

PART I

A theory of professional ethics

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Excerpt
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Fundamental concepts

1.1 Introduction

1.1.1 *The meanings of ethics*

Ethics is a concept with multiple meanings. Some scholars treat ethics as synonymous with *morality*.¹ For them, ethics, like morality, means the moral rules that govern individual behavior and determine what is right and wrong and what the moral duties of individuals are.² Others believe that morality and ethics differ from each other for various reasons.³ They understand ethics as the *discipline* or study of morality. Ethics according to this view is the philosophy of morality that deals with the big questions of human life: what is justice? What is fairness? What is right and wrong? What rights does a person have? A third approach sees ethics as a type of *particular morality*. Ethics as particular morality refers to specific standards of behavior that apply to members of a particular group because of their belonging to the group.⁴ This book refers to ethics as particular morality. It explores the morality that applies to people who exercise a professional role, and focuses on the ethics of mediators.

¹ See, e.g., William H. Shaw, *Business Ethics*, 6th edn. (Boston, MA: Wadsworth, 2008), p. 5. See also Manuel G. Velasquez, *Business Ethics: Concepts and Cases*, 5th edn. (Upper Saddle River, NJ: Prentice-Hall, 2002), pp. 7–8; Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (New York: Oxford University Press, 1999), p. 4.

² See, e.g., Shaw, *Business Ethics*, p. 5.

³ See, e.g., Nicolson and Webb, *Professional Legal Ethics*, p. 4 at notes 30–32 (referring to such writers).

⁴ See, e.g., Michael Davis, *Thinking Like an Engineer: Studies in the Ethics of a Profession* (New York: Oxford University Press, 1998), p. vii (noting that the word “ethics” “refers to those special standards of conduct that apply to members of a group just because of that membership”). See also Kevin Gibson, “The New Canon of Negotiation Ethics” (2004) 87 *Marquette Law Review* 747, 747 (noting that one meaning of the term “ethics” is “a set of rules that applies to specific activities”).



Figure 1.1: Ordinary morality and professional ethics

1.1.2 *Role-ethics and professional ethics*

If ethics is a type of particular morality that applies to role-holders, it must combine two essential components: morality and role, that is, norms of morality as applied to the performance of a role. Daniel E. Wueste, for example, argued that “a professional ethics is not a mere restatement of the norms of ordinary morality (i.e. norms governing human conduct generally); the norms of a professional ethic are tied to an occupation or role.”⁵ I use the term “ethics” for reasons of convenience. It serves to distinguish between the particular morality of role-holders (which could also have been termed “role-morality”) and ordinary or common morality that applies to every person. Professional ethics is a special case of role-morality because all professionals fulfill a role but not all roles are professional. Thus, role-ethics is broader than professional ethics. Figure 1.1 describes the relationship between ordinary morality and professional ethics.

Professional ethics refers to the *moral aspects* of performing a professional role, that is, to the evaluation of professional conduct as morally appropriate or inappropriate. For example, a professional is morally bound to keep in confidence his or her clients’ personal information when the information has been obtained in the course of practice. Professional ethics enables us to take a critical look at the conduct of professionals, at professional practices, and at standards formally and informally adopted by professionals, and to morally evaluate them. Thus, a theory of professional ethics describes what professionals *should* morally do or aspire to; it is not satisfied with what professionals *do* in practice or with their claims regarding the norms that allegedly apply to them. A professional may take a particular action that he or she is legally obligated to take, or fulfill his or

⁵ See Daniel E. Wueste (ed.), *Professional Ethics and Social Responsibility* (Lanham, MD: Rowman and Littlefield, 1994), p. 1.



Figure 1.2: Standards of professional conduct and professional ethics

her role in accordance with some conventions of practice that are acceptable, at least in part, to the professional community to which he or she belongs. In doing so, however, he or she could be following norms of professional conduct that are not necessarily moral, and thus might be inconsistent with professional ethics. For this reason I do not use the term “norms or standards of professional conduct” and “professional ethics” as interchangeable. The standards of professional conduct include the standards of professional ethics, but some of them, notwithstanding their legal status or the fact that they reflect actual practices, may possibly be immoral and thus unethical.⁶ Figure 1.2 describes the relationship between standards of professional conduct and professional ethics.

1.1.3 Mediators' ethics as professional ethics or role-ethics

Mediators' ethics is a special case of professional ethics or role-ethics. It is a case of role-ethics because it is concerned with the norms that apply to those who perform the role of mediators. It is a case of professional ethics, because the role of mediators is a professional role and mediation is a profession.

