come at the expense of the public.<sup>1</sup> And in recent times the settings of occupational practice have changed for a number of ‘traditional’ professions in ways that have been thought to pose special problems. Both lawyers and engineers, for instance, now work increasingly in large multidisciplinary firms dominated by commercial and managerial imperatives rather than the professional norms specific to practice as a lawyer or engineer. Indeed, just what the territory of work is in these cases has changed and introduced uncertainties about the nature, limits and scope of such roles.<sup>2</sup> Moreover, ethico-professional<sup>3</sup> misconduct and, thus, the apparent failure

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<sup>1</sup> See Part I ahead for those I have in mind. Of course, criticism of this sort has also long come from others. Adam Smith famously characterised the professions in this way: ‘People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary’: Adam Smith, *The Wealth of Nations* (1776) book I, ch 10, 129. And Shaw put Smith’s point more bluntly: ‘All Professions are conspiracies against the laity’: George Bernard Shaw, *The Doctor’s Dilemma* (1911) Act 1. I thank Mathew Ward and Tom Campbell for these references.

<sup>2</sup> For a discussion of such problems, see Andrew Alexandra et al, *Professionalisation, Ethics and Integrity Systems: The Promotion of Professional Ethical Standards, and the Protection of Clients and Consumers*, Report for the Professional Standards Council (‘PSC’) (2006), especially the empirical studies of occupations presented in chs 4 and 5.

<sup>3</sup> I use the term ‘ethico-professional’ to address the ethical dimensions of professional life. Obviously, technical dimensions are significant, and are in everyday practice commonly the primary and direct considerations with which professionals are engaged. And many technical aspects of one’s professional

or absence of relevant ethico-professional norms, has been highlighted in, for instance, the auditing and accounting professions by some spectacular recent corporate collapses (as widely discussed in this book).

However, it is necessary that such norms properly operate as guiding regulative psychological influences<sup>4</sup> in occupational actors. And this is true quite generally across occupations, although it is not *just* as true. There are important differences of kind and degree concerning the ethico-professional norms that apply across occupations. Concern for public safety is, for instance, appropriately at centre stage for engineers, but not for lawyers. And more general ethico-professional norms may apply more or less across different occupational groups. So, for instance, professional autonomy may cover more territory and be greater in degree for lawyers or medical practitioners than for real estate agents. On the other hand, ethico-professional commitments driven by market concerns (such as to fair competition or honest and transparent dealings with consumers), while relevant across occupations, may be much more at centre stage for the ethico-professionalisation of real estate agents than, say, for engineers or lawyers.

Nevertheless, that there are relevant ethico-professional norms, both general and specific, properly operating as guiding regulative influences in the psychologies

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life do not have ethical dimensions, or not primarily, but many also do, eg, technical standards for accountants in accurate and honest reporting are also obviously ethical standards.

<sup>4</sup> The term 'regulative' here refers to the regulation of our attitudes and conduct due to psychological guidance by norms, and these norms may be specific or general, and the guidance may be direct or indirect. It is thus a moral psychological notion referring to internal regulative influence and therefore has a different sense than does the term 'regulation', where the latter features in, eg, discussions concerning the regulation of markets or occupations, including of ethical standards. Here, the sort of guiding force imagined to attach to regulation is more specific, ie principally about how rules and laws backed by sanctions 'regulate' the conduct of individuals. The sort of regulation imagined is also thereby about external guiding factors, in particular, rules and laws, rather than internal psychological guidance by the norms that may (or may not) be expressed by those rules or laws. I have adapted the idea (to norms) of a 'regulative ideal' (coined by Justin Oakley) which is introduced in Dean Cocking and Justin Oakley, 'Indirect Consequentialism, Friendship, and the Problem of Alienation' (1995) 105 *Ethics* 86, 106. For a more developed treatment of the idea, see Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (2001), especially the Introduction and chs 1 and 2.

of occupational actors is a generally significant, indispensable feature of professional life. The idea that we could somehow regulate ethico-professional standards into existence, i.e., through laws and rules, has significant limitations. At least, this is what I argue in this chapter.

First, I present two general models of ethico-professional norms: the *commercial occupation/consumer protection* model and the *professional autonomy/client trust* model. I then set out some key criticisms and problems (as sketched above) concerning the legitimacy or relevance of these models. In light of these criticisms and problems, in Part II I move from this general picture of the territory of ethico-professional norms to focus more particularly on the sort of norms identified by the professional autonomy/client trust model. In this Part I put the case for the necessity and importance (albeit different in kind and degree across occupations) of professional autonomy. I focus on professional autonomy since it is central to effective guidance by ethico-professional norms in key cases, and it is also the focus of much of the criticisms of, and problems for, effective guidance by ethico-professional norms. In Part III I present the case for the correlative of the sort of professional autonomy I defend, namely, a duty of care to clients. In conclusion, I recommend the rehabilitation of professional autonomy and duties of care to clients, particularly where, as with the ‘traditional’ professions (although this need not be exclusively so), the occupational area is properly characterised as primarily involving expert use of a substantial, complex and largely discrete body of knowledge and skill in pursuit of the legitimate, and indeed typically significant, ethical and social interests of individuals and the community.

## I TWO MODELS OF ETHICO-PROFESSIONAL NORMS

I want defend the idea that ethico-professional norms, functioning as guiding regulative psychological influences on professional attitude and conduct, have a proper, indeed indispensable, place in professional life. I therefore introduce a general conceptual contrast that I think helpfully frames the ethico-professional territory, and so the sort of ethico-professional norms that apply both generally and more specifically across occupational groups. This will also be helpful for locating and setting out some of the criticisms of, and problems for, professionalisation, professional associations, and, in particular, their claim to guidance by norms and ideals of social or ethical note to the community.

