Chapter One

A Puzzle About Professional Ethics

On June 8th, 1998 Colorado prosecutor Mark Pautler faced an extraordinary

ethical dilemma.   William Neal, a sadistic killer, had killed three people—in one case by

splitting open the victim's skull with a maul—and kidnapped three others.   Neal then left

the kidnapping victims in an apartment, instructing them to have police contact him when

they arrived.   Deputy Sheriff Sheryl Zimmerman contacted Neal by phone and began a

long conversation with him, during which he confessed to (or rather bragged about) the

three murders as well as the kidnappings. He also talked about surrendering to

authorities. Before doing so, he wanted a lawyer.

Not surprisingly, this was hardly Neal's first brush with the law. He had worked

previously with a defense lawyer named Daniel Platter, with whom he now requested to

speak before surrendering. Efforts to reach Plattner failed, however, because his phone

number was disconnected. Prosecutor Pautler, who was at the scene, believed Platter had

left the practice of law.   When Zimmerman told Neal of this development Neal asked to

speak to a public defender instead, and Zimmerman agreed to contact one.

For various reasons, Zimmerman did not do so.   Zimmerman and the other police

present were concerned that a public defender would advise Neal to stop speaking with

authorities, which would have prevented his apprehension.   At this point, Pautler, the

prosecutor, decided to pose as a public defender.   Zimmerman told Neal that a public

defender named "Mark Palmer" had arrived at the scene. Zimmerman then pretended to

brief "Palmer" on the situation before handing him the phone.   Neal was completely

fooled by the ruse and took "Palmer" to be a public defender who was his legal counsel. One of his requests for turning himself in was that "his lawyer" would be present when he was taken into custody. "Palmer," actually Pautler, responded that he would be there. Neal then divulged his location and was peacefully taken into custody. Neal would later be convicted and sentenced to death for his killing spree.

Along with the good work of Sheriff Zimmerman, Pautler's deception of Neal was the key in the apprehension of this dangerous and deranged criminal. Neal had bragged that he had killed over 500 people, and that he would kill more if provoked. His peaceful apprehension made the public safer. Mark Pautler's reward for his savvy and heroic actions? The state bar filed disciplinary charges against him, and his license to practice law was suspended.[1]

"Ordinary" Morality and Professional Role Obligations

The Paulter case highlights a puzzle about professional ethics. Professionals seem to have obligations that are quite different from those of "ordinary morality." Except perhaps for the strict Kantian, Pautler's actions would likely be justifiable from the standpoint of general morality. After all, he helped apprehend a murderer who posed a genuine threat to the public. Yet, because he was a lawyer, Pautler's deception was far from heroic and, at least for the Colorado State Bar, was grounds for discipline. While the Pautler case is unusually dramatic, the tension between ordinary morality and professional ethics is not.

There are a variety of ways in which professional role obligations seem different from the obligations that emerge in the ordinary life.   In some cases, professional role obligations are similar in kind, but different in degree, from ordinary obligations. For example, it is widely recognized that professionals have obligations to honesty and confidentiality that are far stricter than those in ordinary morality.   In everyday life, there is a prima facie obligation to be honest, but there are also a wide variety of cases in which deception is justifiable. In the professions, on the other hand, the range of justifiable deception is exceptionally narrow. Even in medicine, where paternalistic deception was long and widely tolerated, if not encouraged, deception of patients is now prohibited except in the most extreme cases.   This is also true in terms of confidentiality where doctors, lawyers, engineers, and teachers have obligations of discretion regarding sensitive client information that goes far beyond what is typically expected.

While some professional role obligations are different in degree from ordinary morality, others seem different in *kind*. Consider romantic relationships. It is generally permissible for consenting adults to develop and maintain romantic relationships. Indeed, one might say that consenting adults have a *right* to develop and maintain such relationships if they so choose.   However, for professionals such as lawyers, teachers, social workers, and therapists even consensual romantic relationships with their patients, clients or students are prohibited.

Prohibitions on romantic relationships seem to fall in the category of professional obligations that Bernard Geert refers to as "precautionary" obligations.[2]   Precautionary obligations prohibit or restrict particular actions that might not be inherently wrong, but are forbidden nonetheless because of the inappropriate appearance they create, or because

they contribute to a culture in which wrongdoing is otherwise encouraged.   In the legal profession, judges and prosecutors are typically required to avoid even the "appearance" of a conflict of interest, even though the mere appearance of such conflicts would not create bias or prejudice.   For instance, United States federal judicial ethics rules forbid judges (and their law clerks) from owning even a single share of stock in corporations directly involved in their cases.[3]   While it seems unlikely that owning a single share of a corporation would bias a judge, the appearance of impropriety alone is enough, it is argued, to justify such prohibitions.

<div align="center">Separatism in Professional Ethics</div>

How is the tension between ordinary morality and professional role morality to be explained?   One radical approach would be to hold that professional role obligations are not derived from morality at all, but are justified relative to a separate source of obligation.   From this perspective, professional role obligations are not only distinct from ordinary morality; they can require *violations* of ordinary morality. As Benjamin Freedman provocatively puts it, professional role obligations sometimes require professionals to "do evil."[4]   Such a position, dubbed "radical separatism" by some commentators[5] is attractive in that it takes seriously the distinctive and puzzling nature of professional obligations.   One could argue that Mark Pautler, for instance, was perfectly justified in his deception from a moral point of view, but because legal ethics is derived from a non-moral source, he nonetheless violated his obligations as a lawyer.

