



Lecture Notes 3 - 7

Professional Ethics (Athabasca University)



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Feminist Ethics

- Does not specify a strategy for decision making or a clear test for morally right and wrong
- Characterized as a collection of ethical approaches – all of which share certain general insights and tenets
- Feminist ethical approaches all spring from feminist critiques of traditional theories and interpretations of human nature
- Asserts that the history of thought can be shown to be male in that a) they have by and large actually been put forth by men and b) tend to exclude or devalues points of views and experiences that are had by women
- Rowan and Zinaich explain – decisions are autonomous and independent. Whereas women take into account interpersonal relationships that structure their lives
- Women are not often in a position to decide a matter without being acutely aware of the probably impact of their decisions on their children and families
- Feminist ethics believes that how ethical decisions are relational and constrained are important
- The traditional picture of independent decision making needs to be rejected as incomplete or misleading as it does not coexist with relational conception of decision making
- 3 points all feminist theorist tend to agree on
 - o Power relations among persons are often relevant to understanding both the actual moral situations persons find themselves in and how we should theorize morality
 - o Gender and other socially significant categories, such as race, class, and sexuality, often are morally significant
 - o In moral analysis, abstract human ideals, such as rationality, should not be emphasized at the expense of taking proper account of the particular features of persons and their situations
- Many of theorist held positions of power – with increased social power, these men become less aware of the perspectives of others and may fall into the trap of thinking that their perspectives are shared by others
- This can be seen in a doctor patient or lawyer client relationship – msut ensure the power differential does not obscure an accurate understanding of the points of view relevant to the decision making in a particular professional client situation
- Feminist often believe that the dynamic this women are more inclined than men to give priority to interpersonal and social relationships is due to social conditioning
- Any theory that renders the various social categories (race, gender, sexual orientation) irrelevant or invisible will not yield accurate understandings of moral dilemmas and their solutions
- When you abstract from our particular characteristic – tend to overstate the moral importance of some features of humans and their experience to the point where are a likely to neglect other morally important features

- Contextualism – approaches to morality that require our theories and analysis to account for the particularities of persons and situations
- Feminist contend that contextual detail is often relevant to determinations of what is morally right or not

What does it mean to be a responsible engineer?

- Michael S Prithcahrd – the importance of character and imagination
 - o Michael argues that there is more more to being a responsible engineer than merely following the codes laid out by ones professional association
 - o Focuses on the responsibility of engineers to protect public safety, health, and welfare.
 - o Argues that fulfilling this responsibility “calls as much for settled disposition, or virtues, as it does for performing this or that specific action.”
 - o Argues that – although it is important to consider the kinds of actions and behaviours that engineers must avoid, a full account of engineering responsibility will also – and even primarily – consider the positive, desirable contributions that engineers could and should make in the course of their work.
 - o Notes that an engineer might do what is the least required in order to count as fulfilling their responsibilities – or at the other end of spectrum fulfill in a exemplary way
 - o Pritchard vies engineers who only complete the minimum to fulfill their responsibilities within their organization are not responsible engineers
 - o A properly responsible engineer will be one who is competent and who possess virtues such as honesty, integrity, objectivity, accuracy, and so on. Also possess a disposition known as “engineering imagination”.
 - o Engineering imagination – by virtue of the way the engineer is or, in other words, by virtue of their characteristics approach their work and their world, they exhibit readiness or a preparedness to “make something of the moments” that can lead to exemplary performance.
 - o Their character is such that they are inclined to respond thoughtfully to events they need not respond to, rather than simply let them pass by

What is Whistleblowing?

- Mike Martin
 - o Whistleblowing – the actions of employees (or former) who identify what they believe to be a significant moral problem concerning their corporation, who convey information about the problem outside approved organization channels or against pressure from supervisors or colleagues not to do so, with the intention of drawing attention to the problem.

- Whistleblowing – described as **internal** when an employee identifies a problem to someone within the organization, but does not follow approved organization channels, as when, for example, an employee goes above her supervisors head and reveals a moral problem to someone higher still in the hierarchy.
- Whistleblowing – described as **external** when an employee reveals a problem to someone outside of the organization, ie going to the newspaper with information of a moral problem within the organization.
- Anonymous whistleblowing – reveals info without disclosing their identity
- Non-anonymous whistleblowing – do not conceal their identify
- Special relationship between whistleblowing and engineers – results from the fact that engineered products and projects affect the safety, health, and welfare of the public.
- Engineers knowledge often puts them in the position of being the only ones who can understand the possible benefit and harms that could issue from their work

