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What can we learn by looking for the first code of professional ethics?

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ABSTRACT

The first code of professional ethics must: 1) be a code of *ethics;* 2) apply to members of a *profession;* 3) apply to *all* members of that profession; and 4) apply *only* to members of that profession. The value of these criteria depends on how we define "code", "ethics", and "profession", terms the literature on professions has defined in many ways. This paper applies one set of definitions of "code", "ethics", and "profession" to a part of what we now know of the history of professions, thereby illustrating how the choice of definition can alter substantially both our answer to the question of which came first and (more importantly) our understanding of professional codes (and the professions that adopt them). Because most who write on codes of professional ethics seem to take for granted that physicians produced the first professional code, whether the Hippocratic Oath, Percival's *Medical Ethics*, the 1847 Code of Ethics of the American Medical Association (AMA), or some other document, I focus my discussion these codes.

What can we learn by looking for the first code of professional ethics?

The importance of asking, "What was the first code of professional ethics?" is not in which code turns out to be first. Which actually was first may be a matter of luck, for example, a meeting delayed because of war or pushed because of one determined advocate. Like other "first questions" ("Who had the first modern army?" or "Which was the first capitalist economy?"), this one is important because, and only if, it helps turn a swarm of miscellaneous facts into a coherent story, a story that both helps us to understand what we already know and suggests further research. Though writing that story is ultimately for historians, the rest of us, their readers, can make a contribution.

We can, for example, set certain criteria of adequacy for any answer they might give. The first code of professional ethics must: 1) be a code of *ethics;* 2) apply to members of a *profession;* 3) apply to *all* members of that profession; and 4) apply *only* to members of that profession. We have other terms for other kinds of codes: moral codes, legal codes, industrial codes, corporate codes of ethics, and so on. Our concern is only one sort of code, a code of professional ethics.

The value of these four criteria depends on how we define "code", "ethics", and "profession", terms the literature on professions has defined in many ways. Since even seemingly small differences in the definition of these terms can produce a large difference in the answer to our question, their definition is important. Historians (and sociologists) have, I think, failed to appreciate just how important defining these terms is—or at least the difficulty of defining them so that they serve the criteria of adequacy.[1] If philosophy consists (in part at least)

of arranging our thoughts on a subject until they make sense as a whole, there is philosophy to be done before historians know what to do with what they already know about the history of professions.

What I propose to do here is to present one set of definitions of "code", "ethics", and "profession", apply it to what we now know of the history of professions, and thereby illustrate how the choice of definition can alter substantially our understand of professions. Because most who write on codes of professional ethics seem to take for granted that physicians produced the first such code, whether the Hippocratic Oath, Percival's *Medical Ethics*, the 1847 Code of Ethics of the American Medical Association (AMA), or some other document, I shall use the history of medicine to illustrate how choice of definition can change our understanding of the history of codes. I shall not explicitly defend my definitions here. I have nothing to add to the defense offered elsewhere (except an illustration of how useful these particular definitions can be).[2] I shall, however, try to explain the definitions in enough detail to avoid misunderstanding—and to make clear their importance to understanding professions. It is to that explanation that I now turn.

1. Code

The word "code" comes from Latin. Originally, it referred to any wooden board, then to boards covered with wax used to write on, and then to any book ("codex"). That was the sense it had when first applied to the book-length systemization of Roman statutes that the Emperor Justinian enacted in 529 AD. Justinian's *Code* differed from an ordinary digest or other

compilation of law in one important way: he had the legal authority to make his compilation law, replacing all that preceded it. A "codification" is always a new beginning.

Justinian's *Code* was itself part of a larger codification. Along with the *Code*, Justinian eventually enacted: the *Digest* (or *Pandects*), a systematic editing down of Roman jurisprudence (the authoritative writings of Roman jurisconsults, something like the opinions of an American or German appellate court); the *Institutes*, a textbook intended for use in the Empire's law schools; and the *Novels*, statutes too new to be included in the *Code*.[3] These documents, known collectively as the *Corpus Juris Civilis*, replaced the statutes, jurisprudence, and textbooks that preceded them. The *Corpus Juris Civilis* soon became, and remained until a century or two ago, the dominant legal document throughout most of Europe, its terms familiar to most educated people. Even today one of the two major American legal encyclopedias is called *Corpus Juris* in its honor.

For many centuries now, anything sufficiently like the *Corpus Juris Civilis*, or one of its parts, could also be called a "code". Sometimes the analogy with the *Corpus* is quite close, as it is, for example, in the *Code Napoleon* or the *Illinois Criminal Code.* A spy's "secret code" (cipher) is a code in a more distant sense. While a spy's code is an authoritative system of written rules (and thus resembles law), the rules concern only converting one set of symbols into another (ciphering and deciphering). "Computer code" is code in an even more distant sense: computer code resembles the seeming nonsense that spies wrote. By the time we reach "the genetic code", the analogy verges on metaphor. The genetic code is not even a cipher but only something that we may usefully treat as a cipher (when represented in a certain way).

We can see the influence of Justinian on early work in medical ethics. Consider, for example, Thomas Percival's classic *Medical Ethics* (1803). Its subtitle is *A Code of Institutes*

and Precepts, Adapted to the Professional Conduct of Physicians and Surgeons. I do not think we can attribute the odd expression "Code of Institutes" to ignorance. Percival seems to have been working with Justinian clearly in mind. His Preface actually concludes: "According to the definition of Justinian, however, Jurisprudence may be understood to include moral injunctions as well as positive ordinances [with the relevant quotation from the *Institutes* following in Latin]".[4]

Dismissing the hypothesis of ignorance, we must conclude that Percival's subtitle was intended to tell his readers that he was not publishing a code (strictly speaking), that is, an authoritative systemization (a systemization with the force of law). His purpose was to teach rather than legislate; hence, his subtitle's use of "institutes" and "precepts" rather than, say, "laws", "regulations", or "duties". What he published was a "code" only in an extended sense, a *systematic* treatment (much like Justinian's *Institutes*).