While attractive, such a position is unsatisfactory for a number of reasons. As a descriptive matter, it is not clear that professionals actually have obligations to "do evil." Certainly, uncontroversial cases are hard to come by. Freedman cites cases such as physicians observing confidentiality even the face of court proceedings, but only the most flatfooted utilitarian would consider such a case as a clear obligation to do evil. As Alan Gewirth points out, arguments for radical separatism tend to conflate "morality," understood roughly as what we owe one another as free and equal persons, with "ordinary morality," which consists of what persons owe one another in everyday, non-institutionalized settings.[6] Refusing to divulge information in a court proceeding might be a violation of one's obligations as an ordinary person. However, it does not follow that doing so is always immoral. Unique circumstances may, and often do, create unique *moral* obligations.

The descriptive weakness of strong separatism highlights a number of conceptual problems. Radical separatists must assume that no satisfactory answer can be provided to explain the unique nature of professional role obligations from the perspective of morality itself. However, severing the link between professional role obligations and morality altogether raises the thorny question of how professional role obligations gain their normative force, if not from morality. A common answer is to point to the unique features of the *role* and argue that it is the role, and not morality, that explains the normativity of the professional role obligation. However, this seems to commit the naturalistic fallacy in confusing the expectations that come with a role with one's obligations when exercising it.

Because of the heavy weather encountered by radical separatism, many commentators have opted for a more modest separatism in which professional role obligations are derived from morality, though sometimes indirectly, even if they are distinct from the obligations that one might have in everyday, non-institutionalized contexts. Here a broad distinction can be made between interpersonal and institutional approaches taken in the literature on this point. *Interpersonal* approaches focus on the unique relationship between professional and those whom they serve (clients, patients, or the public) and argue that professional role obligations are created by the distinctive moral features of those relationships. For many in the interpersonal camp, professional role obligations are not really separate from morality at all, but rather emerge when ordinary morality is applied in extraordinary circumstances.

Institutional approaches begin with an analysis of professions as social institutions, which play an important, if not necessary, role in the functioning of broader social systems, and then derive professional role obligations from the functional imperatives of those institutions. It is then argued that because the professions serve a unique role within social systems, professionals have unique role obligations.

Both interpersonal and institutional approaches begin with the basic claim that the distinctive nature of professional roles accounts for the unusual obligations that emerge in professional practice. To understand what is unique about the professions, either in terms of the distinctive relationships they create or the social functions that serve as their defining ends, it is worth understanding what constitutes a profession.

What is a Profession?

The idea of a "profession" was developed in the medieval period with the rise of the university. At that time, three "learned professions" were recognized: law, medicine and divinity. But what was unique about these occupations? Unlike many other occupations, law, medicine and divinity required formal, standardized, and highly intellectual training. At this time "philosophy" by and large meant the study of theoretical and practical (moral) knowledge, and included the natural science (aka natural philosophy), logic, mathematics, rhetoric, ethics, metaphysics, and the like. University study at what today is called the "undergraduate" level was essentially the study of philosophy broadly understood. The specialized schools or colleges of the university were devoted to the learned professions: the schools of law, medicine and divinity respectively. Accordingly, the traditional advanced degrees, aside from the Doctorates of Philosophy (Ph.D.), included the Doctorates of Law (J.D.), Medicine (M.D.), and Divinity (Dv.D.). The learned professions stood at the crossroads between *sophia* and *techne*, between abstract, intellectual knowledge, and applied, skilled craft.

Many of the core characteristics of the medieval learned professions are still considered essential properties of any occupation rightfully called a profession. Today professions are occupations that offer effective expert assistance to society which: (1) require extensive training, (2) have a significant intellectual component, (3) provide an important service to society, (4) are organized into associations which, and (5) articulate technical and ethical standards of competent of professional practice.[7]

"Formal" professions, such as law and medicine, also have (6) credentialing or licensing requirements that limit who may engage in a particular professional practice. For instance, the legal community serves as a gatekeeper for entrance into the profession by working with state regulatory agencies to create and enforce credentialing and licensing standards that limit entry into the field.   As a result, bona fide members of the profession enjoy (7) a monopoly on the market of their expert services. Formal professions such as law and medicine also enjoy (8) extensive self-governance in determining the technical and ethical standards of competent professional practice.

More "informal" professions have some, but not all of the qualities of the formal professions.   Journalism, for instance, has a significant intellectual component, requires a certain measure of expertise, and serves a valuable social service. However, it lacks formal training, credentialing, and licensing requirements. "Anyone" can be journalist in a way that is not true for more formal professions.   The distinction between formal and informal professions should be understood as a continuum as opposed to a strict bifurcation. Some professions, law and medicine being the chief examples, are paradigmatically formal. Some fields in engineering and accounting are also quite formal. However, most professions do not possess all eight characteristics of the formal professions and fall somewhere on the broad continuum between the paradigmatically formal professions on the on hand, and non-professional occupations on the other.

