

such things as parental ethics, political ethics, business ethics and religious ethics. In each case the distinctive character of the enterprise derives from the particular relationships and the content associated with particular contexts. These kinds of ethics

do not call for different kinds of ethical reasoning than that called for by ordinary ethics. Rather, it is in ordinary ethics that we find the understandings of moral obligation that are common to all of these more particularized forms of ethics.

Discussion Questions

1. Why does Welch say that professional ethics is ordinary?
2. What does he say is the "common thread" that makes professional ethics ordinary in this way?
3. What does it mean to say that professionals are called to a higher standard of morality than other people?
4. What are the three reasons Welch gives for thinking that professionals are called to a higher standard of morality? How does he respond to these reasons?
5. How would John-Christian Smith respond to the claims made by Welch?
6. After reading the articles by Smith and Welch, which view do you think is more plausible?

The Excuses That Make Professional Ethics Irrelevant

BANKS MCDOWELL

THERE IS WIDESPREAD AGREEMENT that we are facing a crisis in professional ethics. A common strategy for dealing with that crisis, or the perception that such a crisis exists, is to increase ethics instruction in the professional schools and to require continuing education programs devoted to ethics. The governing assumption seems to be that professionals must be taught what their ethical duties are. The widely-held public perception that professionals are unethical does not appear, however, to be based on a belief that professionals, or their clients, are unclear about what ethical conduct is, but rather that professionals do not act ethically. It appears to be much more a problem of compliance than of incomplete knowledge.

Professional groups claim that public perception is distorted, citing polls which have shown that while there is distrust of a profession as a whole, people like and trust their *own* doctors, lawyers, and accountants. Most professionals certainly view themselves as good practitioners, rather than as one of the few bad apples causing rot in the barrel. Professions are using public-relations techniques in response to the public's perception. This approach can succeed only if the number of unethical actors is in fact relatively small. The public's perception, fueled by almost daily media reports of unethical actions by professionals, is quite the reverse. . . .

. . . If the real problems facing professionals are not ones of learning, but of living up to the expect-

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tations of professional ethics, we should focus more on the excuses offered and accepted for lapses from ethical standards. "Excuse" carries different meanings. One, suggested by the word "alibi," is an attempt to avoid *responsibility* legitimately placed on the actor. Another is a *justification* for being excepted from an otherwise applicable ethical obligation. "Excuse" may also refer to an *explanation* as to why the unethical conduct occurred. Such explanations are useful if one wants to change conduct.

In his classic article, "A Plea for Excuses," J. L. Austin shows that one cannot fully understand responsibility, ethical or legal, without adding the realm of excuses to that of normative rules which specify duties. "If ordinary language is to be our guide, it is to evade responsibility, or full responsibility, that we most often make excuses. . . ."¹

Four Types of Excuse

The excuses one hears, and perhaps uses, in professional practice fall into four groups: the claim of ignorance, the transfer of responsibility, the irresistible pressure, and the fault of machines. I will consider each in turn.

THE CLAIM OF IGNORANCE

One excuse often used is "I did not know what the ethical rules were." Such an excuse may be sincere, particularly among older professionals who were not required to take courses in professional ethics. Some ethical requirements are in fact counter-intuitive, such as the rigid requirement of confidentiality placed on lawyers even if the information in question is about harm being done

to third parties. Required ethics courses undercut the legitimacy and persuasiveness of this excuse. As a practical matter, any system of regulatory standards with which people must or ought to comply has to reject this excuse. "Ignorance of the law is no excuse," and if professional ethics is not just law, but ethics, ignorance of ethics should fare no better.

I am skeptical about the factual accuracy in most cases of the claim of ignorance. How often does a professional acting *unethically* really do so out of ignorance or naivete? Even if the claim were true, however, it cannot in general be accepted as a valid excuse because it has to be the duty of a professional to know what his or her ethical obligations are.

To the extent that this excuse is sincere or widespread, increased instruction on the duty side of ethical responsibilities would be the appropriate response.