A key contrast across occupational groups can be put in terms of two models of ethico-professional conduct and relations between ‘professionals’ and the public: the *commercial occupation/consumer protection* model and the *professional autonomy/client trust* model.<sup>5</sup> The former model applies to cover much of the ethico-professional territory of those occupational groups that are properly characterised as primarily commercial groups, such as real estate agents. Here ethico-professional considerations are dominated by concerns about their ethical status as market actors, in particular, the general commitments to norms of fair competition and consumer protection and empowerment. Other ethico-professional norms will also be operative in relation to these, for example,, that real estate agents be honest and accurate in the information they present to consumers.

The second model applies to cover much of the ethico-professional territory of those occupational groups, which, while also commercial groups (meaning that

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<sup>5</sup> I developed these models for: Alexandra et al, above n 2. I draw on my work there for this chapter and I am indebted to my co-authors, Seumas Miller, Tom Campbell, Andrew Alexandra and Mathew Ward for their contributions to this work. In particular, I thank Seumas Miller who originally helped me frame the two models above, and for guidance and contributions to their development.

market standards and norms apply), are not properly characterised as *primarily* commercial groups. Rather, their primary function or purpose is one of service to the community concerning some significant social or ethical good, as found in the ‘traditional’ professions. Here, then, ethico-professional considerations are *not* dominated by market considerations. In particular, ethico-professional norms also, and more significantly, attach to one’s professional role responsibilities to exercise substantial, complex and largely discrete expertise in the pursuit of the legitimate, indeed typically key, social and ethical interests of individuals and the community.

In this chapter I focus on professional autonomy (in Part II) and correlative duty of care to clients (in Part III). More specific ethico-professional regulative norms on account of the non-commercial or self-interested primary functions of such groups are, for instance: the promotion of human health in medicine; providing due process before the law in the legal profession; public safety for engineers; and accurate reporting and monitoring for auditors and accountants.

Setting the scene this way helpfully locates some standing criticisms concerning professionalisation. On the one hand, if we think of professions as primarily about service ideals and guidance by related standards, norms and ideals, then one may be inclined to think of the application of the category of ‘professional’ to commercial occupations and their associations — where the moral imperative is not so clear — as something of a mistake. Accordingly, one will also likely think of this broadened application as deforming or minimising the value dimensions that ought to characterise the ethico-professional norms of professions.

While the traditional professions of, say, medicine or law, may be said to have ‘gone off the rails’ or ‘lost their way’ by moving away from a clear focus on the moral and social goods of human health and justice that it is largely their institutional

purpose to serve, these professions are nevertheless properly conceived of as ‘professions’, largely on account of their service to these central goods — and may be criticised against the criteria represented by these goods. It is precisely against such criteria that they have been claimed to have lost their way.<sup>6</sup> On the other hand, various other occupations, such as real estate agents, do not in any central or direct way serve such notable goods as human health or justice, and so are neither capable of being lauded or criticised against an ethical standard presented by such goods. Thus, broadening the application of ethico-professionalism to accommodate the primarily commercial groups may seem a category mistake that deforms the nature and value of ethico-professionalism.

As I have indicated, however, primarily commercial groups are governed by ethico-professional standards, norms and purposes, both general and specific, related to their status as primarily commercial market actors. So, for instance, while a primarily commercial group such as real estate agents would, in their everyday dealings with consumers or the public, be primarily and directly concerned with making financial deals regarding real estate, this everyday direct pursuit should nevertheless be governed, and so guided indirectly, by the general, overarching ethico-professional commitment to efficiently provide affordable and decent housing to the public.

Guidance by this commitment is most plausibly thought of as operating mostly *indirectly* in the psyche of occupational actors in the primarily commercial groups. We need not imagine, for instance, that real estate agents must be *directly* motivated by a commitment to efficiently provide affordable and decent housing to the public.

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<sup>6</sup> There is now some considerable literature concerning how various professionals have become alienated from their roles on account of their working in settings of practice that work against the ethico-professional regulative norms and ideals that properly apply to their roles. See, for instance, Oakley and Cocking, *Virtue Ethics*, above n 4, especially ch. 6.

Nevertheless, their conduct may be *governed* by this goal insofar as it is undertaken within an overall integrity system including, for instance, prescriptive laws and adherence to codes of conduct and ethics aimed at empowering consumers.<sup>7</sup> And, insofar as real estate associations and individuals show commitment to practice within such a system — and to develop their practice in light of it — they may be thought of as being indirectly guided by the relevant governing goals of the system.<sup>8</sup>

Further, in addition to the relevant ethical goals that apply to the particular occupational area, ethical occupational practice is also marked by the specific sorts of ethical commitments that properly form much of the substantial ethical content involved in the pursuit of these ethical goals — such as the commitment to honest and fair dealings with the public. Nevertheless, the concern with a hijacking of the concept of ethico-professionalism and a devaluing of its currency has particular significance due to the observation of commercial and financial imperatives that have been central to the increasing adoption of, and compliance with, codes of conduct or professional standards schemes under the monitoring and meta-regulatory control of state agencies.<sup>9</sup> In fact, the influence of commercial drivers upon the adoption of professional status might lead to general concerns about the fate of professionalism, even for traditional professions, under such a regime.<sup>10</sup> The general concern for the

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<sup>7</sup> See Alexandra et al, above n 2; Seumas Miller, ‘Institutions, Integrity Systems and Market Actors’ in this book, for an account of integrity systems for occupations.

<sup>8</sup> The distinction between being guided directly or indirectly by a consideration has general application. I may, for example, be guided indirectly by the concern to relax to take up gardening. In turn I may then be directly guided by concerns specific and proper to gardening. Nevertheless, I may give up gardening if it turns out I do not find it relaxing. So the latter consideration may indirectly guide those with which I am more directly concerned. For discussion of the distinction in theoretical ethics and moral psychology discussion: see Cocking and Oakley, ‘Indirect Consequentialism’, above n 4.