The professions, especially the more formal ones, are unique social institutions empowered with significant influence on important social services, systems, and markets. Professional practice, as an offer of expert assistance, also creates distinct relationships between professionals and the clients, patients, or members of the publics they serve. In

explaining the distinctive nature of professional role obligations, interpersonal approaches to professional ethics focus on the unique qualities of the professional-client relationship and derive professional role obligations from the moral demands created by that relationship. Institutional approaches to professional ethics, on the other hand, focus on the unique function that the professions play in broader social systems. While there are a variety of attractive interpersonal and institutional approaches to professional ethics, there is good reason to believe that neither approach alone explains the distinct nature of professional role obligations. Interpersonal approaches tend to be incomplete because they are unable to explain why professional roles should exist in their current form. Institutional approaches provide powerful accounts for the features of contemporary professional roles, but ultimately offer the wrong sorts of reasons for understanding the obligations that professionals have to those whom they serve. The weaknesses of the two approaches can be illustrated by considering the difficulties encountered by interpersonal approaches to professional ethics that focus on promising, and institutional approaches that focus on collective responsibility.

Interpersonal Approaches: Promising and Professional Ethics

One popular way of explaining the existence of special obligations is *volunteerism*. From this standpoint, special obligations are created by the voluntary, binding agreements made between individuals. Occupying a social role can therefore create special role obligations provided that the role player has made a binding agreement—a promise or contract—to adhere to certain expectations. Professional role

obligations gain their distinctive character because of the unique set of promises that professionals make via oaths, mission statements, and codes of ethics to one another and to those they serve.

A "promise" is a speech act by which a promisor communicates to a promisee that the promisor (1) has a firm intention to perform a certain action (ϕ) relevant to the promise's interests, and (2) recognizes that in making such a communication, the promisor now has a compelling moral reason to ϕ, provided that the promisor is morally free to ϕ. Promising is an intuitive explanation for professional role obligations because promises routinely create special obligations that apply only to select individuals. For instance, from the standpoint of general morality, no one is obligated to watch Sara's dog while she is away for the weekend. However, if Bill *promises* to do so, then he has an acquired obligation to do just that. Promises create the same kind of obligations in professions. Because professionals make promises to adhere to strict standards of conduct through their oaths, codes of ethics, and other communications, they acquire special obligations. The moral principle at play here is *fidelity* to one's promises, which is a widely accepted principle in ethics.

The promising approach seems to explain the existence of a distinct, yet morally grounded, professional ethics, and offers powerful moral reasons for why professionals obligations should be honored even when conflicting with everyday moral intuitions. Consider again Mark Pautler's deception of William Neal. However desirable his action might have been, the simple fact is that when he became a lawyer, Pautler promised, in his lawyer's oath and his acceptance of the legal profession's ethical rules conduct, to be

rigorously honest in his professional activities— a promise he violated when he deceived Neal.

Some professions quite explicitly understand professional role obligations as being grounded in the promises professionals make to one another and to those they serve. Consider the American Pharmacist Association code of ethics:

> A pharmacist has moral obligations in response to the gift of trust received from society. In return for this gift, a pharmacist promises to help individuals achieve optimum benefit from their medications, to be committed to their welfare, and to maintain their trust.[8]

The general practice of requiring professionals to take oaths or pledges also seems support the idea that promising plays an important role in normativity of the special rights and duties of professionals. Indeed, the word "profession" gains its meaning from the idea that the practitioner promises, or "professes," in an oath to uphold the service ideal of the practice.

Limitations of the Promising Approach to Professional Ethics

While an attractive way to understand to understand professional obligations, the promising approach is not without its detractors. The criticisms of the view can be grouped into two broad objections. First, the promising approach offers no ethical guidance on the content of the promises that professionals ought to make to clients or the general public. Second, the kinds of commitments that professionals make to clients and the public are often very implicit and informal. Describing such implicit commitments as promises over-burdens the concept of promising.

The first objection runs something like this. While promises may explain how the cluster of norms of a given professional role become obligatory, they cannot explain what those norms should be in the first place.[9] Professionals might promise to respect client confidentiality, but why should they do so? Here the promising approach runs into something of a dilemma. On the one hand, if the professional has an obligation to make such a promise, then it appears the promising approach is not the source of professional role obligations; rather the source must be the underlying duties to make those promises. On the other hand, if professionals have no obligation to make certain promises, then one is left with an ungrounded account of professional ethics. Would it be morally acceptable for a profession, say, medicine, to announce that it would not longer promise to respect confidentiality? Most commentators (and patients!) would argue that such a profession would be unethical.   If they are right, then it seems that promising—at least on its own—cannot explain the source of professional role obligations.

A second common objection to the promising approach focuses on the adequacy of promising as a description of the way professionals make interpersonal commitments to clients or the public. Professionals rarely, if ever, make formal, explicit promises to clients. Even for those who take oaths, and not all professionals do, such oaths are often presented as personal commitments and not necessarily as promises. If they are promises, promises to whom? Clients and the public might not be aware of the content of a professional's oath, or if the professional even took one. While there is no doubt that professionals make a variety of representations to the clients and the public that are rightly thought of as implicit commitments, it strains the idea of promising to describe these commitments as promises.[10] Recall that a promise is a speech act in which promisor

communicates a firm intention to action ϕ, as well as a recognition that the speech act morally binds the promisor to ϕ. While oaths might be promises, many of the informal forms of communication made by professions seem to fall short of the strict idea of what makes a particular speech act a promise.