The mediation profession

There is no one acceptable definition of a profession.⁷ In the past it was common to reserve this term for religion, medicine, and law, and to regard the clergy, medical doctors, and lawyers as professionals.⁸ Today,

⁶ See Sections 1.2.2.3 and 1.2.3.2.

⁷ See, e.g., Eliot Freidson, *Professionalism Reborn: Theory, Prophecy and Policy* (Chicago: University of Chicago Press, 1994), p. 149. See also Eliot Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago: University of Chicago Press, 1986), pp. 20–38; Michael S. Pritchard, *Professional Integrity: Thinking Ethically* (Lawrence: University Press of Kansas, 2006), p. 4 (noting that “[t]here are no generally accepted definitions of ‘profession’ or ‘professional’”).

⁸ See, e.g., Daryl Koehn, *The Ground of Professional Ethics* (New York: Routledge, 1994), p. 12.

the term is used more loosely in connection with other occupations such as engineering, business, teaching, nursing, and journalism.⁹ In fact society nowadays tends to see every person working for a living¹⁰ or exhibiting a high level of skills as a professional.¹¹

Scholars have suggested various criteria for the existence of a profession. Among them one can find special knowledge and skills, autonomy of conduct, commitment to the public, organizational affiliation, and a code of ethics.¹² Scholars view differently the weight that each of these features has in the definition of a profession. Some claim that a profession cannot exist without a commitment to the public.¹³ Others argue that the distinguishing feature between a profession and a mere occupation is the adoption of ethical standards.¹⁴ This debate is reflected in mediation

⁹ See id., p. 11. See also John Kultgen, *Ethics and Professionalism* (Philadelphia: University of Pennsylvania Press, 1988), p. 5.

¹⁰ See, e.g., Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 6th edn. (New York: Oxford University Press, 2009), p. 6 (noting that "... the word *profession* has come, in common use, to mean almost any occupation by which a person earns a living").

¹¹ See, e.g., Koehn, *The Ground of Professional Ethics*, p. 11 (noting that "sometimes the term 'professional' is applied indiscriminately to anyone who exhibits a high level of style, skill, or even cunning").

¹² See, e.g., Freidson, *Professionalism Reborn*, p. 154 (noting that "the denominators connected with various notions of professions, from least to most exclusive, are expertise, credentialism, and autonomy"). See also W. van der Burg, "The Morality of Aspiration: A Neglected Dimension of Law and Morality", in W.J. Witteveen and W. van der Burg (eds.), *Rediscovering Fuller. Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999), p. 172 (referring to three characteristics of a profession discussed in Michael Davis and Frederick A. Elliston (eds.), *Ethics and the Legal Profession* [Buffalo, NY: Prometheus Books, 1986], p. 15: a commitment to the social good, based on special skills and knowledge, with certain autonomy and self-regulation); Barry L. Padgett, *Professional Morality and Guilty Bystanding: Merton's Conjectures and the Value of Work* (Newcastle upon Tyne, UK: Cambridge Scholars, 2009), p. 2 (noting that "[f]our general criteria indicate a profession and typify the persons who occupy the roles therein: specific training, autonomy, public service, and ethical codes"); Koehn, *The Ground of Professional Ethics*, p. 56 (listing five traits of professionals); Michael D. Bayles, *Professional Ethics*, 2nd edn. (Belmont: Wadsworth, 1989), pp. 7–12, 14 (discussing various features of professions); Davis, *Thinking Like an Engineer*, p. 164 (noting that "... a profession is a number of individuals sharing an occupation voluntarily organized to earn a living by serving some moral ideal in a morally permissible way beyond what law, market, and ordinary morality require").

¹³ See Koehn, *The Ground of Professional Ethics*, p. 56.

¹⁴ See Davis, *Thinking Like an Engineer*, pp. 29, 37. But see Carrie Menkel-Meadow, "Are There Systemic Ethics Issues in Dispute System Design? And What We Should [Not] Do About it: Lessons from International and Domestic Fronts" (2009) 14 *Harvard Negotiation Law Review* 195, 196 (noting that "[w]hether a field or discipline requires ethical standards to be considered a profession remains an issue of some debate due to its

literature, which finds it hard to decide whether mediation is a profession or not, but tends to agree that it is a field that is going through a process of professionalization, on its way to being formally recognized as a profession.¹⁵ There are good reasons to support such recognition.

A growing number of people around the world engage in the practice of mediation. Some do it for a living, others as volunteers. Mediators undergo training that provides them with the special skills and knowledge necessary for conducting an effective mediation. Some of them are members of mediator organizations or are affiliated with mediation programs that lay down criteria for training and practice, adopt a code of conduct for mediators, and sometimes enforce the code through disciplinary bodies. These organizations and programs explicitly instruct mediators to utilize their knowledge and skills for the benefit of mediation parties even at the expense of their own interests. In addition, mediation advances the public good; while lawyers are committed to an ideal of legal justice, and medical doctors to an ideal of health,¹⁶ mediators promote mutual understanding, dialogue, and harmony.