<sup>9</sup> Such as, in Australia, the PSC.

<sup>10</sup> The Labor Senators sitting on the Senate Economics Legislation Committee review of the Treasury Legislation Amendment (Professional Standards) Bill 2003 (Cth) put these concerns this way: ‘Most fundamentally, we are disturbed by the fact that some need an incentive in the form of capping in order to lift professional standards. Labor Senators endorse the view expressed in the Government’s CLERP 9 paper in September 2002 which stated: “While the objective of improving professionals standards, including the introduction of compulsory professional indemnity insurance and risk

fate of professionalism here is whether guidance, either direct or indirect, by ethico-professional norms, is behind the work regarding compliance with ethico-professional standards, or whether it is simply a consequence of profit motives or, more generally, prudential concerns. One has reason to be concerned for at least four reasons. First, one may worry that there is some instability or fragility with respect to ethical compliance if the reasons for compliance are purely, or primarily, prudential, since circumstances may well be such that prudence dictates that one does not expend one's resources on compliance. It may, for instance, be less financially onerous to flout compliance and go to court, since the latter cases are rare and difficult for the complainant to win. Second, however well-targeted and comprehensive one's laws, regulations and rules may be, there will always be cases that 'fall between the cracks' and so — if one is to achieve ethical or 'best' practice — require compliance mechanisms in the form of relevant professional, including ethico-professional, norms. Third, interpretation of laws, regulations and rules is often unavoidable and open to compliance to the letter of the law that nevertheless enables unethical practice to flourish. And fourth, insofar as the misconduct of one member of an occupational group affects the reputation of the group, the group has self-interested reason to ignore or cover up the misconduct so that it does not do damage in the public arena.

On the other hand, if one thinks of professions as primarily commercial and self-interested enterprises anyway, and so one rejects or is cynical about claims concerning norms and ideals of service to the community, then these concerns — in particular, points one, three and four — are just what you would expect. The main criticisms against professions, their associations, and the drive to professionalise have

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management programs is admirable, professional bodies should be implementing such measures as a matter of best practice and should not require the incentive of a capping regime to achieve them”': Senate Economics Legislation Committee, Parliament of Australia, *Provisions of the Treasury Legislation Amendment (Professional Standards) Bill 2003* (2004) 39.

been made by sociologists.<sup>11</sup> The key general concerns are: the anti-competitive effects; the anti-consumer or public interest effects; and the sophistry and obfuscation claimed of the so-called ethical service ideals of the professions in the face of their apparent practices to the contrary.<sup>12</sup> On such views, professionalisation has been characterised as a means to attain market power or social privilege,<sup>13</sup> or as a way of legitimising inequalities in social status or raising prices for services.<sup>14</sup> Appeals to ethico-professional norms in this context have been thought of as an abuse of moral language,<sup>15</sup> and much of this has been thought to provide a means to undermine the market economy ideal of informed, sovereign consumers, and thereby the efficiency of markets; that is, to provide goods and services efficiently and at reasonable prices.

A key focus of the attack by these views is the claim by professional groups and individuals to special expertise in a body of knowledge and skill. This is then claimed to license some notable professional autonomy in setting the standards and norms that apply in the area, monitoring that those standards and norms are effectively operating in the area, and in determining how to best comply with and advance those standards and norms. The real purposes, or most significant purposes, of such claims, so the attack goes, are about monopolising a knowledge base to

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<sup>11</sup> Mathew Ward worked as a research assistant on the Report for the PSC, Alexandra et al, above n 2. I thank him for the references to the views of the sociologists I mention and for his helpful comments on their views.

<sup>12</sup> Of course, not all sociological views have been critical. Notable here is Emile Durkheim, *Professional Ethics and Civic Morals* (Cornelia Brookfield trans, 1992) [trans of: ]. Durkheim expressed deep concern about the general indifference that he felt the public displayed towards the morality of life in the economic sphere by comparison with morality in the private sphere: ‘this amoral character of economic life amounts to a public danger ... If we live amorally for a good part of the day, how can we keep the springs of morality from going slack in us? ... It is therefore extremely important that economic life should be regulated, should have its moral standards raised, so that the conflicts that disturb it have an end, and further, that individuals should cease to live thus in a moral vacuum where the life-blood drains away even from individual morality’: at 12.

<sup>13</sup> Notable here is Margali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (1977).

<sup>14</sup> See Smith, above n 1.

<sup>15</sup> Such as by making a scapegoat of an offender in blatant/extreme cases, or by claiming consumer protection (say, against charlatans) when one is really about monopolising the market, or by ‘playing’ the technicality/indeterminacy ratio.

legitimate the professionals' claim to prestige, income and the right to administer themselves.

The attack on the claim of professional groups to a substantial, complex and discrete knowledge base targets what is called the 'technicality/indeterminacy ratio'. Jamous and Pelloile<sup>16</sup> have indicated how 'playing' this ratio serves to protect the discrete knowledge base of the group as a means of protecting and advancing their social and economic power and 'self-regulation'. Professions prevent their knowledge base from becoming routine, or from being seen as merely 'technical', since otherwise their claim to discrete and expert understanding would be undermined, and so too their claims to autonomy and power over their practise of this expertise. Instead, the professions have to assert the need for interpretation and the tailoring of their knowledge to the specific case at hand, a balance that Jamous and Pelloile called the 'technicality/indeterminacy' ratio. Successful professional groups are then characterised as being able to play this ratio out in their favour. When attacked because their practice is not based on science — that is, it is too indeterminate — they may claim that they are the practitioners of an esoteric body of knowledge — that is, that it is too technical for others outside the profession to understand. When charged that their work is simply a technical set of procedures, they may assert their clinical, or legal skill in *interpreting* each case. So construed, knowledge in a profession operates to protect the profession and serves to make it extremely difficult for those outside the profession to challenge it. It also makes charges of malfeasance or unethical behaviour difficult to sustain. And this will be especially exacerbated insofar as another common characteristic of professions, namely their solidarity, is operative.