These potential problems with the promising approach have led some commentators to argue that not only is the promising approach incomplete, it is essentially superfluous.[11] For these commentators, professional role obligations can be explained entirely by appeal to the unique social role played by professional institutions.

Institutional Approaches: Teleology and Professional Ethics

Institutional accounts of professional ethics derive professional role obligations from the rationale behind the institutionalization of the professional role. One of best institutional accounts comes from Alexandra and Miller's "teleological" account of professional ethics.[12]   To show how professional roles are morally structured, Alexandra and Miller offer a rational reconstruction of professional roles that aims to show that the *telos*, or "definitive end," of the professions is not simply the promotion of the public interest, but more specifically the satisfaction of "fundamental needs." A fundamental need, in their account, is a need that, if not satisfied, entails significant harm.

Fundamental needs, according to Alexandra and Miller, create moral rights and corresponding duties to beneficence when an agent (S): (1) has a fundamental need, (2) which S cannot satisfy him or herself, and (3) which another agent (P) can satisfy for S without significant costs to P. Alexandra and Miller defend this view by appealing to

intuitive and well-known "duty to rescue" cases.   If while hiking, P encounters S in a life-threatening situation, and can assist S with no significant risk or costs, then it is widely held that P has a duty to assist S.   These kinds of examples are common in ethical literature and, while not without critics, are uncontroversial.

Their next move, and the crux of their argument, is to extend the duty to assist to the institutional level and apply it to professional roles.   In modern society, individuals will have various fundamental needs (e.g. basic levels of health, education, and safety), which they cannot satisfy themselves. For most individuals, satisfying fundamental needs requires the assistance of others who are knowledgeable and skilled in servicing that need.   Because of this, Alexandra and Miller argue that modern communities have a *collective responsibility* to provide for the reliable satisfaction of fundamental needs. For instance, to satisfy the fundamental need for basic levels of healthcare, modern communities create hospitals and establish protocols for the proper training and vetting of health care providers.   The establishment of the medical profession is not simply done for the sake of efficiency, but helps fulfill the community's collective responsibility to provide for the reliable satisfaction of the fundamental need for health.   The medical professions, in turn, create rules and standards of conduct that also reflect the telos or unique function of the professional role.   Doctors are required to maintain confidentiality of patients because such confidentiality promotes the reliability of the profession's goal of meeting the health needs of the community.   Far from being the results of promises, on this account, the professional role obligations "are actually institutional specifications and instantiations of the underlying collective responsibility to the needy."[13] By making professional rights and duties essential to the role itself, Alexandra and Miller conclude

that individuals assume those obligations simply by occupying that role. One simply

cannot *be* a doctor without being obligated by the norms of medical ethics, because those

norms are necessary to satisfy the collective responsibility to provide adequate levels of

health.

Limitations of Institutional Approaches

Institutional approaches to professional ethics such as Alexandra and Miller's

teleological account offer a powerful explanation for the distinct nature of professional

ethics by linking the moral and functional imperatives of the professional role. Of

course, an account such as Miller and Alexandra's is also quite controversial. It entails a

commitment to an extensive view of beneficence; the idea of *collective* responsibility;

and the claim that individuals have a *right* to professional services. One could object

that their conception of beneficence is relentlessly broad, that moral responsibility rests

with persons, not collectives, and that professionals do not always service fundamental

needs. These are serious objections to their approach, but perhaps the most significant

limitation to their approach, and to institutional approaches generally, is that they give the

wrong sorts of reasons for why professionals have obligations towards those whom they

serve. This becomes clear when one considers the reasons to which clients, patients and

the public appeal when they have been wronged by professional misconduct.

Consider the case of the "gossiping plastic surgeon." Suppose a patient gets

treatments for cosmetic, plastic surgery. Cosmetic enhancements are usually not,

according to Alexandra and Miller a fundamental need.[14] Even so, by occupying the role

"surgeon," the physician has a variety of obligations to the patient because the role has been designed to effectively meet the collective responsibility to satisfy the aggregate of fundamental needs in society. Suppose now the surgeon violates confidentiality and embarrasses the patient by disclosing intimate information about him or her. For Alexandra and Miller, doing so would be wrong because it undermines the effectiveness of the role "surgeon" in fulfilling its institutional function. The surgeon would be failing in his or her part in promoting the collective responsibility to make reliable healthcare available to the public.

While such a view is sensible enough, it does not offer the right sorts for reasons for why the surgeon has wronged *this patient*. This is most clearly seen in the reactive attitudes that such a patient would have to the gossiping surgeon. Far from seeing the surgeon's duty as part of the "institutional specifications and instantiations of the underlying collective responsibility to the needy," the wronged patient will experience reactive attitudes of *personal* betrayal rooted in the idea that the surgeon was directly accountable to the patient. Such a patient would likely hold the surgeon accountable by saying something like "you hurt me" or "you betrayed my trust," rather than offering a complaint rooted in the society's collective responsibility.