THE TRANSFER OF RESPONSIBILITY

Perhaps the most common excuse is that a particular ethical breach was not the agent's responsibility, but someone else's. Much ethical analysis is built on a two-person model—the autonomous professional and the client. In such a simple model, it is difficult for professionals to evade or escape responsibility for injuries their professional activities cause a client or third parties. That model misses the reality of contemporary professional practice. As Christopher Lasch has observed,

[t]he prevalent mode of social interaction today is antagonistic cooperation (as David Riesman called it in *The Lonely Crowd*), in which a cult of teamwork conceals the struggle for survival within bureaucratic organizations.²

Most professional practice today is in large groups—law firms, accounting firms, or medical clinics and hospitals—which are bureaucratic in style and organization, and where professionals are both competing with and cooperating with each other. There are always superiors, rivals for promotion, other members of the team, often junior

¹J. L. Austin, "A Plea for Excuses," *Philosophical Papers*, 3rd. ed. (Oxford: Oxford U. P., 1979), note 7 at 181. Austin gives "justification and excuse" a different meaning than I do. The situation where an actor admits that he acted in a certain way, but claims it was a good thing is what he means by justification. In contrast the situation where the actor admits that he acted in a wrong way, but offers an explanation to partly or totally escape responsibility is what he means by "excuse." I am more concerned with distinguishing between persuasive and unpersuasive excuses. The person to be persuaded may be an objective observer, the professional or legal institution which can impose a sanction, or the actor himself.

²Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (New York: Warner Books, 1979), p. 209.

professionals or staff, who can be blamed for lapses. From childhood on, it seems almost instinctive to pass blame to someone else. Harry Truman's famous statement, "The buck stops here," is striking because it seems an unusual assumption of responsibility for a contemporary person to take. A more representative figure is Ross Thomas's fictional con-man, Otherguy Overby. The nickname "Otherguy" came from his often-used and almost always successful excuse, "The other guy did it."

Not only are specialized professional groups today the dominant mode of practice for many professions, but elite autonomous professionals are increasingly integrated into large corporate organizations. Major corporations, private or governmental, will have legal departments, medical clinics, accounting departments, engineering departments, etc. Blame can often be transferred onto the other types of professionals. This is not always overt and conscious evasion of responsibility. It may be factually difficult to determine individual responsibility for ethical lapses in complex professional operations.

An individualist ethics which permits the transfer of responsibility around the ring of participants in group activity poses two difficult problems. The first problem is developing some method for fixing responsibility of a team activity onto some particular member either because he or she was the director of the team or else was the actor who most closely related causally to injuries caused a client. The legal system which has faced this problem for decades, if not centuries, has moved in many contexts to theories of absolute, or non-fault, liability as a way of avoiding this problem.

The second difficult problem is that of collective responsibility or guilt. This is an old issue in ethics, but one that is as interesting as it is important. There may be different types or degrees of unethical conduct. Not only the most casually significant actor bears ethical responsibility, but the members of a team or group who observe the unethical activity of some members and do not take whatever action is available to them to prevent the activity must bear ethical responsibility, as well. This has been most discussed in connection with the responsibility of the German people during the Nazi period in regard to the holocaust, but it is an issue that must be faced in any group or

professional activity where some actors are unethical. Others cannot ethically turn their heads away and disavow responsibility.

THE IRRESISTIBLE PRESSURE

Another kind of excuse is that the professional does not have the power to act ethically or that the cost of ethical behavior is too high. Most professionals regularly feel pressure to act unethically. In assessing the responsibility of a particular professional under pressure, one must distinguish the following excuses:

(a) "I had to do it to keep up with competitors, either inside or outside the professional working group I belong to." There is a widespread cynical belief that acting ethically places one at a competitive disadvantage. It is difficult to prove or disprove the truth of that belief. A variant of this excuse is the claim: "If I don't do the unethical act and earn the reward, someone else will." Or, the claim: "If that person is unlikely to suffer penalties, why should he or she have the reward rather than I?"

(b) "I had to do it because my employer told me to or expected me to." In the real world, it is often unnecessary for an employer to explicitly order an employee to act in ways that are questionable because of the widely-held cynical view that this is what is expected.

(c) "Loyalty to the group requires that I participate in unethical activity even if I have reservations." This is a well-recognized ethical dilemma when group loyalty seems to conflict with duties owed to others. It raises the whistle-blower's problem with all its moral conflicts. The power of peer pressure is real and often seems irresistible if one desires to remain a member of the group.

(d) "Financial pressures compel unethical behavior." Large organizations of professionals have substantial fixed overhead costs, large investments in technology and in the education of individual professionals, and today even marketing costs. These costs plus adequate compensation for the professionals represent an income floor the organization cannot fall below without going bankrupt. This may not appear to be a serious moral dilemma, because ethical professionals presumably would accept bankruptcy or leave the profession if the only way to continue practicing were to pad expenses or provide unnecessary services. A poll of candid professionals would, I sus-

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pect, show that not many would agree that bankruptcy was preferable to some degree of overcharging. Financial pressure can also lead to overwork so that the best level of performance cannot be maintained. A well-known example is that of medical interns and residents who are expected to be on duty for tours of 36 hours or more with little opportunity to rest.