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<sup>16</sup> Haroun Jamous and Bernard Pelloile, 'Changes in the French University Hospital System' in John Archer Jackson (ed), *Professions and Professionalization* (1970) 111.

In addition to these criticisms of professional associations, professionalisation, and related claims to guidance by ethico-professional norms — in particular professional autonomy — problems have emerged with the new settings in which many professionals now find themselves working. So, for instance, engineering is a well-established profession, in particular with a history of guidance by goals that are not primarily commercial but which are primarily oriented toward serving a significant public good, namely the good of public safety. However, one important development over the past few decades in Australia has been the privatisation of major government instrumentalities such as electricity commissions, which employed large numbers of engineers, and were largely dominated by engineers. Nowadays engineers most commonly work in organisations whose prime purpose is not engineering: for instance mining companies or manufacturers. Another significant change has been the increasingly multidisciplinary nature of the work and therefore of the skills required of engineers to do such work.<sup>17</sup>

And, of course, some spectacular cases of apparent ethico-professional misconduct or failure have also put pressure on the idea of professional autonomy. Auditing and accountancy, for instance, are also well-established traditional professions and are notably characterised by an important economic function and significant ethical norm, namely to provide honest and accurate financial reporting. Accountants, and particularly auditors, however, have come under intense pressure with respect to their standards, competence and integrity primarily due to their

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<sup>17</sup> See Alexandra et al, above n 2, ch. 4. Andrew Alexandra provided the points I use here about the current state of play in engineering.

perceived role in failing to prevent or predict the catastrophic corporate collapses discussed in this book.<sup>18</sup>

However, these negative views and problems should not lead us to ‘throw the baby out with the bathwater’. While professional associations may (often) have been guilty of self-serving practices that come at the expense of the interests of the public, scope for professional autonomy is an important, necessary feature of effective occupational practice in various areas. To help better see this importance, I now put the case for professional autonomy.

## II THE NECESSITY AND IMPORTANCE OF PROFESSIONAL AUTONOMY

The cluster of criticisms noted above characterise professionalisation and professional associations in terms of their self-serving tendencies, principally for greater economic and social power. Thus, the claims of certain occupational groups to a discrete body of knowledge are cast as a means to economic or social power, as are claims of technicality and indeterminacy concerning this body of knowledge.

But, of course, quite apart from such self-serving advantages attached to laying a claim to a discrete body of knowledge, the fact is that certain groups can rightly lay claim to such knowledge. Thus, doctors can rightly claim discrete knowledge, skill and expertise concerning medical health, lawyers may do so concerning the law and just legal process, and teachers concerning education. It is not as if the self-serving practices of, say, doctors, should lead us to imagine that their claim to a body of discrete knowledge, skill and so on is *itself* simply self-serving.

Indeed, not only are the bodies of knowledge, skill and expertise in the areas of these traditional professions *genuine* bodies of knowledge, skill and expertise, they

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<sup>18</sup> Ibid. Tom Campbell provided the points I use here about the current state of play for auditors and accountants.

have been developed to deliver fundamental human and ethical goods, namely human health, justice and education. Accordingly, groups of individuals who may effectively use this knowledge and develop this skill or expertise play central, socially valuable, *institutional* roles.<sup>19</sup> Obviously, for instance, on account of our basic needs and interest in human health, society very much needs a medical profession and medical practitioners. Thus, we have institutions whose purpose is to meet such needs and provide such key human and ethical goods.

Moreover, a central aspect of the institutional role individual practitioners play here is professional autonomy. Autonomy is, of course, a fundamental notion in discussions of what it is to be a person and what it is to lead a worthwhile life for a person. Literally, autonomy means self-governance or self-rule. But what is it to be self-governing or to have self-rule? At the heart of the notion is the idea that a person can make judgments and choices about how they will act or lead their life, and they have the capacity to act and lead their life in accord with these judgments and choices. In these ways, most people can make judgments and choices about what is worth pursuing and have sufficient control over themselves and their external circumstances to act out such judgments and choices. Thus, persons may be self-governing, rather than being driven by impulse or dependent upon (or under the command of) others. Professional autonomy, broadly speaking, concerns the ability of professionals to be self-governing through the exercise of judgments, choices and control with respect to the proper territory of their professional life. The domain of professional autonomy is, therefore, narrower than that of ordinary autonomy, since it is circumscribed by the specific territory of the work, including the specific standards, norms and goals of the

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<sup>19</sup> Thanks to Seumas Miller for characterising these professional roles to me as ‘institutional’.

work. Accordingly, the sorts of choice and control relevant to professional autonomy are similarly more narrowly framed.

Furthermore, since professional autonomy is an *institutional* notion attached to aspects of the practice of certain professional *roles*, it is, unlike autonomy generally, not something one possesses as a result, or in virtue of, one's status as a self-governing person. Professional autonomy is a narrower notion attaching to certain institutional requirements and functions of the proper performance of certain professional roles. Individuals and their collectives then, may have a claim to (some significant degree and kinds) of professional autonomy where such institutional requirements and functions are part of the proper performance of their professional role.