There is other evidence for this way of understanding *Medical Ethics*. Percival's Preface tells us that the original title was *Medical Jurisprudence* (suggesting a series of opinions concerning the *interpretation* of rules governing the practice of medicine). He substituted "ethics" for "jurisprudence" because his early readers (sixty percent of whom were physicians or surgeons) suggested the substitution.[5] Why they suggested that is not clear.[6] But one scholar has pointed out that, even three centuries before Percival, English physicians showed a decided preference for describing as "ethical rules" any regulations specifically concerned with the conduct of their vocation.[7] Whatever the reason for their suggestion, *Medical Ethics,* a text of over two hundred pages, is in fact at least as much about law and custom governing medical practice in England as about what we would now call medical ethics. Its nearest relative in today's bookstore is probably the "how to" book.

Because Percival lacked the authority to enact rules governing all the physicians and surgeons of England, *Medical Ethics* cannot be a code (strictly speaking). Whether the physicians and surgeons of England could, by adopting the rules of *Medical Ethics*, have legislated the first code of professional ethics is a question we must postpone until we have defined “ethics” and “profession”.

Have I been too quick? Could Percival have written a code by putting an *unwritten* code into writing? That is a question of how far to stretch the analogy with Justinian's *Code*. There are at least three ways a code might be “unwritten”. In one, "unwritten" simply means having an authoritative form not yet in writing. A code unwritten in this sense is virtually a code strictly speaking. It lacks only a scribe. The constitution of medieval Iceland was unwritten in this way. The Icelanders, being illiterate, preserved the authoritative text in oral memory. Each year, at the opening of the national legislature, a bard would sing the constitution, just as he might an old *saga*. Any dispute about the wording of the constitution could be settled by singing the appropriate verse.[8]

The medical ethics of Percival’s time seems to have been unwritten neither in this way nor in a second way rules can be unwritten. This second is the way that the definition of a new word may be “unwritten” until someone writes it down. The definer has only to write out the definition for (almost) everyone to recognize it as the one *implicitly* being followed all along. Though more inventive than the scribe’s transcription, this sort of writing down of what was before unwritten looks inevitable in retrospect. The disputes of Percival’s time suggest that much of medical ethics was *not* then just waiting to be written down even in this way. Some of Percival’s “moral injunctions” (or “positive ordinances”) were controversial.[9]

The last way in which a code might be "unwritten" is the way in which the English constitution is "unwritten". In fact, most of the English constitution is in writing, writing either official (such as Parliamentary statutes) or unofficial (such as learned commentaries). The reason the constitution is nevertheless unwritten is that there is no authoritative formulation of it (no codification—as there is of the U.S. Constitution or the constitution of medieval Iceland). There is not even the possibility of an authoritative formulation without considerable negotiation. The English can (and do) disagree about the wording of their constitution. They must offer a construction of its terms whenever they undertake to interpret it.

Before Percival published *Medical Ethics*, medical ethics had *no* authoritative formulation. After he published, there still was none. Since the point of codification (strictly speaking) is to give law (and, by analogy, any similar system of guidance) an authoritative formulation, a code without an authoritative formulation would seem to be no code at all (or, at best, a possible code). Any code, including any code of professional ethics, must have an authoritative formulation (written or oral). *Medical Ethics* is not such an authoritative formulation, though it certainly was an important step toward developing one.[10] Hence, *Medical Ethics* cannot be the first *code* of professional ethics.

2. Ethics

Was *Medical Ethics* nonetheless "ethics"? That depends on what we mean by the term. "Ethics" has at least five senses in ordinary English. In one, it is a mere synonym for ordinary morality, those universal standards of conduct that apply to moral agents simply because they are moral agents. Etymology fully justifies this first sense. The root for "ethics" (*ēthos*) is the

Greek word for habit or character; the root of "morality" (*mores*), the Latin word for much the same idea (one's usual way of behaving). Etymologically, "ethics" and "morality" are almost twins (as are "ethic" and "morale", "etiquette" and "petty morals", and even "ethos" and "mores"). In this first sense of "ethics", physicians, lawyers, and engineers must all have the same ethics—the same as all the rest of us have. This sense of ethics would remove our question from the history of professions, since the first code of "professional ethics" (in this sense) could have been written long before there were professions—by whoever did a good job of codifying ordinary morality. Since our question is supposed to be about the history of professions, we can dismiss this first sense of "ethics" as irrelevant.

In four other senses of "ethics", "ethics" is contrasted with "morality". In one, ethics is said to consist of those standards of conduct that moral agents *should* follow (what is sometimes also called "critical morality"); morality, in contrast, is said to consist of those standards that moral agents generally do follow (what is also sometimes called "positive morality"). "Morality" in this sense is very close to its root *mores*; it can be unethical (in our first sense of "ethics"). What a people believe is morally right (slavery, forced female circumcision, or the like) can be morally wrong. "Morality" (in this sense) has a plural; each society or group can have its own moral code, indeed, even each individual can have her own. There can be as many moralit*ies* as there are moral agents. Even so, ethics remains a standard common to everyone (or, at least, *may* be such a standard, depending on how we interpret "critical morality"). Hence, this second sense of "ethics" is as irrelevant here as the first.