Such reactive attitudes are by no means limited to cases in which fundamental rights are not being served. Consider the horrific case of Farad Fata, the oncologist who defrauded hundreds of patients by recommending aggressive cancer treatments they did not need. During his sentencing, victims were offered the opportunity to testify about the wrong done to them, and their statements centered on the *interpersonal* reasons that Fata was accountable. Said one patient, "I gave full and total trust to this man to get me and

my family through this journey I was about to begin….Dr. Fata took full advantage of my trust in him, my fear of dying and, most of all, my top of the line health insurance"[15] Indeed, Fata himself cited the interpersonal nature of his obligation in his apology to his victims: "I have violated the Hippocratic oath and violated the trust of my patients…"[16]

Professional Role Obligations and the Second-Person Standpoint

The reactive attitudes of those wronged by professional misconduct suggest that the reasons why professionals are accountable to those they serve are ultimately interpersonal and not institutional. Of course, it could be the case that these reactive attitudes are merely psychological reactions to harm, and that when one thinks rigorously about the rational source of what persons owe one another, one is lead to a more institutional theory of obligation. However, a wide variety of ethicists argue that this is not so— that the reactive attitudes of persons when wronged point to the fact that the source of moral obligation is ultimately interpersonal.

Stephan Darwall, for instance, argues in *The Second-Person Standpoint* that moral accountability is made possible by the fact that persons can claim a practical authority over one another and demand certain treatment, or justifications for treatments, in light of one's standing as a free and equal member of the moral community.[17] For instance, when having his or her foot stepped on, a person might say, "please don't do that," thus asserting an authority to demand accountability on the other. When someone wrongs another person intentionally, the reactive attitudes of the victim— resentment, indignation, betrayal, and the like— are rooted in the fact that persons qua persons are

uniquely accountable to one another.   It is not rational to be resentful about the gloomy weather—weather is not accountable to persons.   It is rational, on the other hand, for a person to resent someone who intentionally harms or takes advantage of his or her vulnerabilities.

Moral accountability; that is, holding others accountable in light of what one thinks is owed to them, emerges in what Darwall calls the "second-person standpoint"— an engaged, will-to-will, or I-Thou, relationship marked by mutual recognition of each other's status as *persons*.   When holding others accountable, persons rightly demand second-personal reasons for the justification of treatment they find objectionable; reasons that are rooted in the dignity of persons that should be honored as free and equal members of the moral community.   The reactive attitudes of wronged patients, clients, and members of the public are therefore not simply emotional reactions to perceived harm; they are *demands for accountability* rooted in the second-person standpoint.

Moral accountability is intrinsically, and perhaps dialectically, related to *moral obligation*.   For instance, when an agent holds another accountable and *blames* him or her for immoral conduct, the agent is referencing a moral obligation.   Darwall cites Mill's comment that "we do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it," either by law, the criticisms and social sanction of others, or "the reproaches of his own conscience."[18]   Or, as Darwall puts it, "there can be no such thing as a moral obligation and wrongdoing without the normative standing to demand and hold agents accountable for compliance."[19]

Because accountability and obligation are dialectically related—they are the preconditions for one another— the second-person standpoint plays an important role in

the kinds the reasons that ground obligations. Obligations need to be understood in the context of the second-person standpoint and the mutual recognition of personhood that is inherent in such a perspective. For this reason, moral obligations must be justified on the grounds of what is owed to the other as a free and equal member of the moral community who has the authority to hold one accountable for acting in a manner consistent with that status. As a result, moral justifications rooted in the efficient production of a certain state of affairs, even a morally desirable state of affairs, are the wrong kinds of reasons for holding others morally accountable. Obligations need to be justified in ways that are indigenous to the second-person standpoint if they are to offer the right sorts of reasons—second-personal reasons-- for why person can be held morally accountable.

Darwall's point is nicely illustrated by thinking about the wrong committed by enslaving another human being. Utilitarianism has often been criticized for allowing for the possibility of a just institution of slavery provided that it creates the greatest happiness for the greatest number of people. Bentham argued that this could not be so—that the pain created by slavery is so intense that the institution would never achieve net social utility. Even if one granted this point, one cannot help but ask: is the wrong of slavery really located in its net disutility for society? Or rather, does its wrong lie in the failure to extend the dignity that ought to be accorded to all persons qua persons? Surely the slave does not cry out, "You create disutility by treating me this way!" Rather, the slave cries, "I am not an animal, but a human being!" As persons generally would not grant permission to others to enslave them, they must accord to others the same dignity; or, as Lincoln put it, "As I would not be a slave, so I would not be a master."[20]

This same problem plagues institutional accounts of professional ethics. While it may be morally desirable to construct professional roles in a particular manner, and while doing so may satisfy broader collective responsibilities, these accounts fail to offer the kind of second-personal reasons that explain why professionals are accountable to the specific persons they serve. When a professional wrongs a client or patient, the blameworthiness is not exclusively, or even primarily, due to the professional's failure to promote the collective responsibility to satisfy fundamental needs. Rather, the primary blameworthiness of wronging those served by the professional lies in its violation of the client or patient as persons. It is for this, second-personal reason, that wronged clients appeal to betrayed trust, promise breaking, or inhumane treatment when holding professional misconduct blameworthy.