What then, is the rationale for thinking that there is such a claim to be laid regarding professional autonomy attaching to certain occupational roles (albeit in degrees and varying across roles)? The particular rationale I defend in this Part is where it is plausibly thought necessary for the effective use of the sorts of knowledge, skills and expertise required for the delivery of the (legitimate or valuable) goods and services it is the purpose of the occupational roles in question to deliver. Crucial here is the question of how substantial and complex the territory and related body of knowledge and expertise is, for as the territory gets more complex and less routine, it will require the exercise of judgment in a range of different and often less predictable specific situations.<sup>20</sup> Indeed, if one thinks generally of what it is to become skilful and effective an area involving substantial and complex considerations, it is (typically) very difficult to imagine how one could become so without regular use of interpretive and creative judgment. For example, do rules or standards of procedure apply in a

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<sup>20</sup> I thank Andrew Alexandra for: 'less routine, it will require the exercise of judgment in a range of different and often less predictable specific situations.'

given case, do they need revision or augmenting, are there conflicts in applicable rules and how might these be balanced. Thus, the criticisms based on self-serving uses of the ‘technicality/indeterminacy’ ratio also need to be balanced with a reality check: substantial and complex bodies of knowledge *are* typically *both* highly technical and indeterminate, as, for instance, in both medicine and law. We need practitioners who can make such judgments, both technical and indeterminate, so that the body of knowledge and expertise in respect of which they make them is effectively employed and expands and improves. Accordingly, when we train practitioners in an area, an important part of what we are concerned to do is to train and develop their capacities to make accurate and creative judgments where required.

Moreover, for individual professional autonomy to be effective there will also (typically) need to be relevant degrees and kinds of professional autonomy at the collective level. If the standards and norms, for instance, of medical or legal practise, were not largely set by medicos or legal experts it is hard to imagine that these standards and norms could be appropriate and desirable ones. So while in such circumstances a doctor or lawyer might have some individual professional autonomy in choosing how to conform to these standards and norms, it would be a very limited form of professional autonomy. The standards and norms need to be the right ones, and, in many cases, such as medicine and law, this would require significant professional autonomy at the collective level.<sup>21</sup> The self-serving considerations we

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<sup>21</sup> This need not be (so much) the case. In Alexandra et al, above n 2, Andrew Alexandra distinguished between professional self-regulation (autonomy at the collective level in setting standards and norms in an area), and professional independence (autonomy at the individual level in choosing how one complies to these standards and norms), using the case of the police officer to highlight how these may come apart. For while police officers (either as individuals or as a collective) largely do not set the standards and norms that govern them (since we the community, notably through our government, do), they do exercise quite considerable individual professional autonomy in determining how they best comply with these standards and norms. The role of the police officer and the contrast here, however, seems something of a special case. As I explain above, it is, for example, part of the role of doctors, lawyers, and engineers, or their collectives, to largely determine the standards and norms in their area. Their ‘individual’ autonomy to comply with standards will not be worth much if the standards are

have seen against professional ‘self-regulation’ suggest, on the most plausible reading, that we should not leave *accountability* within the exclusive control of the professional collective. So if one imagined that professional autonomy implied that the collective had exclusive control over accountability in the field, then the notion of professional autonomy would be in serious trouble. However, one need not imagine that professional autonomy implies such things. On the contrary, it implies the taking of responsibility for one’s judgments and conduct, either individually or as a collective, and so implies accountability. Nevertheless, this does not suggest *at all* that such control need *not* be accountable to independent parties or standards. Thus, while recommending the rehabilitation of professional autonomy where appropriate, one must also recommend a suite of mechanisms aimed at ensuring accountability to independent parties and standards, such as the standard of fair competition.

The worry about professional autonomy seems primarily driven by the worry of abuse that it is thought to allow. If one has significant professional autonomy, then this may open the door to abuse as well as effective and proper use. To counter this it is appropriate that accountability to independent parties and standards are retained and strengthened. Nevertheless, if professional autonomy is retained and strengthened as appropriate, then it may well remain true that the vulnerability to abuse that it allows cannot be *altogether* prevented by regulation, i.e., in terms of specifiable laws or rules of conduct backed by appropriate positive and negative incentives. Suppose this is true (as I think it is). Would this mean we should give up on the idea of professional autonomy, or of the relevance of ethico-professional norms as providing effective guidance for occupational actors? If we could get the goods that these occupational roles are supposed to deliver without the need for guiding ethico-professional norms,

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misguided, and it is hard to see how they could be otherwise, if they are not significantly determined by those with the relevant expertise in these areas of substantial and largely discrete bodies of knowledge and skill.

in particular professional autonomy, then we might be tempted.<sup>22</sup> However, this is not the case. Indeed, the fact that we cannot do without professional autonomy is not just an empirical matter. As argued above, it does not even make sense to suppose that one could become expert in an area of substance and complexity in knowledge and skill, without the exercise of interpretation and creative judgment in many cases.<sup>23</sup> And it is clear that this applies to the areas of expertise, such as medicine and law, which we need for the delivery of the significant social and ethical goods it is the purpose of these occupational areas to deliver.

Vulnerability to abuse is the other side of the coin of allowing professional autonomy (where needed or desirable). Indeed, it is the other side of the coin of allowing autonomy generally, i.e., the individual autonomy that all of us who are capable of it share. As an autonomous person I may make bad choices or choose bad things, such as to pursue my own self-interest at the expense of the legitimate claims of others. Accordingly, we have a range of informal and formal, and negative and positive incentives aimed at discouraging such choices and conduct and encouraging ethical ones. However, while we seek to eradicate such abuses, we do not suppose we should do so by eradicating individual autonomy generally. While this would do the trick, the price is not only far too high, it is also self-defeating. We can hardly respect the claims of persons not to be abused by others who choose to do so if we address the problem by removing the autonomy of people generally to choose how they

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<sup>22</sup> One might reject the idea that we should eradicate professional autonomy *even if we could and were still able to get much of what we need out of occupational actors*. Insofar as we are persons capable of (some) autonomy, this may generally be a good thing to encourage, and discouraging it would be a bad thing. Why would autonomous people want to work where they are allowed no autonomy? And why would you want to leave the area of work undeveloped by the interpretive judgment ‘calls’ of persons doing the work? No doubt some reasons may be given in either case. Nevertheless, it would generally seem undesirable both for persons and their work if people were not encouraged to make choices and judgments and to take responsibility for them.