"Ethics" is sometimes contrasted with "morality" in another way. *Morality* then consists of those standards every moral agent should follow. Morality is a universal minimum, our standard of moral right and wrong. Ethics, in contrast, is concerned with moral good, with

whatever is beyond the moral minimum. Ethics (in this sense) is whatever is left over of morality in our first—universal—sense (which includes both the right and the good) once we subtract morality in this third—minimum—sense (which includes only the right). There are, I think, therefore two reasons to dismiss this sense of "ethics" here. First, this ethics of the good is still universal, applying outside the professions as well as within. A profession's ethics, we agreed, applies within the profession, not outside. Second (as we shall see), professional ethics consists (in large part at least) of moral *requirements*, the right way to conduct one's profession rather than just a good way to. Any sense of "ethics" that does not include the right cannot be the sense relevant to professional ethics.

The second sense of ethics (critical morality) is closely related to the fourth, a field of philosophy. When philosophers offer a course in "ethics", its subject is various attempts to understand morality (all or part of morality in our first sense) as a rational undertaking (something we should, or at least may reasonably, participate in). Philosophers do not teach morality (in our first, second, or third sense of "morality")—except perhaps by inadvertence. They also generally do not teach critical morality, though the attempt to understand morality as a rational undertaking should lead students to dismiss some parts of morality (in its second, descriptive, sense) as irrational or to feel more committed to morality (in its first or third sense) because they can now see the point of it. Since a code of professional ethics, whatever it is, is not philosophy, we may dismiss this fourth sense of "ethics" just as we did the preceding three.

"Ethics" can be used in a fifth sense, to refer to those *morally permissible standards of conduct governing members of a group simply because they are members of that group.* In this sense, Hopi ethics is for Hopi and for no one else; business ethics, for people in business and for no one else; and legal ethics, for lawyers and for no one else. Ethics—in this sense—is relative

even though morality is not; it resembles law and custom, which can also vary from place to place or group to group. But ethics (in this sense) is not mere *mores*. Ethics must at least be morally permissible. There can be no thieves' ethics or Nazi ethics, except with scare quotes around "ethics" (to indicate a merely analogical or perverted use).

Because the term "govern" may indicate either an achievement (the standards are in fact generally followed) or the mere intent that they be followed (or belief that they should be followed), we may distinguish between *actual* ethics and *ideal* ethics. Actual ethics are those ethical standards members of the group generally follow, use to defend or criticize relevant conduct, and otherwise endorse in practice. Ideal ethics are standards that members of the relevant group can recognize as what they would be willing to follow if everyone else in the group (generally) did the same. They are *merely* ideal standards when they are not part of actual practice. An ideal code of ethics is a possible or model code; an actual code of ethics, a living practice (as well as an ideal practice).

This fifth sense of "ethics" is, I think, the one implicit in the subtitle of Percival's *Medical Ethics* ("Adapted to the Professional Conduct of Physicians and Surgeons"). He has, it implies, done something more than repeat general standards or apply them to medical practice. He has "adapted" them to the special circumstances of physicians and surgeons. They are, in this respect, special standards ("positive enactments"). The standards are nonetheless merely ideal; Percival was trying to change practice, not merely systematize it.

This fifth sense also seems implicit in the claim that a profession has a code of ethics distinct both from ordinary morality and from the code of any other profession. Why I think this should be clear once I explain what I take a profession to be.

3. Profession

What then do I take a profession to be? "Profession" resembles "ethics" in having several legitimate senses. "Profession" can, first, be used as a mere synonym for "vocation" (or "calling"), that is, any useful activity to which one devotes (and perhaps feels called to devote) much of one's life, even if one derives no income from doing so (or, at least, does not engage in it even in part for the income).[11] If the activity were not useful, it would be a hobby rather than a vocation. In this sense of "profession", even a gentleman (in the sense of "gentleman" still current long after publication of Percival's *Medical Ethics*) could have a profession, even if it was only private charity or public service.

"Profession" can also be a synonym for "occupation", that is, any typically full-time activity defined in part by a "discipline" (an easily recognizable body of knowledge, skill, and judgment) by which its practitioners generally earn a living. It is in this sense that we may, without irony, speak of someone being a "professional thief" or "professional athlete". The opposite of "professional" in this sense is "amateur" (one who engages in the activity for "love", not as a living).

"Profession" can, instead, be used for any occupation one may openly admit to or profess, that is, an honest occupation: While athletics can be a profession in this sense, neither thieving nor gentility can be. Thieving cannot because it is not honest; gentility because, though an honest way of life, it cannot be an occupation. This has, I think, been the primary sense of "profession" outside English-speaking counties until quite recently.

It certainly is the sense it had, for example, when Durkheim and Weber wrote about "professions" a century ago.[12]

"Profession" can also be used for a special kind of honest occupation. There are at least two approaches to defining this sense of "profession". One approach, what we may call "the sociological", has its origin in the social sciences. Its language tends to be statistical, that is, the definition does not purport to state necessary or sufficient conditions for an occupation being a profession but merely what is true of "*most* professions", "the *most* important professions", or the like. Generally, sociological definitions understand a profession to be any occupation whose practitioners have high social status, high income, advanced education, important social function, or some combination of these or other features easy for the social sciences to measure. For social scientists, there is no important distinction between what used to be called "the liberal professions" (those few honest *vocations* requiring a university degree in most of early modern Europe) and today's professions (strictly so called). Carpentry cannot be a profession (in the sociological sense) because both the social status and education of carpenters are too low. Law certainly is a profession (in this sense) because lawyers have relatively high status, high income, advanced education, and important social functions. Business managers also form a profession (in this sense) because they too tend to have high income, high status, advanced education, and an important social function. For most sociologists, it is obvious that Europe and the Americas have had professions for many centuries.