A Third Way: Trust as Mediating the Interpersonal and Institutional

Interpersonal accounts of professional ethics such as the promising approach rightly offer second-personal reasons for professional accountability, but fail to sufficiently anchor which specific obligations the professional should promise to uphold. Moreover, promising may be too specific a practice to account for the variety of implicit ways that professionals make commitments to those they serve. On the other hand, while the institutional approach explains why it is desirable, perhaps even morally desirable, for professionals to adopt certain standards of conduct, it fails to give the right kinds of reasons that show why professionals are morally accountable *specifically* to the persons they serve.

An adequate approach to professional ethics must integrate institutional and interpersonal considerations if it is to explain both the distinct nature of professional role obligations, and why those obligations are *owed* to those served by professions. One possible way of mediating these approaches, and the one developed in this book, is to ground professional role obligations in the reasons professionals have to invite, develop, and honor the trust of those they serve. Like promising, trust is an interpersonal moral phenomenon and generates second-personal reasons rooted in an I-Thou relationship between persons. Indeed, for some ethicists, promises are a kind of invitation to trust. Moreover, trust seems to be a key element in both the reactive attitudes of wronged clients, such as Dr. Fata's victims, and in the motivation of virtuous professionals committed to honoring the trust they have invited from those they serve. At the same time, trust is well known in the social sciences as a key element in the functioning of social institutions. Indeed, ethicists have only recently come around to the study of trust as a moral concept. Before that, trust was the province of social scientists who saw it as a mechanism that accounted for the stability of practices and complex social institutions.

Trust-Based Professional Ethics: The Main Ideas

Trust-based professional ethics begins with the relatively weak claim that the telos professional practice generally is *an offer of effective expert assistance*. Accepting such an offer entails a variety of vulnerabilities for patients, clients, employers, and even the public. Professional-client relationships are marked by often-unavoidable knowledge and power asymmetries. Those who rely on professionals entrust important interests—in

many cases fundamental needs— to the discretionary decision-making of the professional. Because patients, clients or the public cannot closely police the professional's work, they must *trust* the professional.   Trust is the coin of the realm of professional practice. When trust is insufficient, clients and patients deploy a variety of *hedging* strategies to limit their vulnerability, but these very strategies limit the effectiveness of the professional service. For instance, patients with low levels of trust in their physician are less likely to seek medical assistance, less likely to be forthcoming about their condition, less likely to follow through on treatment plans, and more likely to perceive treatment outcomes as negative ones. Additionally, the public's trust in professional communities is essential to the support for social arrangements by which the formal professionals are given self-governing monopolies on key social services.

Trust is essential to effective professional practice, but that does not alone prove that professions have an *obligation* to invite and develop client trust. The efficiency of practices alone does not provide the second-personal reasons necessary to make them obligatory. The professional's obligation to invite and develop trust is rooted in the respect for the rational personhood of the client, patient, and general public. Professionals are given a wide variety of social capital, ranging from increased prestige to monopolistic control of social services. In return, those served by professionals reasonably expect effective expert assistance. The idea of reciprocal justice or "fair play"[21] requires that professionals honor their end of this "social bargain" and engage in the practices necessary for their expert assistance to be effective, which, in this case, includes inviting and developing client trust.

Professionals have an obligation to invite and develop the trust of those whom they serve. Given the important needs entrusted to their care, professionals invite trust by making a variety of explicit and implicit fiduciary commitments. They invite trust on the grounds that they can be relied upon, among other things, to be uniquely honest, loyal, respectful of client autonomy, discreet and diligent. In inviting a trusting dependence from those they serve, professionals have an obligation to honor their fiduciary commitments as a matter of respect for the unique vulnerability they have invited from those who trust them.

Because they have an obligation to invite, develop and honor the trust of those whom they serve, professionals, by extension, have an obligation to be *trustworthy*. Clients form trust in professionals in part because they infer that professionals are trustworthy. Professionals who are not trustworthy will not be able to develop trust, or will to do so through unethical deception. To be trustworthy, professionals must, among other things, develop the personal traits necessary to reliably care for the interests entrusted to them. Integrity, loyalty, honesty, respect for autonomy, discretion, beneficence and diligence are therefore not only fiduciary commitments—promises, if you will— that professionals make to those who depend on them, they are *professional virtues* that professionals must develop in their own character.

Being trustworthy is necessary to develop an ethical basis for trust with clients, but it is not sufficient. Professionals must be *effectively trustworthy*— that is, they must not only possess the professional virtues that make them reliable, they must also effectively signal or communicate that trustworthiness to (would-be) dependents.

Impression and signal management is not only a good business strategy; it is necessary if the professional is to develop client and public trust.

Developing the professional virtues and being effectively trustworthy highlight the important role of the profession as an *ethical community*.   As ethical communities, the professions maintain ongoing ethical/existential, moral, and application discourses that are oriented to interpreting the professional telos and the obligations necessary to responsibly care for the vulnerability of those they serve. Professional communities link these discourses with educational practices that aim at developing the professional virtues among their members, and credentialing and compliance standards that offer institutional incentives for responsible conduct. Finally, community members make intersubjective commitments to one another, sometimes dramatically in the form of oaths, to uphold the obligations inherent in the profession's practice.