Do corporate engineers have extra responsibilities

- Richard T. De George – Ethical responsibilities of engineers in large organizations: the pinto case
 - Discuss the case of the ford pinto with the aim of assessing the proper responsibilities of engineers within corporations
 - His view on whistleblowing – there are conditions under which it is morally permissible for engineers to blow the whistle on organizations for which they work or do work for and there are further conditions that make it not only permissible, but obligatory for engineers to do so.
 - Also emphasizes they should not be whistle ready – but instead find channels to communicate and fix the issue
 - Rallies against the tendency to place the burden of organizational moral responsibility on the shoulders of the organizations engineers
- When is it permissible for engineers to blow the whistle?
 - Should arise in unusual situations when the engineers responsibility to protect public safety, health, and welfare conflicts with their responsibilities to their employee or organizational affiliate
 - Ex – ford pinto, challenger space shuttle, convairs design for the DC-10 aircraft.
 - De George argues in favour of three conditions that must be met for whistleblowing to be permissible – then argues 2 additional conditions are required for it to obligatory
 - Martin – thinks that although Georges elements are important, it is not the case that certain of them whistleblowing permissible, while the additon of others make it obligatory
 - Argues that whistleblowing justification isn't straightforwardly formulaic and that any list of conditions offered with support a prima facie obligation to blow the whistle.

- Conditions need to be weighed against other relevant features of the particular situation in which the dilemma arises
- Favours 4 conditions, in any given situation, would indicate only a strong prima facie obligation to blow the whistle

How should we view whistleblowing by engineers

- Martin's aim – not simply to critique George's theory – but to convince us that final judgements about obligations to whistle blow must be made contextually, not as a matter of general rule
- Concludes that decisions about whether or not to whistle blow on one's organization must take into account the conditions that George discusses, but also features of the particular contexts in which the dilemma arises – including one's particular prima facie duties to the organization, one's own rights, the possible personal costs of one's whistleblowing, and the extent to which whistleblowers are supported and protected – or not – within the public domain
- Martin considers 3 positions that one may take toward whistleblowers working for/with corporations
 - Condemn them as rats who through their disloyalty undermine their organizations and colleagues
 - Consider their situations tragedies to be avoided and aim to do so
 - Affirm that they do not have an obligation to blow the whistle in certain circumstances and treat this obligation as paramount
- Martin defends that we should adopt the attitude in point 3 – and develop both public discussion and formal public support – such as legal provisions – to protect whistleblowers from those who retaliate against them for blowing the whistle
- Only then – will we be able to use objectivity in judging situations in which it is truly necessary and justifiable to resort to fulfilling their responsibilities of protecting public safety, health, and welfare through whistleblowing

Conflict of Interest in Science and Engineering

- David B Resnik – conflicts of interest in science
- If legit interests interfere with an engineer's objectivity and trustworthiness – more likely that one or both of the following will obtain: the judgements they make will not be in the best interest of the public or regardless of the soundness of the judgements, the public's trust and confidence in them will be undermined
- Resnik explains – real, potential, and apparent conflicts of interest – and how these concepts should be applied so that we may assess the moral dimensions of situations in which scientists and engineers face such conflicts
- Morally problematic conflict of interest – marked by the presence of interest or obligations that could undermine the engineer's ability to act objectively and fairly
- Suspicion arises when doubts about the professional's disinterestedness or trustworthiness crop up
- Happens when personal interest interferes with professional interest

- Resnik – certain interest or obligations may unduly affect an engineers objectivity or disinterestedness in that she biases her judgment and renders them unreliable – involving a corruption of justice
- Resnik – corruption of will – the will is understood to be responsible for motivating a person to act in one way or another – a corruption of will may result when a professional understands what her declared judgment ought to be, based on expertise, but finds themselves unable to follow through because of an unwillingness to forego an interest contrary to that better judgment
- Resnik – professional misconduct or a professional intentional violations of applicable ethical standards for the purposes of securing benefits to themselves
 - o Intentionally violates ethical standards in favour of a biased interest
- Real conflict of interest – agents act against objectivity or demonstrate their untrustworthiness. The mere appearance of bias can threaten the trustworthiness of research because appearances can erode trust
- Conflict of interests are morally significant even if they are only potential and/or apparent since they can affect others perceptions of professional and their decisions and actions
- Potential conflicts / Apparent conflicts – separate ideas – even though he admits that real, potential, and apparent are not always practically separable.
- Resnik – judging situations as involving or not involving conflicts of interest must be done on a case-by-case basis. Nevertheless, he does offer some recommendations for establishing policies that should help prevent all forms of conflict of interest – real, potential, or apparent.
 - o Disclosure of interest
 - o Distancing oneself from the situation
- Resnik – preventative approach to conflict of interest is best – if one acts on the basis of a biased interest – ones action is obviously morally problematic; however, if one fails to prevent or circumvent even the appearance of a conflict of interest, one has opened the door to legit moral criticism

UNIT 5: Ethics and Medicine

- Will discuss the role of moral virtues in medical practice, medical codes of ethics, and the Hippocratic oath, in both its traditional and modern versions; models for the physician-patient relationship, privacy and confidentiality, truthtelling obligations of physicians, informed consent, patients decision making competency, and surrogate decision making in health care

Medicine and Virtue

- Aristotle understood – the good life to be the life that is proper to human given our nature.