Refuting a sociological definition is not easy. Because its claims are stated in terms of "most", a few counter-examples do not threaten it. When the counter-examples seem to grow more numerous than the professions fitting the definition, the defenders of a sociological definition can distinguish between "true professions", "fully developed professions", or the like

and those not fitting the definition ("pseudo-professions", "less well developed professions", and so on). The only professions that seem to appear on every sociologist's list of "true" or "fully developed" professions are law and medicine. When evidence is brought in that even these do not fit the definition, sociologists can retreat again, claiming that their definition is only an "ideal type" that actual professions only approximate more or less. When asked why this ideal type rather than another, sociologists generally explain the choice in terms of a theory of society they accept (Marxist, Weberian, Durkheimian, or the like). The way the professions understand themselves seems to play a surprisingly small part in the sociological approach to defining professions. A professional's protest receives much the same treatment that a zoologist would give the protests of a goose she was studying.

The other approach to defining "profession" is philosophical. A philosophical definition attempts to state necessary and sufficient conditions for some group to count as a profession. While a philosophical definition may leave the status of a small number of would-be professions unsettled, it should at least be able to explain (in a satisfying way) why those would-be professions are neither clearly professions nor clearly not professions. A definition covering "most professions" is not good enough. A philosophical definition is much more sensitive to counter-example than is the sociological.

Philosophical definitions may be developed in one of (at least) two ways: the "Cartesian" and the "Socratic" (as we may call them). The Cartesian way tries to make sense of the contents of one person's mind. One develops a definition by asking oneself what one means by a certain term, setting out that meaning in a definition, testing the definition by counter-examples and other considerations, revising whenever a counter-example or other consideration seems to reveal a flaw, and continuing that process until one has put one's beliefs in good order.

The Socratic way seeks common ground between one or more philosophers and the "practitioners" (those who normally use the term in question and are therefore expert in its use). Thus, Socrates would go to the religious to define "piety", to soldiers to define "courage", and so on. A Socratic definition begins with the definition a practitioner offers. A philosopher responds with counter-examples or other criticism, inviting practitioners to revise. Often the philosopher will help by suggesting possible revisions. Once the practitioners seem satisfied with the revised definition, the philosopher again responds with counter-examples or other criticism. And so the process continues until everyone is happy with the result. Instead of the private monologue of the Cartesian, there is a public conversation.[13]

What follows is a Socratic definition (the product of many years trying to fit the definition to the practice that members of professions take themselves to be engaged in):

> **A profession is a number of individuals in the same occupation voluntarily organized to earn a living by openly serving a certain moral ideal in a morally permissible way beyond what law, market, and morality would otherwise require.**

According to this definition, a profession is a group undertaking. There can be no profession of one. This may seem a small point, but it has the immediate consequence of disqualifying the Hippocratic oath as the first code of *professional* ethics. Since a single person can take an oath whatever anyone else does, the Hippocratic oath cannot, as oath, be a professional code (though its contents may correspond to the contents of a professional code). To be a professional code, the oath would have to bind each and every member of the profession, taking effect only when all have so sworn and remaining in effect only while each new member

of the profession also takes the oath and none of the old renounces hers. An oath can be an (actual) code of *professional* ethics only in the context of a relatively complex practice—a practice so complex it probably could not be maintained for long in any large group.[14]

The members of the group must have an occupation. Mere gentlemen cannot form a profession. Hence, members of the traditional "liberal professions" (clergy, physicians, and lawyers) could not form a profession until quite recently—until, that is, they ceased to be gentlemen, began to work for a living, and recognized the change in circumstance. That seems to be well after 1800. So, if clergy, medicine, and law were the first professions, they must (according to this definition) have become professions less than two centuries ago.

The members of the would-be profession must *share* an occupation. So, for example, a group consisting of physicians and dentists cannot today be a profession, though physicians can be one profession and dentists another. They cannot because they belong to distinct occupations—occupations so distinct that they have separate schools, degrees, licensing, and organizations. Here, then, is another reason Percival's *Medical Ethics* could not be the first code of *professional* ethics. In 1803, physicians still constituted an occupation (or, rather, a vocation) different from surgeons. The education, degree, licensing, and organization of surgeons were then still as separate from those of physicians as the education, degree, licensing, and organization of dentists today are from those of physicians today.

Each profession is designed to serve a certain moral ideal, that is, to contribute to a state of affairs everyone (every rational person at her rational best) can recognize as good (that is, as what she wants to take place). So, physicians have organized to cure the sick, comfort the dying, and protect the healthy from disease; lawyers, to help people obtain justice within the law; engineers, to help produce and maintain safe and useful objects; and so on. But a profession does

not just organize to serve a certain moral ideal; it organizes to serve it *in a certain way*, that is, according to standards beyond what law, market, and morality would otherwise require. A would-be profession must, that is, set *special* (morally permissible) standards. Otherwise it would remain nothing more than an honest occupation. Among the standards may be a certain minimum education, character, and skill, but inevitably some of the special standards will concern conduct rather than mere competence. These special standards of conduct will be ethical (in our fifth sense of "ethics"). They will govern the conduct of all members of the group simply because they are members of that group—and govern no one else (even if they are otherwise in the same circumstances).

These ethical standards will, if effective, be *morally* binding on every member of the profession simply because of membership in the profession. The members of a profession must pursue their profession openly; that is, physicians must declare themselves to be physicians, lawyers must declare themselves to be lawyers, engineers must declare themselves to be engineers, and so on. The members of a (would-be) profession must declare themselves to be members of that profession in order to earn their living by that profession. They cannot be hired as such-and-such (say, a physician) unless they let people know that they are such-and-such. If their profession has a good reputation for what it does, their declaration of membership will aid them in earning a living. People will seek their help. If, however, their profession has a bad reputation, their declaration of membership ("I am a quack") will be a disadvantage. People will shun their help. The profession's special way of pursuing its moral ideal is what distinguishes its members from others in the same occupation, and from what the members would be but for their profession.