It seems to me that a mediation profession exists, but the great variety in mediation practice among practitioners – the existence, side by side, of paid and volunteer, organized and unorganized, highly skilled, experienced mediators and amateur, sporadic mediators – does not comfortably enable us to label all mediators as professionals. Thus, theoretically, one could distinguish between professional and non-professional mediators.

Mediators' ethics as either professional ethics or role-ethics

From an ethical perspective, however, the distinction between professional and unprofessional mediators should not be overemphasized.

tendency to 'exclude' some professions or to mark them as separate from important lay expertise and service").

¹⁵ See, e.g., Menkel-Meadow, *ibid.* (noting that "[t]he field of conflict resolution, broadly defined, is currently at what I would describe as a 'mid-point' in this quest for formal recognition as a profession"). See also Craig McEwen, "Giving Meaning to Mediator Professionalism" (2005) 11 *Dispute Resolution Magazine* 3 (discussing the meaning of mediator professionalism and suggesting ways to promote it); Jacqueline M. Nolan-Haley, "Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective" (2002) 7 *Harvard Negotiation Law Review* 235, 243–45 (discussing professionalization of mediation); David N. Hofstein, "Ethical Guidelines for Attorney-Mediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators?" (1997) 14 *Journal of the American Academy of Matrimonial Lawyers* 267; Jeffrey W. Stempel, "The Inevitability of the Eclectic: Liberating ADR from Ideology" (2000) *Journal of Dispute Resolution* 247.

¹⁶ See Davis, *Thinking Like an Engineer*, p. 165.

Non-professional mediators, whatever that term precisely means, who present themselves as mediators, perform the role of mediators, and are identified by the public as members of the mediation profession, should be treated as subject to the ethical standards that apply to professional mediators. This is simply because mediators' ethics is the ethics that applies to those who perform the role of a mediator. A person who performs a role that places him or her in a position of power and influence, and who conducts a process that has a social definition and purpose, is subject to norms of role-morality that apply to role-holders, whether or not they are named professionals.¹⁷ Thus both professional and non-professional mediators are subject to the ethical standards that apply to those who conduct mediations. It is possible in principle to distinguish between the professional ethics of mediators and the role-ethics of mediators, but that would be to insist on semantics. Therefore, this book refers to mediators' ethics, mediators' professional ethics, and mediators' role-ethics as interchangeable. It treats all mediators as subject to mediators' ethics irrespective of whether they are paid or unpaid, mediating many mediations or few, are members of a mediator organization or not.

1.2 Professional ethics: an integration of morality and role

If ethical norms are moral norms that apply to the performance of a role, then understanding professional ethics requires us first to examine what norms of morality are, and second to apply these norms to the circumstances of holding a role.

1.2.1 *Moral norms and ethics*

1.2.1.1 A definition of moral norms

An attempt to define moral norms in simple terms is bound to fail, as there are numerous theories of morality that come up with different definitions of morality and with various criteria for moral conduct and living a moral life. For example, Immanuel Kant (1724–1804) offered a moral criterion or a categorical imperative according to which a moral

¹⁷ See, e.g., Kevin Gibson, "Contrasting Role Morality and Professional Morality: Implications for Practice" (2003) 20 *Journal of Applied Philosophy* 17, 17, 28 (arguing that the "distinction between role morality and professional morality is over-determined" [p. 17] and that "it might be correct to think of individuals not so much as professionals in role, but rather as people who are able to manifest power" [p. 28]).

rule is a rule that rational people accept as universal, or put differently, a rule that respects people and treats them as ends rather than as means only.¹⁸ Theories of consequentialism such as *utilitarianism* measure morality according to a cost-benefit criterion and instruct us to prefer those acts and rules that result with the greatest amount of happiness.¹⁹ Theories of *rights* focus on the moral rights that individuals have and dictate how they ought to be treated. According to these theories, some moral rights derive from a special relationship or role, while others are fundamental human rights that all persons have; these latter rights are universal, equal, and natural, and their existence does not depend on being conferred by human institutions such as the legal system.²⁰ Another group of theories – theories of *virtues* – focus on the character of moral persons.²¹ These theories can assist in making moral decisions by posing the question: how would a virtuous person have acted in similar circumstances?²²

Theoretically, each of these theories could be employed to identify all moral norms, and serve to justify and interpret particular individual norms.²³ In practice, however, each has limitations that preclude the exclusive use of *one* theory alone.²⁴ Moreover, combining *all* the theories

¹⁸ See, e.g., Shaw, *Business Ethics*, pp. 59–60. See also James Rachels and Stuart Rachels, *The Elements of Moral Philosophy*, 6th edn. (Singapore: McGraw-Hill, International Edition, 2010), p. 128 (quoting Kant who wrote “Act only according to that maxim by which you can at the same time will that it should become a universal law”); id., p. 137 (“Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only”).