There are two broad ways to deal with seemingly irresistible pressures that professionals claim push them into unethical activity: either (1) to demand that all professionals be strong enough to resist the pressure or, (2) to redesign social structures and the way professional services are delivered in ways that minimize such pressures. It is obviously easier and less disruptive to select the first alternative and to expect professionals to be strong enough ethically to resist such pressures. That may, however, be unrealistic, which forces us to consider the second alternative more seriously.

THE FAULT OF MACHINES

Another way of evading responsibility is to blame it on technological failure. Almost all professional activity today makes use of complex technology, consisting of machinery and the techniques for using it. Malfunctions can occur in machinery, in communication systems, in techniques, or in integrating the work of various professionals who are masters of specialized technology. One can always argue that the professional is responsible for all the technology used in handling a client, but technology today is so complex that one must rely on technical experts when the system malfunctions. For example, medical doctors, even though trained in chemistry and pharmacology, rely heavily on drug manufacturers for information about appropriate drugs, side-effects, dosages, etc.

We have been conditioned to think that machines can be made to work perfectly. They are not supposed to possess the human capacity for error. When machines and technology break down, there is the same diffusion of individual responsibility we talked about above. Was it the designer, the manufacturer, the wholesaler, the installer, the repairperson, or the user who committed the human error which led to the machine's malfunction? In both ethical and legal theory we still try to identify particular individuals

who must bear the responsibility for technological failure, but that effort seems artificial and unrealistic. No single person can be responsible for the functioning of incredibly complex and integrated technological systems. To select any single one or a small group to bear that responsibility raises the difficult issue of whether it is ethically defensible to ascribe responsibility to a person who has no real control or ability to prevent such malfunctioning.

The Fallibility of Human Beings

An additional excuse used by all professionals who view themselves as decent people is that we are all fallible and a certain level of ethical wrongdoing is unavoidable and tolerable. Defendants in malpractice suits routinely describe their misconduct as only a minor error and blame greedy lawyers and ungrateful clients for suing. The error is not seen as something the professional should be held responsible for, so it is unnecessary to alter conduct, except defensively to be prepared for the next lawsuit.

This common claim made by professionals who have injured their clients in some way has three distinguishable elements. One element is whether the professional was acting in good faith, i.e. without the intent to harm. Carelessness, a middle position between intentional and accidental injuring, has gradually become for lawyers, who label it negligence, the most important aspect of civil liability.

The second element is the amount of harm caused by the wrongdoing. While one can argue that the degree of injury is not relevant to the question of wrongdoing, in the practical world it makes an enormous difference. . . .

. . . The third aspect is that some tolerance for the inherent fallibility of the human actor needs to be built into any ethical system. Much ethical discussion still assumes that the ethical human being should not have such lapses. This is not a weak excuse because we all, however competent and decent, cannot go through a professional life without some professional misjudgments or ethical lapses. The problem is that of determining what degree of mistakes made in good faith is acceptable. The difficulty, of course, is that once this excuse is accepted, intentionally unethical professionals can always *claim* their actions were of this intermittent good faith quality.

These excuses are sophisticated versions of excuses regularly used by children. My secretary, Leslie Vigus, who has two teenage daughters, told me she always hears "You didn't tell me I wasn't supposed to do that" or "My sister did it." Courses in professional ethics are often expected to undo or reverse ethical training that has been going on for two or more decades from parents, peers and teachers, and that has frequently tolerated such avoidance of responsibility.

Implications for Professional Ethics

These various excuses are not always conscious efforts to avoid ethical responsibility. They reflect the reality of the way professions are organized and the way in which they function, with the consequent constraints and pressures on individual professionals. Teachers of professional ethics must help students understand and adapt to that reality in ways consistent with both the individual's ethics and to the ethics of the profession. Otherwise, there will be enormous guilt carried by professionals and little change in the conduct of the profession as a whole.

Legalizing professional ethics as a set of quasi-minimal requirements leaves aspirational ethics out in the cold. Furthermore, even those fairly remote boundary lines may appear insignificant because effective sanctions are rarely used.