Because the members of a profession are free to declare themselves or not, they will (generally) declare themselves only if the declaration benefits them overall—that is, serves some purpose of their own at what seems a reasonable cost. The purpose need not be selfish or even self-interested. Some may enter (or remain in) the profession because it seems the best way to help others, even while others enter (or remain) because they like the work, status, or income. Whatever the purposes of individual members of a profession, their membership in a profession identifies them as engaged in pursuing the moral ideal the profession pursues according to the (morally permissible) special standards the profession has adopted.

Where members of a profession declare their membership voluntarily, they are part of a voluntary, morally permissible cooperative practice. They are in position to have the benefits of the practice, employment as a member of that profession, because the employer sought a such-and-such and they (truthfully) declared themselves to be one. They will also be in position to take advantage of the practice by doing less than the standards of the practice require, even though the expectation that they would do what the standards require (because they declared that profession) is part of what won them employment. If cheating consists in violating the rules of a voluntary, morally permissible cooperative practice, then every member of a profession is in a position to cheat (that is, to violate the profession's special standards). Since, all else equal, cheating is morally wrong, every member of a profession has a moral obligation, all else equal, to do as the profession's special standards require. Its special standards are its ethics (in our fifth sense of "ethics).

A profession's ethics imposes moral obligations. These obligations may, and generally do, vary from profession to profession. Indeed, it is possible to have several professions sharing a single occupation, one profession being distinguished from another only by its distinctive

professional obligations, its special standards. So, for example, physicians (MD's) are one profession of medical healer and osteopaths (OD's) another, even though both claim to serve the same moral ideal (curing the sick, comforting the dying, and protecting the healthy from disease) with much the same skills. What seems to distinguish them today are their professional standards (what count as appropriate ways of serving a shared moral ideal).[15] The special standards of a profession generally appear in a range of documents, including standards of education, admission, practice, and discipline. A code of ethics is the most general of these documents, the one concerned with the practice of the profession as such. A "profession" without such a code (at least "unwritten" in our first or second sense) is at best a profession *in utero*.

An occupation's status as a profession is (more or less) independent of license, state-imposed monopoly, or other special legal intervention. Such special legal interventions are characteristic of bureaucracy rather than profession. In principle, professions are not the creatures of law; and, even in practice, some professions (such as Certified Financial Analysts) do without license, monopoly, and other protection against market pressures, except a form of protection analogous to that the law gives to trademarks (to protect the consumer from counterfeits).

While professions often commit themselves to obey the law, they need not. Indeed, insofar as the laws of a particular country are unjust (or otherwise fall below the moral minimum), any provision of a professional code purporting to bind members of the profession to obey the law would be void (just as a promise to do what morality forbids is void). The relationship between law and profession is complex.

An occupation's status as a profession is (according to the Socratic definition proposed here) also (more or less) independent of its social status, income, and other "social indexes" of

profession. There is, for example, no profession of business managers, even though business managers have relatively high social status, income, and education and important social functions. What business managers lack is a common moral ideal beyond law, market, and ordinary morality—and common standards, including a code of ethics, settling how that ideal should be pursued. There is, on the other hand, certainly a profession of nursing, though nurses typically earn much less than business managers and have much lower social status. The only high status a profession entitles one to is being regarded as more reliable or trustworthy in what one does for a living than one would (probably) be if that way of earning a living were not organized as a profession. This high status is deserved only insofar as the profession continues to meet the special standards it has set for itself.

4. Some consequences of these definitions

Having seen why neither the Hippocratic Oath nor Percival's *Medical Ethics* can be the first code of professional ethics, we may now consider the most popular remaining candidate for first code: the AMA Code of 1847. There are least three reasons favoring its candidacy. First, it is a code (in part at least), that is, a systematic statement of rules. Second, it applies to members of "the profession" simply in virtue of that membership. The code speaks of "physicians" as such, not just members of the AMA. Third, the code is plainly not a code for gentlemen (people who do not work for a living). So, for example, Chapter II, Art. V says (in part):

> 9. A wealthy physician should not give advice *gratis* to the affluent; because his doing so is an injury to his professional brethren. The office of a physician can never be

> supported as an exclusively beneficent one; and it is defrauding, in some degree, the common funds for its support, when fees are dispensed with, which might justly be claimed.[16]

The code is explicitly constructed to help members of a certain occupation (physicians) earn a living. This is an important departure from Percival's *Medical Ethics*, a gentlemen's code.

There are nonetheless at least three reasons to reject the candidacy of the 1847 code. The first is that some of the provisions of the code state the duties of non-physicians. The code consists of three chapters. Half of Chapter I is about "Obligations of Patients *to* Their Physicians" and the second Article of Chapter III is likewise about "the Obligations of the Public *to* the Profession". A code of *professional* ethics, we agreed, applies *only* to members of the profession. A professional code that attempts to govern patients or the public is, in that respect at least, not a professional code.

To this first reason for rejecting the candidacy of the 1847 code, there are two responses. One is that the presence of extraneous material does not undermine the candidacy of the *rest* of the code. The other response is that even the extraneous material is not present in a disqualifying way. It is there as a mere deduction from the professional rules, not as independent legislation. The original "Introduction" is quite clear on this point:

> Every duty or obligation implies, both in equity and for its successful discharge, a corresponding right. As it is the duty of a physician to advise, so has he a right to be attentively and respectfully listened to. Being required to expose his health and life for the benefit of the community, he has a just claim, in return, on all its members,

> collectively and individually, for aid to carry out his measures, and for all possible tenderness and regard to preventing needlessly harassing calls on his services and unnecessary exhaustion of his benevolent sympathies.[17]

The public has duties to the physician because, but only because, those duties are necessary for the physician to perform his. This passage has been described as invoking a "social contract" or the "principle of reciprocity", but it seems to me a much simpler appeal to the principle that "ought implies can". The physician's rights against patient and public are necessary for the physician to be able to do what is required of him. Morality cannot (reasonably) require those things of him without imposing on others duties to aid.[18]

While I think both responses are sound as far they go, they also point to a deeper problem in the 1847 code. Its authors do not seem to have understood the code as legislation even in the entirely professional sections. The "Introduction" presents the entire code as a disquisition on "Medical Deontology", a set of rules resting on "the basis of religion and morality". This basis is what allows the code to move from a description of the duties (or obligations) of a physician to a physician's "rights" (that is, the duties others have to physicians). It is also, according to the Introduction, what allows the code to speak to all physicians (rather than just to members of the AMA). That is the second reason to reject the 1847 code as the first code of professional ethics. Even if we edit out the duties of patient and public, the 1847 code is not a *code* (strictly speaking).