- Its fitting to cultivate and exercise virtues, that is, character traits that contribute to our flourishing, both individually and collectively.
- It is controversial to claim that professionals should be morally obliged to be virtuous.
- Edmund Pellegrino – responsible physicians exhibit what by ordinary standards would be supererogatory behaviour – that is – behaviour that is morally good not but morally required. Believes that physicians/proffesionals are morally obliged to act with compassion and dignity, to honour the medical profession, and to care for the sick as well as treat them
- Acting virtuously is not morally optional for physicians

The Hippocratic Oath and Codes of Medical Ethics

- Values/virtues are articulated by the Hippocratic oath and in formalized codes of medical ethics
- Readings – the Hippocratic oath – the traditional version
- The traditional version of the hippocratic oath – first formalized statemtent of physicans ethical duties – includes the duties that physicians have to patients as well as those to their colleagues and to the profession
- Widely used version was written by Louis Lasagna
- Traditional vs modern versions
 - o Both versions focus primarily on caring and benefitting the sick
 - o Traditional was male dominated and said physicians were obliged to share their income with mentors in need or to teach others without financial compensation
 - o Traditional – keep patients from hard and injustice
 - o Modern – care adequately for the sick
 - o Specific prohibitons against abortion and euthanasia do not appear in the modern version
 - o Makes note of physicians not “playing god”
 - o Modern – insist that physicians are mindful of their own humanity and that of patients when exercising their responsibilities to care for their patients as best they can
 - o Both recognize virtues as essential to ethical medical practice
 - o Traditional – virtues of respect and loyalty; in requiring physicians to give money to needy mentors, teach other for free, and share their knowledge
 - o Modern – relies more heavily on prescriptions exercised in terms of virtues, and it makes explicit reference to the virtues of respect, warmth, sympathy, understanding, humiliaty, and self awareness.
- The oath must remain open to revision in light of changes in the world
 - o Examples
 - No longer male dominated
 - Physicians must accept patients refusal of medical interventions

Physician-Patient Relationships

- Different kind of medical situations require different sorts of interactions

- Reading – Emanuel Ezekiel and Linda L. Emanuel – four models of the physician-patient relationship: an anthology
- Emanuel – characterizing the ideal relationship
 - Examine 4 models
 - Paternalistic
 - Informative
 - Interpretive
 - Deliberative
 - Assess them in relation to the following considerations
 - What are the appropriate goals of the interaction
 - How should physicians' obligations be conceptualized and prioritized
 - What should be the role of patients' values in decision making about matters of their own health
 - What conception of patient autonomy should be employed within physician-patient interactions

- The Paternalistic Model
 - Centres upon the best healthcare outcomes for patients as judged by physicians
 - Ethical principle of primary importance is beneficence – i.e. the physician's overriding obligation is to “do good” for her patient.
 - Main goal is the promotion of optimal health-care outcomes, whether this means correcting a patient's conditions of ill health, preventing ill health, or minimizing pain and suffering
 - The physician uses their professional judgement to determine what a patient needs and to provide “selected information that will encourage the patient to consent to the intervention the physician considers best
 - Patient participation in decision making is limited – not important for the patient to understand much at all about their health situation, nor that they communicate their own relevant beliefs and values to the physician
 - Physician judges what the patient should understand about the recommended course of action and communicate it to them

- The informative model
 - Goal is to have patients make informed, autonomous decisions about their health and treatment plans and for physicians to arrange and carry out healthcare services accordingly
 - First duty of physicians is to provide all of the factual information needed and wanted by patients – who will then determine the course of action or inaction they prefer
 - Decisions are motivated by the patient's own desires and values – sometimes referred to as the consumer model
 - Patients are in control of all decision making about their health
 - Physicians' own values and judgements aren't to enter into decision making

- This is a weakness of the model for 2 reasons
 - Physicians refrain from sharing with patients their evaluative judgements, when in fact, patients need and tend to want physicians judgements
 - Physicians need to communicate some of their own values and judgments to convey a caring approach
- Another limitation is it assumes patients know their own values and desires
- First order vs second order desires
 - Example are smokers
 - First order desire is to smoke
 - Second order desire is to quit
 - If her second order desire wins, it can become her new first order desire
 - First order = want second order = wants to want
- The interpretive model
 - Aims first to secure for the patient a robust self-understanding, which will inform his health-care decision making, and second, to carry out the care option that best fits this understanding.
 - The physician is a counsellor who helps to interpret the patients values as these relate to the particular health-care context and its place in the patients life
 - Duties include engaging the patient in a join process of understanding
 - The communication is directed at the patients values, desires, beliefs, and self.
 - The physicians role is limited to helping the patient interpret and understand himself
 - Patients usually want the physician to share their views about what is good or not
 - However this model does not promote physicians to share their values
 - Understands patient autonomy to consist in self-understanding
 - Self understanding – does not imply change or growth
 - Patients coming to know their second or higher order desires and how these accord or not with his first order desires and behaviour
- The deliberative model
 - Physicians act as teachers or friends of their patients with the aim of helping the patient learn what health-related values not only can be realized but should be realized
 - Patients and physicians work together deliberate about the best available course of action – which would best satisfy the most worthy of health related values
 - Physician must be sure not to coerce the patient or put pressure upon the patient – although at times there is a fine line between persuasion and coercion
 - Understands patient autonomy to consist in self-development
 - Self development – patient may undergo changes in his set of desires or set of beliefs as a result of deliberating with his physician about the options available; a