<sup>23</sup> As I have indicated, more specific ethico-professional norms, such as ‘be honest’, also unavoidably involve interpretation.

conduct themselves. I might not now be vulnerable to abuse due to the unethical choices of others, but since I cannot make choices myself now, I am, in too fundamental a way, no longer a person. The respect for my status as a person grounds the need to address my abuse, and therefore we would be advised to preserve this respect. Of course, as noted above, professional autonomy and personal autonomy are very different things. In particular, unlike personal autonomy, one does not have professional autonomy on account of one's status as a person. So the removal of professional autonomy as a means to avoid the problems of abuse would not be self-defeating in the way that removal of individual autonomy would be. Nevertheless, the necessity and desirability of professional autonomy for the effective employment of expertise required for the delivery of key social and ethical goods would be undermined. It would be self-defeating then to remove professional autonomy as a way to address the problem of the vulnerability of the public to abuses of professional autonomy. Again, it may do the trick, but since the legitimate and significant interests of the public in the effective delivery of these goods would now be fundamentally undermined, it would be 'by our own lights' self-defeating.

### III CORRELATIVE DUTIES OF CARE TO CLIENTS

As I have indicated, consumer protection and the need for it in relation to market and professionalisation issues is central to the ethico-professional norms of primarily commercial occupations, and remain relevant to all commercial occupations, even if not primarily so. So, for instance, and largely on account of concern with consumer protection, a professionalising group would have a commitment to, and be developing, effective processes in respect of fair competition, accountability through transparency, and reactive and preventative ethico-professional

risk management strategies. However, conceptualising service users simply as *consumers* in regard to their relations with professionals is a mistake. Correspondingly, conceptualising professionals just as market actors, and ethico-professional norms as exclusively driven by market concerns, has been a mistake. These are common views — indeed, the overriding views — found in both the practical mechanisms, such as in the laws of the ‘new regulatory state’ (for example, the *Trade Practices Act 1974* (Cth)), and academic and governmental discussions of professionalisation, market and regulation issues. Nevertheless, these views significantly misunderstand the professions and the promotion of the interests of the public. In particular, they misunderstand the sort of ethico-professional norms that attach, not on account of one’s status as a consumer, but on account of one’s being a *client* of professional services.

As sketched above, a basic, general contrast that can be applied across occupational groups concerns the ultimate purposes that govern the groups. For the primarily commercial occupations, commercial imperatives are at the forefront. It is appropriate, then, that ethico-professional standards and norms and the concern to promote the interests of the public will focus on market and consumer protection issues. However, a significant marker of professions — perhaps most notably and widely recognised in the traditional professions such as law and medicine — is that members of the public are not just consumers of their services but are also their *clients*. Of course, even as a client, one does consume these services — so what is the distinction? Firstly, as I have indicated, the ‘traditional professions’ require the inculcation of a body of expert knowledge and skill, together with a high degree of professional autonomy for the effective use and development of this body of expert knowledge and skill. In consequence, there is a high degree of accountability and

liability associated with the use of such knowledge and skill. Secondly, this expertise and professional autonomy is put in the service of, and guided by, the promotion of some (often significant) human or ethical good — such as the delivery of just process for the legal profession, or human health for medicine. Finally, this service is (typically) undertaken by the professional role occupant in *advocacy of the* (legitimate, and often significant) *interests of their client*, that is, a particular individual or organisation.

On account of the *advocacy* role played by a professional in regard to your interests, you are their client, and not simply their customer or the consumer of their services — as you are when, for example, you go to the shop or bank. Of course, your bank offers services such as financial advice and, as a consumer of these services the bank would advocate your (financial) interests. To this extent then, they might also be thought to treat you as a client. Moreover, as, say, with your General Practitioner, you might well have an ongoing relationship with your bank as their client. Indeed, albeit in a weaker, more limited way, you might perhaps be the client of your local shopkeeper and not just their customer, and so they may be careful to stock the sort of bread you regularly buy. Certainly, it has become quite common for occupational groups and businesses generally to promote themselves as providing *client* services and as regarding their customers as clients. And they may be thought to do so either in respect of how they ‘look after’ and so advocate the relevant interests of their customers *over time*, or by how they do especially well — that is, comprehensively — at a *particular time*. Thus, for instance, you might get your car serviced by a particular mechanic with whom you are in a client relationship over time, or at a particular time, on account of their comprehensive advocacy of your interests with regard to your car — say, by giving more investigation and long-term advice. In the

case of the traditional professions however, advocating the interests of their customers as ‘clients’ is not a grab for a larger share of the market. Rather, it is because it is the primary institutional purpose of these occupational areas to provide expert advocacy of their clients’ legitimate interests: in the case of medicine and law, to promote significant individual, social and ethical goods, ie, health and just legal process respectively.

In contrast, there has also been a significant shift by certain occupational groups, such as those involved in the human service industries, including health and welfare (and significant aspects of the legal profession), toward conceiving relations with the public on the model of customers or consumers. The central point of this shift has been to empower the *choice* of the public as consumers of these services.<sup>24</sup> For instance, in the case of the medical profession, as a norm of best practice nowadays, your medical practitioner (whether treating you as a ‘one-off’ exchange in a public hospital or as your General Practitioner) will typically take a good deal more time than was typical a few decades ago to explain your situation and, where appropriate, offer the information required for making certain choices.<sup>25</sup>

To some extent we may be *both* client, in the sense of advocacy of our (legitimate) interests, and consumer, in the sense of empowerment of one’s choices regarding services offered, whether in the case of the traditional professional (such as medical practitioners), and the ‘emerging’ professional (such as real estate agents), or other occupational groups generally (such as motor car mechanics). However, unlike the motor mechanic or shopkeeper, the traditional professions are primarily a

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<sup>24</sup> Thanks to Kylie Cocking for developing, in discussion, the relevance of choice as crucial to the contrast between consumer–client.