The third reason to reject the 1847 code as the first code of professional ethics is closely related to this second one: the 1847 code is not a code of *ethics* (in the special-standards sense). Because the code does not claim to legislate (to lay down "positive ordinances"), its rules must

be mere applications of ordinary morality to the special circumstances of physicians and patients (something less inventive even than Percival's "adaptions"). The 1847 code is a statement of medical morality ("medical deontology") rather than medical ethics. The code does not (it claims) go beyond what ordinary morality requires.

To this third reason for rejecting the candidacy of the 1847 code, some may object that the code clearly is legislation. The AMA had to adopt the code. What it adopted included many innovations, for example, a provision requiring physicians to "face the danger [of pestilence], and continue their labors for the alleviation of the suffering, even at the jeopardy of their own lives." [19] To this I reply that adopting a statement may, or may not, be legislation (strictly speaking). Justinian's *Code* was law in a way the *Institutes* and *Digest* were not (though all were "adopted"). The new beginning a code makes is not the only kind of novelty; a code's novelty is ordinarily independent of its innovations.

Some might accept this reply but object on the opposite ground that I seem in effect to be defining much of modern medical ethics out of professional ethics. I am indeed, but I do not consider pointing this out an objection. We need to make two distinctions: one, between (what we might call) professional *morality* and professional *ethics*; the other, between *professional* ethics and *institutional* ethics.

Professional morality treats the obligations of professionals as special cases of the obligations of ordinary people. What distinguishes professionals from other moral agents, insofar as there is any moral distinction at all, are their special circumstances—knowledge, opportunity, expectation, and so on. For professional morality, moral theories are central tools; professional codes are either altogether irrelevant or (at best) "folk philosophy" not to be taken too seriously. For professional ethics, in contrast, professional codes are the central documents of

professionalism. They do not simply state the profession's special standards; they enact them. Moral theory has no more privileged place in professional ethics than in the making or interpreting of laws, promises, or the rules of some practice. Much of what we now call "medical ethics" might better be called "medical morality" (as indeed some writers have called it).

Obscuring this distinction is another, that between professional ethics and institutional ethics. Professional ethics teaches one set of standards to physicians, another to nurses, and so on (formal codes of ethics being central in deciding what should be taught to whom). For institutional ethics, however, not the profession's standards but the institution's standards (or, at least, the institutional context) are central to deciding what gets taught to whom. So, for example, institutional ethics is likely to teach "*bio*medical ethics" rather than medical ethics, nursing ethics, or the like. The working assumption will be that there are certain standards (beneficence, autonomy, and so on) that apply to *anyone* working in a medical context—physicians, nurses, psychologists, administrators, and perhaps even lawyers. If the standards are special in the way the standards of professional ethics are, then "biomedical ethics" is the institutional parallel of professional ethics. If, however, the standards in question derive directly from morality (or moral theory), then we would do better to call the approach "biomedical *morality*" because of the parallel with professional morality. Generally, "biomedical ethics" today seems to be understood as biomedical morality. The duties of a physician would be exactly the same even if medicine were not a profession.[20]

To keep straight the difference between these two ways of approaching "biomedical ethics", I suggest explicitly distinguishing professional ethics (as I have defined it) from what I am suggesting we call *institutional ethics*. Some examples of institutional ethics, the special standards of an institution or organized place, are academic ethics, business ethics, and research

ethics. All these "ethics" apply across professions (apply to anyone, professional or not, working in a certain institution). The 1847 AMA code seems to me to be organized like a code of institutional ethics (insofar as it is a code of ethics at all) rather than like a code of professional ethics: it applies equally to everyone in a medical context, whether physician, patient, or public.

These three reasons for rejecting the AMA's 1847 code as the first code of professional ethics help to explain the history of that code in a way the various objections to those reasons do not. As early as 1855, the question was raised at an AMA meeting whether the 1847 code was binding on all AMA members, member societies, and organizations. One way to read that question is, "Does the AMA have authority to *enforce* the code by, for example, expelling those who violate it?" That question would not touch the justification of the code as medical morality (or "medical deontology"). The other way to read the question does: "Is the AMA code morally obliging simply because it is medical morality or must it be enacted as binding rules?" At its 1855 national meeting, the AMA made following the code a condition of membership, thus making it binding on all members but leaving open its relationship to non-member physicians (a large proportion of all physicians). It is not clear whether the AMA of 1855 understood its code as an ideal for physicians generally or as actually binding on them. Hence, it still seems to fail to be the first code of professional ethics because those enacting it either did not understand it as ethics or (understanding it as ethics) did not understand the code as *binding* members of the *profession* as such.

5. Confirmation in the Subsequent History of Codes

There matters stood until 1903. In that year, the AMA adopted a new code. The 1903 code differs from its predecessor in at least two striking ways. The first is that all references to duties of others *to* physicians are gone. The 1903 code applies only to physicians. In this respect, it is a clear advance toward a code of professional ethics (in our preferred sense)—and a clear recognition that there was something wrong with both the 1847 code and the 1855 attempt to impose it.