- patient may experience growth in relation to his desires, his beliefs, or in general, his person
 - Consist not only in the understanding of higher order desires – but also in their critical examination of them
- The deliberative model is endorsed by Emanuel and Emanuel as the best overall
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Privacy and Confidentiality in medicine

- Privacy is a condition that admits of degrees, in that a person may choose to share personal information with one or more others until the information is public
- Since it matters to us who possesses what information about us, it matters that we control any disseminator of personal information
- In health care
 - Patients are vulnerable and may be considerably more so depending on the seriousness and sensitivity of their health condition
 - Physicians maintain patient confidentiality, the, is so the vulnerability of patients is not compounded by a lack of control over information they wish to keep private
 - Without trust and assurance that it will remain confidential, patients are less likely to divulge information that is necessary for resolving or optimally treating their health issues
- A central moral value is trust
 - It is reasonable to think that the deliberative model may be more conducive to establishing trust between physicians and patients than the others
- For physicians – the ethical problems become – under what conditions, if any, is breaching patient confidentiality ethically justified? A further issue is whether such breaches are ever ethically obligatory
- The duty to protect client confidentiality is under to be paramount in most situations – its understood that it gives way to the duty to protect third parties from harm if and when certain kinds of conditions happen
 - Practitioner has reason to believe that a client present serious danger to a third party
 - Alternative measures taken by the practitioner to relieve their concern that the client will cause serious harm to a third party have failed
 - Fails to secure permission from the client to disclose to the third party that harm is intended by the client
- Reading – Kenneth Kipnis – a defense of unqualified medical confidentiality
 - Describe the case of *Tarasoff v regents of the university of California*
 - Although the ruling is only relevant in California, Canada and US have used similar legal reasoning
 - The duty to protect when a client is a serious threat of physical violence to a reasonable identifiable victim or victims and the chain of causation that results in harm is clear

- Kenneth Kipnis
 - Contends that breaking confidentiality is never ethically justified.
 - Distinctions between
 - The law
 - Practitioners personal moralities
 - Their deep personal values
 - Their professional ethics
 - Claims that only the last set of requirements, that is, those specified by a well-conceived medical ethic, is relevant to determining what physicians ought to do in relation to any given ethical problem encountered within their practices and, in particular, in relation to problems they encounter with respect to patient confidentiality.
 - Taking into account medicines “core” values; including trustworthiness, respect for autonomy, and care for the well being of the public, Kipnis contends how we ought to determine the actual moral duties of physicians faces with conflicts among these core values
 - Kipnis believes the physician should maintain an exceptionalness confidentiality rule that guarantees the confidentiality of patients private information
- Even if there is no potential victim – may be that the professionals should be required to report certain health conditions to relevant authorities for the sake of society and the greater good
- Certain US/Canada states/provinces – require that physicians report certain communicable disease and incidences of abnormal brain activity such as seizures, and some laws require that physicians report wounds caused by weapons
- Duty of confidentiality must give way to stronger countervailing societal interest

Truth telling and Deception by Physicians

- Western medicine is moving more towards taking the value of patient autonomy to heart
- Creating the moral duty for physicians to always tell the truth and the whole truth to patients
- Reading – David Thomasma – Telling The Truth to Patients: a clinical ethics exploration
- CMA states that physicians should provide patients with the information they need to make informed decisions and ensure that this information exchange is understood
- Thomasma – it is possible that a physicians duties to care for a patient and to communicate the information relevant to the patients decision making are, at least in certain situations, consistent with the physician not telling the truth to that patient
- Thomasma discuss examples where a physicians duty to care come into conflict with their duty to tell patients the truth
- 2 ways they may be intentionally not truthful
 - In telling or indicating a falsehood to a patient

- Providing the patient with some relevant and true information while omitting other relevant and true information
- Thomasma – conditions that justify a physician not disclosing the truth to a patient – but only temporarily – 4 conditions
 - Autonomy – this idea assumes that patients have the ability to adequately understand their own situation and judge their interest
 - in situations that they are not capable, it is morally necessary to protect patients from harm and to prioritize the principles of beneficence and non maleficence over the principle of respect for patient autonomy
- thomasma – truth may be overridden by the value of the survival of the community – suggest that he thinks it is important to think about issues of healthcare ethics against the backgrounds of the real communities in which the issues arise
- thomasma – shift from paternalistic care to care that is more focused on autonomy is that technological and pharmaceutical advances now provide alternatives to patients and physicians who formerly would have had no reasonable hope against certain kinds of diagnoses
- survival of the community now depends on physician truthtelling more than the community we previously occupied
- thomasma – default view is that at all times, the default mode should be that the truth is told