¹⁹ According to the classical version of act-utilitarianism “right actions are those that produce the greatest balance of happiness over unhappiness, with each person’s happiness counted as equally important” (Rachels and Rachels, *Moral Philosophy*, p. 109). According to the new version of rule-utilitarianism we ask “what rules should we follow to maximize happiness? Individual acts are then judged right or wrong according to whether they are acceptable or unacceptable by these rules” (id., p. 118).

²⁰ See, e.g., Shaw, *Business Ethics*, p. 66.

²¹ See, e.g., Beauchamp and Childress, *Biomedical Ethics*, p. 31 (noting that “a moral virtue is a trait of character that is morally valuable”).

²² See, e.g., Rachels and Rachels, *Moral Philosophy*, p. 170. See also Beauchamp and Childress, *Biomedical Ethics*, pp. 45–47 (considering the connection between moral virtues and moral norms of action).

²³ See, e.g., Beauchamp and Childress, *Biomedical Ethics*, p. 103 (using the moral theories of Kant and Mill to justify and clarify a principle of respect for autonomy).

²⁴ See, e.g., id., pp. 336–363 (discussing various moral theories and their failure to provide a comprehensive and adequate theory of morality). See also Rachels and Rachels, *Moral Philosophy*, pp. 113–114 (noting that utilitarianism might justify an action causing harm to some individuals but increasing overall public happiness); Shaw, *Business Ethics*, p. 61.

in order to identify moral norms is problematic because they sometimes yield different and inconsistent results.²⁵

This book cannot determine which of these theories is correct, yet has to adopt a workable perspective of morality to enable it to arrive at the norms of professional ethics. The perspective that will guide us rests on a consensus among theoreticians of morality that moral norms (and thus norms of ethics as well) must meet *minimum criteria of rationality and impartiality*. James Rachels and Stuart Rachels argue that most theories of morality incorporate a minimum conception of morality in one form or another.²⁶ According to a minimum conception of morality, “morality is, at the very least, the effort to guide one’s conduct by reason – that is, to do what there are the best reasons for doing – while giving equal weight to the interests of each individual affected by one’s decision.”²⁷ David E. Cooper claims that “[i]n ethics there is a general consensus that the moral point of view from which to judge and make claims has to be a standpoint that is impartial . . . The most popular current consensus in ethics maintains that for a moral point of view to be impartial, it must (1) meet publicly acknowledged rational standards, (2) satisfy conditions of universality – that is, in principle be compatible with what all honest people could agree to after deliberation, (3) be self-critical rather than ideological, and (4) promote generalized empathy and respect among all people.”²⁸ The philosopher Bernard Gert adds that “given agreement on the facts, a moral philosopher can show that a moral decision or judgment is mistaken if he can show that the moral decision or judgment is

²⁵ See, e.g., Richard Norman, “Applied Ethics: What is Applied to What?” (2000) 12 *Utilitas* 119, 131 (noting that “[i]f the resolution of moral conflicts about abortion, or euthanasia, has to await the resolution of disputes between utilitarianism, rights-based theories, and their other theoretical competitors, there is little hope of progress towards agreed answers. The alternative view of applied ethics as the clarification and articulation of the values which people actually hold may offer more scope for agreement”). See also Beauchamp and Childress, *Biomedical Ethics*, p. 334 (noting that “[w]e accept as legitimate various *aspects* of many theories advanced in the history of ethics. However, we reject both the hypothesis that all leading principles of the major moral theories can be assimilated into a coherent whole and the hypothesis that each of the theories offers an equally tenable moral framework”). But compare David E. Cooper, *Ethics for Professionals in a Multicultural World* (Upper Saddle River, NJ: Pearson Prentice Hall, 2004), p. 36 (noting that “[t]he premise of this book is that we need to adopt a combination of the principles approach [i.e. ethical egoism, utilitarianism, natural rights theory, social contract theory, Kantian duty ethics, and discourse ethics] and the virtues approach to ethics”).

²⁶ See Rachels and Rachels, *Moral Philosophy*, p. 13. ²⁷ Ibid.

²⁸ Cooper, *Ethics for Professionals*, p. 33.