Should the common excuses employed by professionals for actions of questionable morality be thought of as mere alibis or as genuine justifications? For the great range of ethical questions, this must be determined by the actor. If the professional feels the excuse is appropriate, whether from rationalization, ignorance, or on valid grounds, he or she then feels free to act against the standard. The reality testing of that judgment might be the reaction of peer professionals. However, many, if not most, professionals are reluctant to criticize their peers' actions, partly out of professional courtesy and partly as a protective device, believing that refraining from criticizing other professionals will encourage others to abstain from criticizing them. Another reality test—at least at the borderlines where professional codes of ethics are at work—might be whether some professional or legal sanction is sought. For those amoral professionals whose only concerns are about conse-

quences, that likelihood is not great enough to effectively inhibit self-interested justifications even for gross violations of ethical standards.

If one feels, as I am inclined to do, that the problematic excuses are more likely the result of bad institutional structure than of consciously immoral actors, then one major task of ethical study and education must be to help professionals identify the pressures that push them toward unethical action, to realize when they have gone past acceptable or tolerable limits, to realize that *excuses are often a way of avoiding these tough choices*, and to survive in that difficult world where one is often uncomfortable with the choices one is forced to make.

A list of acceptable excuses coupled with our well-known capacity to rationalize action in accordance with self-interest could combine to trivialize the operation of ethics in professional practice. We seem to have produced in professionals a fair amount of anxiety and guilt without the inner strength or institutional support that leads to personal or systemic change which would relieve the gulf between ideal and practice. The psychological price professionals pay and the social price clients pay is still excessively high.

Conclusion

Looking at professional ethics through the lens of the excuses offered when a professional has not complied with a putative obligation raises a series of questions that ought to be addressed by specialists in professional ethics. Under what circumstances is an excuse a mere alibi for unethical conduct and when is it a genuine justification? If an excuse relies on the individual's position in professional organizations, should we not criticize the way the profession is organized and suggest structural changes that might reduce the number of situations in which problematic excuses are required? To what extent should we assist each other to adjust to what some regard as a corrupt system and to what extent should we encourage each other to be agents of change inside that system?

The analysis of professional ethics which says that the problem is lack of knowledge of pure ethical duties, the assumption that individual professionals always have the option to act in accordance with those duties, and the definition of

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ethics as establishing ethical borderlines prevent us from dealing with the really difficult issues. Such ethical analyses appear theoretical and irrelevant to students and professionals who know or intuit that the most important moral issues they will meet are how to avoid or come to terms with systemic pressures, that is, to develop some defensible way of adjusting personal and professional ideals with financial and competitive pressures to compromise.

In "A Plea for Excuses," J. L. Austin recognized that he had only opened up the subject of

"excuses" and that a much more detailed study would enlighten the entire area of responsibility and what it means to act or not to act. In the professional arena, fundamental problems that are masked by excuses still need to be addressed. The use of excuses to evade personal responsibility contributes to the marginalization of professional ethics. Until we deal more forthrightly with the existence of a ready and acceptable set of excuses, the current emphasis on professional ethics will remain largely a public relations gambit rather than a real improvement in professional integrity.

Discussion Questions

1. Why is McDowell addressing the issue of excuses? Why does he think it is important?
2. What are the different meanings of the term *excuse*?
3. What are the five types of excuses that professional practice falls into and what does each one mean?
4. According to McDowell, when is an excuse legitimate and when is it not? How would you counter or respond to an excuse that is not legitimate?
5. What would McDowell say about a professional who, after making a mistake, says, "I'm only human. Nobody is perfect!" Would it matter if that professional was a teacher? A lawyer? A surgeon?

Cases

Case 2-1

Mr. Roger Chancey, an engineer for Solar Tron Microwave, discovered a flaw in the design of one of Solar Tron's products. Mr. Chancey had good evidence that the flaw would cause harm to the buyers of the product. He went to his supervisor and told her of the flaw. She waved Mr. Chancey and his evidence away by saying, "It's too late. The product is already on the market." Mr. Chancey went over her head to the general manager. The general manager agreed with Mr. Chancey about the problem. He pulled the product from the market and fired Mr. Chancey's supervisor. When Mr. Chancey was asked why he went over his supervisor's head, Mr. Chancey responded, "I was just following the rules."

1. According to Michael Davis, what are the different ways of understanding Mr. Chancey's reply: "I was just following the rules"?
2. Does Kant's emphasis on obedience to the laws of the categorical imperative have any bearing on Mr. Chancey's excuse?
3. Do any of the moral theories discussed in Chapter 1 support Mr. Chancey's decision to go to the general manager? When is Mr. Chancey's obligation to prevent harm discharged? (That is, how far should he go to prevent harm?)
4. According to Michael Davis, which of the seven interpretations of following the rules should Mr. Chancey attempt to follow?

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