The second important difference between 1903 code and its predecessor is that the word "Code" is gone from its title, replaced by "Principles". The Preface explains the change in this way:

> Inasmuch as the American Medical Association may be conceived to hold a relation to the constituent state associations analogous to that of the United States through its constitution to its several states, the committee deemed it wiser to formulate the principles of medical ethics without definite reference to code or penalties… The American Medical Association promulgates [these Principles] as a suggestive and advisory document.[21]

This refusal to impose the code on *anyone*, even on members of the AMA, is clearly a move away from a professional code, but it is a move easy to understand given our analysis of the 1847 code. The AMA faced the same conceptual problem in 1903 that it had sought to solve by deduction from ordinary morality in 1847: how to have a code of medical ethics binding on all (American) physicians. The 1903 solution was to pass the problem on to the state associations. They were better situated to enact the text of the 1903 code by "code or penalties" (that is,

presumably, by winning incorporation into state licensing statutes). While a mere private association like the AMA could bind its own members (the members of its state associations federated in the AMA) and could offer advice to all physicians, it could not (the 1903 code assumes) enact rules binding on all physicians. If we think of the authors of the 1847 code as working in the tradition of natural law, we might conclude that the authors of the 1903 code (as well perhaps as the AMA of 1855) were legal positivists who assumed that the only way to make a code binding on all physicians was to enact it into law (or, however unlikely, to get all physicians to contract the obligation by joining the AMA). Since the 1903 code does not claim to bind anyone, not even members of the AMA, it is at best the first *model* for a code of professional ethics—and so, the physicians of 1903 had not yet (quite) organized as a profession. The 1903 code cannot be the first (actual) code of professional ethics.

The AMA was soon unhappy with this model code, replacing it in 1912. The new document, also called "Principles", seems to resolve the conceptual problem in a new way, one assuming a clear understanding of the difference between a code of professional ethics and a legal code. The 1912 code is not a mere model. It speaks as authoritatively concerning what physicians should and should not do as the 1847 code did. Yet, though AMA membership in 1912 did not yet include even half of all American physicians, the AMA did *not* follow the 1847 code in claiming to deduce its special standards from general moral principles. The 1912 code took the form of ordinary rule making, a code in the strict sense. And this form was not a mere empty gesture. The code seems to have gone into effect quickly. Whether members of the AMA or not, physicians were soon using it to settle disputes about how physicians should conduct themselves. It became part of medical practice. So, if the codes discussed so far were the only candidates, we would have to declare the AMA's 1912 code the first code of professional ethics.

This declaration will doubtless come as news to many historians of medicine. I know of none who picked the 1912 code as medicine's first code of professional ethics. The declaration may also cheer another profession. The American Bar Association (ABA) adopted its first code of ethics in 1908. The title of that code—"Canons of Professional Ethics"—suggests that the ABA may have followed the AMA in choosing a title for its code that would avoid confusion with ordinary law making ("code and penalties"). But the ABA did not follow the 1903 AMA in passing on to its state associations the problem of making the code binding (or the AMA of 1847 in understanding the code as "legal deontology"). Instead, the ABA enacted a set of rules (and explanations of purpose) going beyond what law, market, and morality would otherwise require. The Canons apply to all (American) lawyers and (apparently) only to them. The ABA's code therefore meets all our criteria of adequacy *four years ahead* of the AMA code. What, if anything, did the AMA of 1912 learn from the ABA's daring? What had the ABA learned from the AMA's 1903 code?[22]

We may now draw at least two conclusions about codes of professional ethics, conclusions much more interesting than that the ABA seems to have beaten the AMA to the first code by four years. One conclusion is that professional codes are much newer than commonly thought, though with many precursors and alternative ways of organizing work. Thinking about alternatives to professional codes may help us to understand better what a profession offers its members (and why some governments encourage professions and others do not). The other conclusion is, I think, that we understand professional codes of ethics (and the professions that adopt them) much less well than commonly supposed. So, for example, much criticism of professional codes simply misses the mark: a professional code is neither a faulty rendition of ordinary morality nor a legalistic alternative to it; professional codes do something neither law

nor morality can—they combine law's ability to provide novel (special) standards with morality's claim on conscience.[23]

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NOTES

1. See, for example, Ivan Waddington, "The Development of Medical Ethics: A Sociological Analysis", *Medical History* 19 (1975): 36-51; or Anne-Marie Moulin, "Medical Science and Ethics before 1947", in Ulrich Tröhler and Stella Reiter-Theil, editors, *Ethics Codes in Medicine: Foundations and achievements of codification since 1947* (Ashagate: Aldershot, 1998), pp. 24-39.

2. Michael Davis, *Profession, Code, and Ethics* (Ashgate: Aldershot, 2002).

3. For a brief introduction to Roman law, see Alan Watson, *The Spirit of Roman Law* (University of Georgia Press: Athens, 1995); or David Johnson, *Roman Law in Context* (Cambridge University Press; Cambridge, 1999).

4. Thomas Percival, M*edical Ethics; or a Code of Institutes and Precepts Adopted to the Professional Conduct of Physicians and Surgeons,* (S. Russell: Manchester, 1803), p. 7.

5. Robert Baker, "Deciphering Percival's Code", in Robert Baker et al., ed. *Codification of Medical Morality* (Dordrecht: Kluwer, 1993), pp. 179-211: "In 1794, he circulated a printed version of his code under the title *Medical Jurisprudence* to twenty-five eminent people (15 physicians, 4 barrister/lawyers, 3 clergy/ theologians, and 3 laypersons) whose comments formed the basis for a revised edition, published in 1803, as *Medical Ethics*." P. 180.