Informed Consent

- no significant disagreement over the idea that the practice of informed consent secures important benefits for both patients and health care professionals
- informed consent plays a vital role in realizing effective and just health care interactions
- the debate lies in what does proper informed consent consist in?
 - what values is it based on?
 - Is it a genuine expression of patient autonomy or a formality or an ongoing process between professionals and patients
 - Is voluntary concept incompatible with persuasion or only incompatible with coercion
 - What/how much info renders a patient sufficiently informed

Freedman

- Benjamin Freedman – a moral theory of informed consent
 - Article deals with the requirements he takes to be necessary in order for patient consent to morally valid
- Katz – informed consent – must it remain a fairy tale
 - Looks at the validity of informed consent – focuses on current practices which he believes are inadequate

- Argues current practice is little more than a charade which misleads patients into thinking that they are making decision when indeed they are not
- Contends that physicians need to stop thinking that patients needs the physicians to make decisions for them
- Freedman – consent is grounded in a basic moral right we have to be treated as person, not as objects or mere things
 - Professionals have a duty to recognize both a persons consent to health care intervention and a persons refusal of same
 - Critiques three requirements that are commonly understood to be necessary for patient consent
 - Patients must be competent
 - Matter of being capable of making a responsible decision wholly depends on ones being a responsible person
 - If theyre responsible, theyre competent
 - Consent must be informed
 - Freedman takes issue with this one.
 - Argues that informed could be superfluous
 - Possible for a patient to provide ignorant but morally valid consent
 - Consent must be free, that is, voluntary
 - le not coerced or not made under conditions of duress.
 - Choices constrained by forces of nature or by natural events are not involuntary choices
 - A force or influence be what freedman calls either a true reward or a threat.
 - An influence that is coercive and this a genuine threat is an influence that would allow a person to achieve only something that the person already has a right to
 - An influence that is merely persuasive but not coercive promises a genuine reward. It is an influence that would allow a person to achieve something beyond the things to which they are already morally entitled.
 - To acquiesce to a persuasive influence is to agree to do what is proposed in order to achieve something that one may want but does not need
 - To acquiesce to a threat is to agree to do what is proposed in order to achieve or maintain something to which one is already morally entitle by virtue of one's right and freedoms
 - Concludes that valid informed consent
 - Must be competent ie a responsible person
 - Voluntary that is free of coercion

Katz

- Criticizes prevailing views and practices on informed consent
- Believe sthat the history on informed consent shows a reluctance of physicians to share decision making with patients and to accept the idea that patients are the rightful ultimate decision makers of matters pertaining to their own vodies and health

- He view coincides with the deliberative model of physician-patient relationship
- Recognizes and discusses a variety of factors that might impede joint decision making
- Examples are
 - Medical uncertainty
 - Patient inconvenience
 - Patient autonomy
- Both the principle of autonomy and beneficence act as justificatory motivations for adopting certain courses of action in health-care contexts
- These factors often compete for primacy in health-care interactions and health-care decision making
- Katz challenges the widespread belief that illness and disease diminish patients capacity for autonomous decision making
 - If physicians assume that the anxietis and emotions interfere with their rational capacities – physicians tend to adopt a paternalistic attitude
 - 2 factors come into play
 - The ignorance resulting from simply not being told the whole truth of ones health situation would itself diminish ones autonomy
 - Patients lack of information and resulting ignorance are like to make them appear more incapable of understanding than they truly are
 - This reinforces physicians tendency to think patients are incompetent
 - Believes arguments favouring well being over autonomy are not convincing
- Katz adopts a standard view of consent – claims it’s a hybrid concept – involves both disclosure obligations of physicians and decision making responsibilities of the patients.

Patients Decision Making Competency

- In order to validly consent to a health care intervention, a patient must show sufficient competence
- le able to make reasonable decisions about whether or not to consent to a recommended health care treatment
- Must make decision in accordance with their own interest insofar as they understand their own interest
- Allan Buchanan and Dan Brock – Standards of competence
 - How should health care professionals judge whether or not patients decisions are reasonable and thus reflective of sufficient competence
 - Not simply a matter of understanding if the patient possess the capacity
 - Argue that the approach should be when judging competency is to incorporate a number of salient considerations which will yield competency requirements.
 - Consider 3 difference types of standards for judging competency in health care
 - Minimal standard
 - Outcome standard
 - Process standard
 - They reject the first two and favour the third

- Process standard – the reasoning process by which patients arrive at their decisions to consent or to reject health-care interventions
- What is primarily important is the process of the reasoning that leads up to a decision satisfies certain conditions
- Decision-relative standard
- No matter what decision is made, the decision is always made relative to the alternatives.
 - The whole matrix of decision making is relative to assessing the patients competence
 - Ie just because they're competent to accept it does not mean they are competed to refuse it and vice versa