The profession-as-ethical-community plays an important role in the effective signaling of the professional's trustworthiness by developing and promulgating the reputation of the professional social-type. Because those who depend on professionals often have little, if any, personal familiarity with them, they depend on the reputation of the professional role in extending *anonymous trust* to professionals.   When inviting anonymous trust, professionals utilize the reputation of their professional role as a "bootstrapping" mechanism to initiate trust development with clients.   Reputation of the professional role works dialectically with professional's impression management, and the ethical quality of one's professional conduct.   Given the importance of reputation, professionals are also accountable to their peers because their own conduct influences the overall professional reputation. When professionals engage in misconduct, they not only

wrong their clients or patients, they also wrong fellow members of the professional

community by damaging the reputation of the professional role.

Trust-Based Professional Ethics and The Pautler Case

How would trust-based professional ethics apply to the case of Mark Pautler—the

prosecutor who pretended to be a public defender in order to apprehend a murderer? It

might be tempting to think that an exclusively teleological approach would be sufficient

to explain his unique role obligation to honesty. Lawyers serve the fundamental need for

justice, and honesty is a requirement of servicing that need. But Pautler could (and did!)

argue that if the goal of the legal profession is to promote justice, surely honesty must at

least *occasionally* give way to other norms, such as efficiency in capturing dangerous

criminals. Paulter argued that his deception of Neal actually promoted the defining end

of the legal profession.

The Colorado Supreme Court, which, on the recommendation of the Colorado

State Bar, suspended Pautler's license to practice law, took a dramatically different tack.

It held that honesty was one of the core traits of the trustworthy lawyer. For that reason,

lawyers are rightly held to rigorous standards of honest conduct. This is reflected in the

Model Rules of Professional Conduct for the Colorado State Bar which state: "It is

professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty,

fraud, deceit or misrepresentation."[22] The Court took note the rigorous, almost categorical

nature of this rule.

> No exception to the prohibition contained in Colo. RPC 8.4(c) is found
> within the rules nor is any suggested within the explanatory commentary.

After exhaustive research, not a single case has been discovered which recognizes an exception to the ethical principle that a lawyer may not engage in deceptive conduct.[23]

It is no accident that lawyers are held to such a rigorous standard of honesty. The legal profession serves the public interest of preserving and promoting justice and as such, it plays a vital role in the preservation of society itself. Individual clients create a significant personal vulnerability by taking up the lawyer's invitation to trust. Moreover, the legal profession enjoys broad self-governance in its monopolization of legal services. Such self-governance requires an extension of significant trust from the general public to the legal profession. For these reasons, lawyers make clear—dramatically clear in their oath, but also in their model rules of professional conduct— that they can be trusted on the grounds that they will be, among other things, honest with those who depend on them. These commitments are an important way in which the profession develops the reputation of professional role. Were lawyers not to make such commitments, they would not be able to effectively offer expert assistance to clients and the public at large, thus exploiting the benefits of their role without doing their fair share to promote its core value.

In addition, the Court concluded that, even among lawyers, Paulter had distinctive, and more stringent, professional obligations given his unique role as a prosecutor.

Prosecutors, who are enforcers of the law, have higher ethical duties than other lawyers because they are ministers of justice, not just advocates…They must be forever vigilant that their conduct as attorneys not only meets the minimum standards of conduct set forth in The Rules of Professional Conduct but they must strive to exceed those requirements. They must also carefully carry out their duty to protect the public in the exercise of their prosecutorial responsibilities while maintaining the duties and responsibilities of professional conduct imposed upon them by The

Rules of Professional Conduct. They may not choose to satisfy the former at the expense of the latter.[24]

However noble his intention, Paulter *exploited* his role by taking advantage of the trusting expectations created by the fiduciary commitments made by lawyers, including himself, and the role reputation developed by the legal community. His personal representations to Neal were nothing short of an invitation to trust based on those commitments. Pautler was therefore obligated to honor, as in a promise, the trust he had secured from Neal. If he was not willing to do so, then he should not have invited that trust. When instead he used that invited trust to deceive the "client" he pretended to serve, he wronged Neal by exploiting his trust. The bona fide public defender later assigned to Neal complained of the difficulty in creating a trusting relationship with him once Pautler's ruse had been exposed. Neal eventually dismissed his public defender and represented himself at trial.

Pautler also wronged his peers. Given the importance of the professional reputation, lawyers make a commitment to one another that they will reliably conduct themselves in a manner that promotes the reputation of the profession. A lawyer offering to assist a "client," and then using that trust for the purpose of deception, strikes at the very heart of the reputation of the professional role. Paulter made a commitment to his peers that he would be honest in his professional conduct, a commitment he breached when he deceived and manipulated Neil.