6. Percival, *cited in n. 1, above, p. 7.*

7. Albert R. Jonsen, *A Short History of Medical Ethics* (Oxford University Press: New York, 2000), pp. 50-51.

8. Knut Gjerset, History of Iceland (Macmillan Company: New York, 1924), pp. 29-35.

9. See Baker, cited in n. 4, above, pp.190-192.

10. As if to obscure this point, the AMA begins its present code of ethics with a "History" of medical codes in which Percival's 1803 book is cited as "his *Code of Medical Ethics*". American Medical Association, "Principles of Medical Ethics and Current Opinions of the Judicial Council", in, for example, Rena A. Gorlin, ed. *Codes of Professional Responsibility* (The Bureau of National Affairs, Inc.: Washington, D.C., 1986), p.100. The British did not develop a written code of medical ethics (strictly speaking) until after World War II. For a survey of developments between 1803 and 1948, see Andrew A. G. Morrice, "'Honour and Interests': Medical Ethics and the British Medical Association", in Andreas-Holger Maehle and Johanna Geyer-Kordesch, editors, *Historical and Philosophical Perspectives on Biomedical Ethics* (Ashgate: Aldershot, England, 2002), pp. 11-36.

11. Hence, the term "vocational high school" is probably best understood as a euphemism for "trade school", since the schools so named teach trades rather than vocations.

12. See Emile Durkheim, *Professional Ethics and Civic Moral* (Routledge: London, 1957), pp. 1-41. Compare Elliot Friedson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago: University of Chicago Press, 1986), pp. 32-35. Though Max Weber is often linked with Durkheim as another early student of professions, he does not, as far as I can tell, ever use the word, preferring "vocation" (*Beruf*) and "status group". He is the great student of bureaucracy, not profession. See, for example, Max Weber, *Economy and Society,* edited by Guenther Roth and Claus Wittich (University of California Press: Berkeley, 1978).

13. A Socratic definition is always provisional in two ways: First, even one objection from a philosopher or practitioner reopens the process of defining. Second, the definition does not purport to describe an a-historical entity (an essence) but merely a certain usage. Even a Socratic definition that is right today may be out of date tomorrow (if not, precisely, wrong).

14. Compare Daniel P. Sulmasy, "What is an Oath and Why Should a Physician Swear One?" *Theoretical Medicine and Bioethics* 20 (1999): 329-346. Sulmasy recognizes that even today many physicians do not take any oath, and that even among the two-thirds or so who do, there is no one oath they all take (no authoritative Hippocratic oath). He nonetheless makes an interesting argument for an oath, though one wholly independent of profession.

15. Competence is itself a professional standard. So, for example, what counts as a competent diagnosis or rationale for treatment will vary with the profession. What an MD might consider competent work an OD might not.

16. Robert B. Baker et al., editors. *The American Medical Ethics Revolution* (Johns Hopkins University Press: Baltimore, 1999), p. 332. Compare this similar discussion in Percival, cited in n. 1, above, pp.39-40 (Rule XV): "Some general rule should be adopted, by the faculty, in every town, relative to the *pecuniary acknowledgements* of their patients; and it should be deemed a point of honour to adhere to this rule, with as much steadiness, as varying circumstances will admit. For it is obvious that an average fee, as suited to the general rank of patients, must be an inadequate gratuity from the rich, who often require attendance not absolutely necessary; and yet too large to be expected from the class of citizens, who would feel a reluctance in calling for assistance, without making some decent and satisfactory retribution." Neither in this paragraph, nor in the next two also concerned with fees, does Percival ever suggest that fees are required if physicians are to make a living. Fees are understood instead as part of an exchange of gifts ("gratuities").

17. Baker, cited in n. 15, above, pp. 317-318.

18. Compare, for example, Baker, cited in note 4, above, pp. 191-192: "As the three chapter titles to the American code [of 1847] make evident, the profession's manifest intent in drafting the code is to *establish a contract,* a *quid pro quo, with the public*: the profession, on its part, pledges internal regulation and service in exchange for a societal ratification of the profession's autonomy and prerogatives." Not only is this not "evident" to me, but what is evident is that absolute absence of the language of contract (or even of "*quid pro quo*"), that is, language suggesting that either physicians or public has a choice given the nature of things. What we have

instead is the logical deduction of reciprocal duties from purposes (something characteristic of natural law).

19. Ch. III, Art. I. §1. Compare Baker, cited in n. 15, above, p. 41: "No previous statement of medical morality had ever made refusal to treat the epidemic-stricken sick a censurable offense."

20. See, for example, Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics* (Oxford University Press, 1979)—or any of the four successive editions.

21. Baker, cited in n. 15, above, p. 335.

22. The ABA worked with the Canons for sixty years (while amending it from time to time). Then, in 1970, it replaced the Canons with "The Code of Professional Responsibility". The ABA was soon as unhappy with this document as the AMA was with its 1903 Principles. In 1980, the ABA adopted a new "code", "The Model Rules of Professional Conduct", for the first time adopting the approach the AMA took in 1903 (and abandoned in 1912). So, technically, American lawyers no longer constitute a single profession; the lawyers of each jurisdiction are a separate profession (because each jurisdiction has a code governing only lawyers practicing there). I say "technically" because most states adopt the ABA model and most lawyers treat the ABA model as if it were the actual code of ethics (whatever their state has made law). This is one situation in which lawyers do not seem as legalistic as one would expect. It may also be a situation of confusion resulting from academic confusion about the difference between law and ethics.

23. See, for example, John Ladd's well-known "The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion", in Rosemary Chalk, Mark S. Frankel, and Sallie B. Chafer, eds., *AAAS Professional Ethics Project: Professional Ethics Activities in the Scientific and Engineering Societies* (Washington, D. C,: AAAS, 1980), pp. 154-159.

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