Surrogate Decision Making

- Sometimes understood that patients are not competent to reliably consent or reject health care interventions on their behalf
- Dan Brock – Surrogate decision making for incompetent adults: an ethical framework
 - Understands competency to be decision relative and should be judged according to a process standard
 - Does the patients choice sufficiently accord with the patients own underlying and enduring aims and values for it be accepted and honored, even if physicians and others may not think it's the best choice
 - If borderline competent – need to look at the extent of the decision – ie is it a minor wound?
 - Approach borderline competence should be approached in the same way as other ways
 - Who should be the surrogate when a surrogate is needed?
 - Identifies possible agents
 - The person the patient chosen or would have wanted as their surrogate
 - Family member who is close
 - Friend who is close
 - Institutional representative – ie attending physician or chief of staff
 - Standard of reasoning surrogates should use – if patient has provided a valid advance directive specifying their wishes, surrogate should make decisions based on those wishes
 - If no advance wishes – surrogate may substitute their own judgement or use a best interest strategy – ie decide as the patient would decide
 - Best interest strategy – should be surrogates third choice – only used when there is no valid directive and no information about how the patient would have chosen
 - Best interest approach – if theres no information on interest – use the social majority

Study 6: Ethics and Journalism

Journalists duties and the privacy of public officials

- Samuel Winch, Lee Wilkins, Dennis Thompson – under what conditions is it morally appropriate for journalists to report on private aspects of the lives of public officials
 - o Must determine the degree of prominence any particular news item requires
 - o Three authors provide us with an account of the conditions under which it is permissible (or even obligatory) for journalists to investigate and disclose public private aspects of the lives of our political leaders
- Winch – begin with the various philosophical justifications for understanding privacy as something to which persons generally have a right
 - o All proposed ideas are rooted in ideas about human nature – the kinds of being we are and about what is needed so that we may live dignified and meaningful lives
 - o A basic consideration is how to make sense of ourselves as both individual persons and as social persons
 - o Commonly believed there are “natural rights” that cannot be taken away from us
 - o Winch accounts kants justification of privacy as a right – our status as moral agents depends on our ability to exercise control over our persons and as winch explains – this opens the door to privacy
- Winch – dissatisfaction with Mill’s utilitarian justification to privacy
 - o Greatness happiness for greatest amount of people
 - o It would seem that liberty and privacy are only instrumentally valuable and may be overridden for the sake of a greater good
 - o Mill in On Liberty – speaks of indiv liberty as an intrinsic good which would make it more difficult to override liberty
 - o Mill makes the case that liberty is something that is not merely instrumentally good, but is something that is good in itself – ie wrong to interfere with indiv liberty in all cases except those where such interference is necessary to prevent harm to others
 - o Winch – establishment of democracies has been a more clearly delineated distinction between private domain and public domain
 - o Winch – how to deal with political journalists – intimately private matters should always be kept private and should always be kept private for everyone, including public officials – unless there is very clear evidence of a significant public injustice being hidden under the guise of privacy
 - o Reasoning for revealing info about one person must all be the same for revealing info about another – ie everyone has an equal right to privacy – ie equal intimate privacy
- Wilkin – view is much less protective of the privacy of public figures

- Requires certain conditions to be met to justify public disclosure of politicians private matters
- She argues it is important for journalists to report on matters pertaining to the political character of officials
- Leaves door open to report on any manner of emotional/psychological characteristics a politician may be understood to have – as long as they show reasonable connection between these characteristics and performance
- Winch insist that a connection must be drawn between what is reported and performance – however doesn't think that some kinds of private matters are too personal or too intimate to be publicly communicated
- Lays out the conditions required for what is good journalism as well as the conditions for good reportage
- Thompson – treads on the private lives of public figures can be either good or bad in that it either strengthen or undermine our democratic ways
 - The relevance standard – requires that journalists report on politicians private matters only if the matters are relevant to the politicians performance
 - If public officials are properly held accountable to citizens
 - Argues that accountability requires the citizens to make informed and reasonable judgments about the performance of politicians
 - Cautions journalists using Greshams Law: cheap talk drives out quality talk
 - Thompson is concerned about the quality of our political disclosure
 - Should be cautious about officials private matters because it has a tendency to dominate over other forms of information, lower the quality of public disclosures, and thereby diminish democratic accountability

Section 7: Ethics and Law

Lawyers Professional ethics and ordinary ethics

- Monroe H Freedman – argues that lawyers above all else, must zealously advocate on behalf of their clients
 - Lawyer is understood to be concerned only with their clients interests – to the exclusion of the interest of others, if necessary
 - Contends that satisfying this primary professional obligation sometimes obliges lawyers to do things we ordinarily would judge to be immoral
 - The zealous advocate is the role required within our adversarial system of law – the overarching goals of which are truth and justice
 - Freedman connects lawyers ostensibly immoral behaviour with their role responsibilities with the adversary system, and the adversary system with truth and justice – the lofty values of truth and justice ultimately justify lawyers behaviour
- Luban – argues against freedman