There are, of course, limits to one's obligation to honor trust and keep one's commitments. For instance, there is no moral obligation to keep a promise if doing so requires immoral behavior. Pautler argued that his case constituted just such an

exception—and it is here that a certain measure of reasonable disagreement about the Pautler case has emerged. Pautler argued that his deception of Neal was *necessary* to protect the public from an imminent threat and that he was therefore obligated to do so. If correct, this would justify his dishonesty. While there is a *prima facie* obligation to honor trust, those obligations can be trumped by other, more important obligations. Because he was morally required to deceive Neal, Pautler argued, he was freed from his duty to honor Neal's trust.

The Colorado Supreme Court rejected Pautler's argument, in fact, though not in principle. In this case, the court held that the fact the sheriff had already made an effort to contact *another* defense lawyer indicated that the subsequent deception of Neil was unnecessary. If one defense attorney had already been sought at Neal's request, why not simply seek out another?

Pautler also argued that, while perhaps not necessary, the threat to public safety was significant enough to make his deception morally desirable. The court rejected this view because of the slippery slope such a principle would create. If Pautler were allowed to lie, even for noble intent and under extreme conditions, then the door is opened for less scrupulous lawyers to find/invent pretexts that would justify an increasing range of dishonesty. Dishonest behavior on the part of lawyers discredits the profession and the justice system itself, so clients, the public, and even lawyers themselves, have good reasons to insist on categorical honesty among lawyers, even in extreme cases. To invite and develop the trust of clients and the public, lawyers make a "zealous" commitment to honesty—even in cases in which such a commitment does not serve the public interest in the immediate instance. It is for these reasons that Pautler was required

to follow rules of conduct categorically requiring honesty in professional conduct.

Conclusion

The Pautler case illustrates how professionals have a variety of role-based obligations that are quite distinct from those in everyday interactions. Interpersonal and institutional accounts are each too limited to provide a satisfactory explanation for the distinct nature of professional role obligations and are best brought into a dialectical relationship via the mediating concept of trust. The telos of a given profession elucidates the range of trust that should be invited and developed from patients, clients, and the general public. Once invited, professionals have an obligation rooted in the idea of fidelity to honor the trust extended to them. Because client-professional relationships are unusual in that they occur under relatively anonymous conditions, those who depend on professionals entrust important interests to their discretionary judgment in a relationship characterized by knowledge and power asymmetries. Professionals must invite and develop an unusual form of trust, and therefore have unusual obligations when honoring that trust.

Notes for Chapter One

[1] *People v. Pautler* 47 P.3d 1175, 1184 (Colo. 2002).

[2] Bernard Gert and Charles Culver, *Bioethics: A Systematic Approach* (Oxford: Oxford University Press, 2006).

[3] *Code of Conduct for United States Judges*, accessed May 10, 2016, http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#d.

[4] Freedman, Benjamin, "A Meta-ethics for Professional Morality," *Ethics* 89 (1978): 19.

[5] Smith, John-Christian, "Strong Separatism in Professional Ethics. Professional Ethics," *Professional Ethics* 3 (1994): 117-40.

[6] Alan Gewirth, "Professional Ethics: The Separatist Thesis," *Ethics* 96 (1986) 286.

[7] Bayles, Michael. *Professional Ethics* 2nd Ed (Belmont, CA: Wadsworth, 1989): 7-13.

[8] "Code of Ethics for Pharmacists," American Pharmacist Association, accessed August 13, 2015, http://www.pharmacist.com/code-ethics.

[9] Andrew Alexandra and Seamus Miller, *Ethics in Practice: Moral Theory and the Professions* (Kesington, AUS: University of New South Wales Press, 2009): 105.

[10] For instance, see Michael Davis, "Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession," *Philosophy and Public Affairs* 20 (1991): 150-167.

[11]Alexandra and Miller, *Ethics in Practice: Moral Theory and the Professions,* 105.

[12] See Alexandra and Miller, "Needs, Moral Consciousness and Professional Roles," Professional *Ethics* 5 (1996): 43-61; Alexandra and Miller, "Ethical Theory, 'Common Morality,' and Professional Obligations," *Theoretical Medicine and Bioethics* 30 (2009): 69-80 and Alexandra and Miller, *Ethics in Practice: Moral Theory and the Professions*.

[13] Alexandra and Miller, *Ethics in Practice: Moral Theory and the Professions*, 80.

[14] Alexandra and Miller, "Needs, Moral Self-Consciousness, and Professional Roles," 55.

[15] "Patients Give Horror Stories as Cancer Doctor Gets 45 Years" CNN, accessed on August 20, 2015, http://www.cnn.com/2015/07/10/us/michigan-cancer-doctor-sentenced/.

[16] Ibid.

[17] Stephan Darwall, *The Second-Person Standpoint: Morality, Respect and Accountability*. (Cambridge, Mass.: Harvard University Press, 2006).

[18] Darwall, *The Second-Person Standpoint*, 92.

[19] Darwall, *The Second-Person Standpoint*, 99.

[20] Abraham Lincoln, *Speeches and Writings, 1832-1858*, ed. Don Fehrenbacher (NY: Library of America, 1989): 484.

[21] John Rawls, *A Theory of Justice* (Cambridge Mass.: Belknap Press, 1999): 93-98.

[22] *People v. Pautler*.

[23] Ibid.

[24] Ibid.