<sup>25</sup> For a philosophical treatment of the professional role morality of the medical (and legal) professions, see Oakley and Cocking, *Virtue Ethics*, above n 4, especially ch. 4 in regard to the shift from the perceived paternalism of the traditional professional–client model prevalent in medicine decades ago.

*cooperative* enterprise within their occupational community, with respect to the establishment and development of the discrete and substantial expertise and skills it is their institutional role to apply in the advocacy of the public interest. Such cooperation is obviously necessary to the continuing development of such bodies of expertise and skill and, so, intrinsic to their institutional role.<sup>26</sup>

As set out above, a key aspect of both the long-standing sociological criticisms and of the ethico-professional focus on empowering consumers, in particular their choices, is the asymmetry of knowledge (and associated power) between professionals, or many occupational actors generally, and the public. As a client of a professional, one typically stands in a relatively weak position compared to the professional: say, one's doctor or lawyer in relation to the knowledge, skill and power relevant to promoting one's medical health or justice before the law. However, that there are these asymmetries between clients and professionals is a proper feature — indeed, largely the *raison d'être* — of such professional–client relationships. Short of extraordinary efforts (including undertaking many years of study and training), one could not put oneself in the position of being able to make informed choices and judgments, and attaining the skill, expertise and so power to carry these out in relation to one's medical, legal, and similar needs — at least, not with any comprehensive or deep understanding and authority. Certainly, few of us could put ourselves in a position of commanding knowledge and skill across a number of areas involving substantial expertise. Moreover, one might not want to spend a significant part of one's life gaining the expertise of a medical doctor, or an engineer, and it is hard to see how there could be any generally applicable imperative that one ought to do so.<sup>27</sup>

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<sup>26</sup> I thank Andrew Alexandra for this point.

<sup>27</sup> While one might agree that we cannot reasonably be expected to have the expert professional knowledge and skills of, say, our doctor, one might argue that this does not show the limits of the

Thus, we have significant social institutions the purpose of which is to meet these significant social and ethical needs we all share. It is an entirely appropriate feature therefore, of certain relationships between the public and professionals that there is an asymmetry of knowledge, skill and expertise. Correspondingly, it is entirely appropriate that the consumer becomes a *client* of the professional in such cases, in the sense that client becomes the professional's responsibility to provide understandings and choices based upon their discrete expertise, on behalf of, and in promotion of, their client's legitimate, often significant, interests. Since promoting consumer choice here is limited — both practically and in terms of what is desirable or worthwhile — promoting ethico-professionalism here is not about promoting consumer choice.

On account of the asymmetry, the vulnerability of the public that must be addressed is not a lack of knowledge or skill the public expects, wants or should have in pursuing their interests as the client of professionals. The solution is not, therefore, to ratchet up consumer choice and so limit or eradicate the asymmetry. Rather, the overall integrity system for professional standards would here focus on promoting conditions for the proper (and improving) exercise of a professional's duty of care<sup>28</sup> and special responsibility to act in their client's interests *on account of the asymmetry*.

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consumer protection/choice model of ethico-professional relations with the public. We can, for example, solicit the expert advice of third parties, upon which we may then give informed consent concerning a particular professional's advice. Nevertheless, the key contrast remains: we are still not able to deliberate comprehensively on the specialised information and, on this basis, make our own choices about what we should do (and what should be done to, or on behalf of, us). We remain dependent upon the expertise of others whose advice and choices we may then 'authorise'. However, our authorisations remain dependent upon an effective role for professional responsibility in regard to empowering trust in our authorisation. Professional responsibility and client trust are not made redundant.

<sup>28</sup> 'Duty of care' is commonly a legal notion and there refers to specific duties of care — typically based on the concern to not do harm — enshrined in black letter law. Such legally binding specified duties of care are part of the picture I have in mind. However, such duties of care may cut across the consumer–client distinction, eg, that a seller not pass on faulty goods to a consumer. And the duties of care I have in mind might go beyond what is, or even could be, enshrined in black letter law. As I argue, standards of ethical conduct, including ethico-professional conduct, often cannot be codified in rules or laws, or at any rate cannot be codified easily or well.

It is, of course, important to promote one's capacity to make informed choices — including with respect to occupational areas involving a substantial, complex or discrete body of knowledge or skill. Thus, for instance, it is important that our lawyer or doctor provides us with understandings of our legal or medical situation and its related options and costs, upon which *we* can then make decisions. A good recent example of the recognition of the value of promoting informed choices in such areas in the US, Europe, and now in Australia, is the advent of surgeon report cards: that is, providing accessible data to 'consumers' that reports on the performance of surgeons across relevant surgical procedures.<sup>29</sup>

Nevertheless, we also need to be able to put ourselves in the hands of professionals who are experts in a body of knowledge and skill we could not reasonably be expected to share or possess ourselves. The focus here is not to empower our choices as consumers, but to promote good professional–client relationships where professionals have a special responsibility in regard to the discharge of their discrete expertise in advocacy of their client's relevant (legitimate, and typically significant) interests.

Identifying and contrasting the empowerment of consumer choice and client trust articulates different approaches to the promotion of ethico-professional standards, norms and ideals. In particular, it articulates the need to focus such efforts towards *both* the empowerment of consumer choice *and* the professional responsibility associated with professional–client relations. In the case of real estate agents, as discussed, the development of ethico-professional standards and norms would be primarily directed by a consumer protection model, rather than a client trust

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<sup>29</sup> For a very recent collection of essays on the advent of surgeon's report cards and their ethical implications, see Steve Clarke and Justin Oakley (eds), *Informed Consent and Clinician Accountability: The Ethics of Report Cards on Surgeon Performance* (2007).

model. On the other hand, ethico-professional norms directed by a client trust model would be a significant focus for, say, lawyers.