- Neither truth nor justice nor our adversarial legal system provides sufficient justification for systematically shielding lawyers and accepting their immoral behaviour
- Believes freedman too heavily rely on the adversary system excuse which is more limited in its ability to justify problematic behaviour than these thinks believe
- Cohen – disagrees with freedmans views
 - Argues that the zealous lawyer conception reduces lawyers to no more than knowledgeable rule followers whose judgment are limited to how legal rules ought to be applied – “pure legal advocate” – requires merely a lawyer to understand the law, know to apply it, and do so with a single aim of winning their clients cases
 - Moral agent conception – lawyers would not be permitted, but expected, to use their own judgements in cases where there is conflict between their duty to best represent their client and their duty to fulfill other responsibilities and abide by the standards of ordinary morality
- Both theorist defend that is morally inappropriate to grant lawyers wholesale protection from ordinary moral judgments – however both concede there are situations where seemingly immoral behaviour on part of lawyers is ethically justified

An argument for excusing lawyers from ordinary morality

- Freedman – Professional Responsibilities of the Criminal Defense Lawyer
 - Adversarial system of law – system is based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views
 - Idea is that they system will allow for the truth to prevail
 - Lawyers and criminal lawyers – encounter situations where they must decide between breaching client confidentiality and participating in a deception of the court
 - Lawyers must hold confidence all information and that this information will not prejudice the case
- Freedman contends that lawyers are an officer of the court participating in the search for truth
- Freedman refers to truth as the goal and a product or outcome of the gal system as a whole
- Second sense of truth implied by freedman’s discussions of lawyers deceiving the court
 - Truth in this second sense is akin to honesty or truthfulness
 - This sense of truth refers to a characteristic of particular claims that lawyers may or may not make and particular actions that lawyers may or may not take within the context of their legal practices
- Freedman needs to establish that keeping client confidentiality provides justification for lawyers behaving in ways that would ordinarily be understood as immoral, such as their being deceptive

- Freedman defends lawyers purportedly immoral acts by claiming that such actions are permissible because there are policy considerations that are times justify frustrating the search for truth and the prosecution of a just claim
- Freedman acknowledges that some cases will yield inaccurate results
- Makes you question why freedman thinks that deceiving the court are morally necessary for promoting the overall goals of truth and justice
- Freedman – sometimes deceiving the court to maintain client confidentiality supports the overall ability of the system to yield truth
- Freeman – maintaining confidentiality does not by itself justify the deception that sometimes requires - in fact, he appeals to additional values within our legal system which tip the balance in favour of deceitfully maintaining client confidentiality over being honest – ie adversary system, presumption of innocence, prosecution burden to prove guilt beyond a reasonable doubt, right to counsel
- All of these come together to say lawyers must uphold confidentiality

Arguments for Not Excusing Lawyers From Ordinary Morality

- Luban – freedman carries the adversary system excuse too far
 - o Adversary system does not provide enough justification for this sort of across-the-board defence of lawyers behaviour
 - o Adversary system does not properly apply to and justify some actions by lawyers that would be judged as immoral according to ordinary standards – especially if they are carried out by criminal lawyers
- Luban distinguishes between criminal proceedings and non criminal proceedings
 - o Generally lawyers in non criminal proceedings are justified on different ethical grounds than is the behaviour of lawyers in the latter settings
 - o In criminal proceedings – we must consider as morally relevant the imbalance of power that exists between the state and individuals – as well as the idea that individual liberty is a fundamental value in liberal democracies
 - o Unjustified interference by the state in the lives of indiv is not to be tolerated and sometimes this means that in liberal democracies, indiv require special protection
- Luban – argues that zealous advocacy for the accused is justified on the grounds that it safeguards indiv liberty against the encroachment of the state
- Widespread belief that it is better to let 100 criminals go free than to convict 1 innocent
- Primary role of zealous advocate is to curtail the power of the state over its citizens by hobbling the government and a no hold barred defence
- Over zealous is not meant to serve justice per se, it's more to protect indiv from wrongful interference and to prevent innocent people from being unduly penalized for a powerful government
- The same concerns do not come into place in non criminal legal cases as the courtroom competition is more evenly matched
 - o The question is to what extent should lawyers be involved to protect the interest of their clients

- Luban – for the adversary system excuse to justifiably shield lawyers from ordinary morality in non criminal proceedings – at least one of two things would need to be shown
 - Adversary system is the best system for accomplishing certain goals such as ferreting out truth, defending peoples legal rights, safeguarding against excesses,
 - The system is intrinsically good, in and of itself, regardless of its goals and the consequences it yields
- Luban – adversarial system – clients often confuse entitled to and legal right
 - No reason to believe that when the goal of each of two adversarial lawyers is to win the case for his client, the better case rather than the better lawyer will win
 - Dubious justification for our adversarial system to view it as intrinsically good on the basis of it being –
 - Integral part of our culture and tradition
 - Simply a good thing that lawyers provide legal services to people in trouble
- Luban – neither consequentialist nor non-consequentialist moral reasoning justifies immoral behaviour that may be carried out by non-criminal lawyers within our adversary system
 - When professional and moral obligation conflict, moral obligation should take precedence
- Pragmatic reasoning for maintaining our adversarial legal system
 - A some sort of system is required
 - For all we know, our adversarial system does do a good job or better job as would an alternative
 - It is likely that the costs of changing to another kind of system will outweigh the benefits of doing so
- Cohen – asks whether it is possible for an effective lawyer to also be a morally good person
 - Compares traits believed to be that of a morally good person and compares it to traits of a good lawyer
 - Two conceptions of lawyering – pure legal advocate and as a moral agent
- Cohen – thinks issue from the pure legal advocate conception of lawyer are the following
 - The profession and legal system come to be disrespected
 - Legal system becomes a haven for persons who are guilty and even wicked
 - People of strong moral character are discouraged from choosing law as their profession
 - Unjust law may fail to be rectified, since the amoral or immoral legal experts who succeed within the adversary system may not see the need or simply may not bother to put forth the effort needed to remedy ethical flats
 - Harm is suffered by particular indiv and groups who are affected by the morally questionable actions lawyers carry out in their routine practices

- Cohen – reject our adversarial system altogether and replace it with another type of legal system or retain our adversarial system but abandon the pure legal advocate conception in favour of some alternative conception of lawyer
- Noonan – moral agent conception and the pure legal advocate conception
 - A lawyer is also a human being and cannot submerge his humanity by playing a technician's role
 - Lawyers should not prioritize winning their clients' cases over all other values and responsibilities, but should always balance this professional goal with other morally relevant considerations
 - Moral agent conception of lawyers – should not forfeit or neglect morality in their professional lives but rather should understand themselves as having various professional and ethical duties that will sometimes conflict and require ethical evaluation
 - Lawyers should understand themselves as having the additional responsibility of determining which of their values and duties ought to take precedence in case of conflict
- Moral agent conception – lawyers would be expected to thoughtfully employ their own judgements and, in the end, any given judgement may support either a value primarily associated with ordinary morality or a value specifically associated with ordinary morality or a value specifically associated with lawyers' professional role
- Cohen and Luban – there will be situations where lawyers are justified in acting in ways contrary to ordinary moral values; however these actions should not be systemically endorsed but instead defended on the basis of the details of the particular contexts in which conflicts arise – ie there may be some instances for the lawyer to passionately advocate for their clients and defend them at the expense of ordinary moral values

Lawyers and Virtues

- Not uncommon view that lawyers lack moral virtue
- Wealthy corrupt businesses hiring the best lawyers to manipulate the law to win the case or minimize punishments
- The view that lawyers should be first and foremost, fervent client advocates, as Cohen argues, is at odds with our ideal of a morally good person.
- Amy Gutmann – Can virtue be taught to lawyers
 - Draws to our attention a specific virtue she thinks is necessary for lawyers, both professional and ethically.
 - Whichever conception of lawyer we adopt, it is important for lawyers to cultivate and demonstrate the virtue of deliberating with clients about the implications of legal action and its alternatives
 - Gutmann contends – the obligation for lawyers to deliberate with their clients about legal means and ends is endemic to legal ethics in a constitutional democracy

- Gutmann reviews 3 conceptions of legal virtue – however all three virtues are incomplete because each fails to acknowledge the requirement that lawyers in providing their services, must deliberate with their clients about the relevant needs and desires clients have
- Clients who do not know much about law or legal strategies are not likely to know what their own interests are or (as Gutmann puts it) what their own informed preferences are
- They won't know their preferences until they receive both information and advice from lawyers (similar to the deliberative model in physician-patient)
- Gutmann contends – that the standard conception of legal virtue is incomplete without explicitly acknowledging that good advocacy requires such deliberation
- Gutmann – social justice conception
 - o Focused on lawyers' commitment to justice itself
 - o Motivating question – what constitutes a just society and what is required to achieve this
 - o Although client advocacy is an important part of lawyering according to this conception – advocacy is taken to give way to justice in cases where the two conflict
 - o Gutmann notes – the obligation to facilitate justice implies an obligation to try and bring clients' desires and expectations in line with justice
 - If a lawyer recognizes a client's intentions are contrary to justice, he must discuss with the client what social justice would require and then work with the client to bring the client's intentions into conformity with justice
 - Social justice conception – is incomplete without explicitly acknowledging that it is necessary for lawyers to be disposed “to deliberate with their clients with the aim of arriving at a mutual understanding of what justice in a constitutional democracy permits or demands
 - o Gutmann's third conception – assesses the character conception
 - It's motivated by the idea that lawyering provides an opportunity to live a good life by helping others to live good lives
 - It's incomplete unless it explicitly acknowledges that the practical judgments involved necessarily issue from active deliberations in which the legal professional and his client discuss and come to agree on what constitutes the good life for the client and on how, specifically, legal assistance can contribute to achieving this for the client

Whither Lawyer-Client Confidentiality

- Landesman and Pizzimenti think that a lawyer's obligations to keep clients' information confidential has its limits
- Bruce Landesman – confidentiality and lawyer-client relationship
- Lee Pizzimenti – informing clients about limits to confidentiality
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