A good example of an ethico-professional norm that is important for lawyer–client relationships is the well-recognised problem of an ‘expectation gap’ regarding what the lawyer can offer their client. In particular, while they can be expected to provide due or just process for their client, they cannot guarantee the outcome desired by the client, even if this is the just outcome. Thus, the appropriate ethico-professional norm for lawyers is the former, not the latter. While a clarification of this sort addresses the limits of the professional services on offer, it does not serve to empower consumer choice. It is not as if on account of understanding the limits on my lawyer’s services, I am in a better position to make relevant choices in the pursuit of my interests — such as to choose another lawyer’s services that are not so limited. It is therefore not an ethico-professional norm that can be grounded in the consumer protection model concerned with the promotion of consumer choice. It is rather a clarification of the nature and limits of the discrete expertise that the professional may be expected to put into the service of a client’s interest, where the client is unequipped to make, or act on, the relevant sort of informed choices. It is thus an ethico-professional norm that is driven by the client protection model since it is concerned to facilitate a proper and specific duty of care in relation to this ‘expectation gap’. That is, to clarify both the sort of expertise the professional can put in service of their clients’ interests and the sort of interests this expertise can be expected to serve.

Moreover, while some such duties of care may be amenable to reasonably comprehensive specification in terms of laws or rules, for example, in codes of conduct, many are not. Sometimes this is because the duties of care are simply quite open-ended. Consider, for example, how a professional will need to exercise

professional judgment or discretion where the existing rules don't provide guidance. For example, the *Property, Stock and Business Agents Act 2002* (NSW) requires that real estate agents *be honest* in their dealings with the public. However, what this means is sometimes unclear and inevitably subject to interpretation. For instance, an industry representative I interviewed asked me the following question: does an agent have to tell a buyer that someone was murdered in the house he is selling?<sup>30</sup> The general prescription to 'be honest' requires some further clarity concerning what it is that one must be honest about. On the other hand, it is doubtful that one could provide an exhaustive list of such considerations. In the example given, one should presumably be guided by those considerations it would be reasonable to think may be material to a person's decision to buy the house — and the fact that a murder is known to have taken place in the house could count as such a consideration. But if an occupational actor is to be guided in this way, given that an exhaustive list of such considerations could not be provided to cover all such possibilities, it would seem to require that *ethico-professional conscience* be the driver for compliance with the dictum 'be honest'. That is, the professional's approach is guided by genuine commitments to be honest and transparent about considerations it would be reasonable to think may be material to their client's decision.<sup>31</sup>

A key implication of the client protection model is to strengthen the accountability and general integrity roles played by occupational associations and professional oversight bodies in regard to the proper discharge of the professional's duty of care to their clients. Accountability for those groups for which the market concerns of fair competition and consumer protection are at centre stage — such as

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<sup>30</sup> This, along with other interviews by myself and others on the team, was undertaken as part of: Alexandra et al, above n 2.

<sup>31</sup> One of the points made by Seumas Miller in this book is how the preventative aspects of integrity systems, such as ethical and professional development programs, seek to immerse professionals in the relevant ethical issues and problems in their field and thus develop such commitments.

real estate agents — is primarily market driven. The market, properly conceived and effectively operating,<sup>32</sup> where commercial integrity is about consumers and suppliers being restored to relative equals in power, knowledge, and so on, would thereby provide a proper guide for shaping the ethico-professional standards and norms for these groups — including accountability to their consumers. However, as indicated, the market cannot provide the sort of accountability required for the professional's duty of care to their clients. This duty of care is clearly not about making profit in fair ways and commitment to consumer choice. So the effective delivery of this duty of care across an area will require a significant governance role for professional oversight bodies and associations.

#### CONCLUSION

The legitimacy or relevance of guidance by ethico-professional norms has long been under fire on a few fronts. The self-interested tendencies of individuals and groups undermine proper guidance, and is not likely to go away. A key way to work towards accommodating self-interest and guidance by ethico-professional norms is by developing the integrity mechanisms aimed at delivering *deserved* reputation in an occupational area. Reputation is important across occupational groups, both the primarily commercial and competitive groups and those groups that are primarily cooperative enterprises concerned with service to significant social and ethical institutional purposes. Insofar as deserved reputation can be established through relevant integrity mechanisms, it would work to align self-interest with relevant

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<sup>32</sup> Of course, ideal markets do not exist. However, even if they did, this would not provide a comprehensive, accurate frame for ethico-professional considerations.

ethico-professional concerns, particularly those concerned with the legitimate interests of others.<sup>33</sup>

My concern in this chapter, however, has been to provide some characterisation of ethico-professional norms generally, and show why the ethico-professional norms attached to the professional autonomy/client trust model in particular are an indispensable and valuable feature of professional life. Problems of abuse will remain and accordingly call for a strengthening of, in particular, accountability mechanisms, including to independent parties and standards. But the idea that we might ‘regulate’ ethico-professional practice and do away with guidance by the ethico-professional norms fundamentally misunderstands professional ethics. Such guidance is a generally necessary and valuable feature across occupations, including for instance, real estate agents. In the case of the ‘traditional’ professions, however, the occupational area is properly characterised as primarily involving expert use of a substantial, complex, and largely discrete body of knowledge and skill in pursuit of significant ethical and social interests and goods. Here I have argued that effectively operating guiding ethico-professional norms, in particular robust forms of autonomy and a correlative duty of care to clients, are central to the exercise of this expertise and the pursuit of these significant individual and community interests that are the primary purposes of these groups.

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<sup>33</sup> For a more developed account of ethico-professional reputation, see Alexandra et al, above n 2, especially ch. 6.