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DOING THE MINIMUM AS AN ALTERNATIVE TO EXERCISING REASONABLE CARE IN A PROFESSIONAL ROLE

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In the second edition of ENGINEERING ETHICS: CASES AND CONCEPTS (Wadsworth, 2000), Harris, Pritchard, and Rabins distinguish three conceptions of professional responsibility: the "minimalist", the "reasonable care", and the "good works". Of the minimalist conception, they say (among other things) that it "holds that engineers have a duty to conform to the standard operating procedures of their profession and to fulfill the basic duties of their job as defined by the terms of their employment." (p. 101) In contrast, the reasonable care conception "moves beyond the minimalist view's concern to 'stay out of trouble', requiring the engineer to exercise reasonable care in the performance of engineering tasks" (p. 103). I will argue that this distinction is incoherent, that the "minimalist conception" (so defined) necessarily includes not only reasonable care but at least some of what Harris, Pritchard, and Rabins classify as "good works". I conclude with a suggestion for what they might say instead about a certain "minimalist <u>attitude</u>" one finds in business (though, in truth, it should be called "sub-minimalist").

While I think the text in question is important enough to justify this sort close analysis, I undertake the analysis here for another reason. The question of what is "the minimum" owed an employer is a recurring theme in business as well as professional ethics, not so much in the classroom as in practice. An open discussion of it is important, in part at least, because, even in practice, there is generally an incoherence in what is meant by "the minimum", an incoherence Harris, Pritchard, and Rabins catch, even if they do not clarify it. While I shall follow the text in focusing on engineers, everything I say applies (more or less) to the other professions--and, with obvious amendments, even to managers belonging to no profession.

What is "the minimum"? The first thing to notice in the passage that I quoted is that there are at least two different minimums expressly referred to: 1) "the standard operating

procedures of their profession"; and 2) "the basic duties of their job as defined in the terms of their employment". To these two, we might be inclined to add at least three other standards of conduct: 3) the requirements of ordinary morality; 4) the requirements of the criminal law; and 5) the requirements of the civil law, including various forms of government regulation.

These five standards of conduct are, of course, not independent. For example, for engineers at least, the standard operating procedures of their profession include ordinary morality, the criminal law, and whatever their contract of employment says (consistent with the other standards). That is an important point because it already suggests how much might be implicit in the minimum as Harris, Pritchard, and Rabins describe it. But I mention such interdependence only to put it aside. My concern is something a bit harder to get at, something requiring us to peal off two other potential sources of confusion.

One such source is the term "standard operating procedures of their profession". If we understand the engineers' code of ethics as part of the standard operating procedures of their profession, we will find ourselves far from the minimum Harris, Pritchard, and Rabins describe. Consider, for example, the Preamble and Fundamental Canons of the "Code of Ethics for Engineers" of the National Society of Professional Engineers NSPE). The Preamble enjoins engineers to "perform under a standard of professional behavior which requires adherence to the highest principles of ethical conduct on behalf of the public, clients, employers, and the profession." "Highest principles of ethical conduct" sounds much more like a maximum than a minimum.

Of course, this language is preamble, that is, the opening guide to interpretation of the specific standards of conduct to follow, not an independent standard of conduct. But even the code's Fundamental Canons require engineers, "in fulfillment of their professional duties, [to] hold paramount the safety, health, and welfare of the public...[and so on]." If the "standard operating procedures of their profession" includes their code of ethics, as I think it does, then the "minimum" for engineers is a high standard, maybe not as high as "good works", but certainly higher than "reasonable care". So, in what follows, I shall assume that "the minimum" ignores the profession's code of ethics and interpret "standard operating procedures of their profession" to refer only to technical standards.

Of course, engineering's technical standards are (more or less) mere specifications of

what engineers take to serve the safety, health, or welfare of the public, their employers, and their clients. If the technical standards are not interpreted with that in mind, they are likely to be misinterpreted and at least some of those misinterpretations will be sufficiently far from what engineers expect of one another to count as incompetent. For professions generally, the ethical is an integral part of the technical.

You can, I think, already see why I might describe the minimalist conception of professional responsibility as incoherent. But that inconsistency between minimalism and professional responsibility is not my concern today; it is merely one potential source of confusion. The contrast between the "minimalist conception" and "the reasonable care conception" of doing one's job would be incoherent even if engineers had no code of ethics. So, let us suppose, contrary to fact, that engineers are not professionals bound by a code of ethics. We are now ready to consider a second potential source of confusion, the contract of employment.

The contract of employment--what Harris, Pritchard, and Rabins seem to mean when they refer to "the basic duties of their job as defined by the terms of their employment"--is a moral as well as a legal document. It represents an exchange of promises as well as an exchange of legal commitments. Ordinary morality may, then, require an employee to do things even if the law does not, for example, to give reasonable notice before quitting even if the law does not enforce that term of the contract. Some of the promises or legal commitments are explicit, but many are implicit. For example, every contract of employment makes the person employed an agent of the employer. All agents are, unless expressly exempted, supposed to avoid conflicts of interest, to act as faithful trustees of the property, secrets, and reputation of their employer, and to exercise the skill and judgment necessary to do the work for which they are paid.[1] The law of agency seems to demand a good deal more of every employee than what Harris, Pritchard, and Rabins describe as "the minimum".

This brings me to the chief point I want to make here. Agency is one part of the legal substructure of employment. Tort, the very area of the law from which Harris, Pritchard, and Rabins draw their term "reasonable care", is another. According to tort law, everyone owes everyone else reasonable care. Legal negligence is just a failure to exercise reasonable care that results in harm. If you fail to exercise reasonable care and no one is

hurt, there can be no tort liability because such liability presupposes a harm that money damages can repair at least in part. If the failure of reasonable care is neither conscious nor great, it is mere negligence. If the failure is conscious, the negligence is "recklessness"; if the departure from reasonable care is great, the negligence is "gross negligence".

The law has always had trouble keeping recklessness and gross negligence separate; the inference from gross negligence to recklessness is generally hard to resist. So, for example, if workers throw huge tiles from a roof of a tall building onto a crowded street, we find it hard to believe that they were not aware of how gross a departure from reasonable care they were engaged in. We move instantly from the premise of gross negligence to the conclusion, recklessness.

That is one reason the law has trouble with the distinction between recklessness and gross negligence. There is another. Either can be the basis of punitive damages in tort and of criminal prosecution. So, for example, a driver who causes another's death while moving west at high speed in the eastbound lane of a busy interstate, will not be able defend against a charge of "reckless homicide" by claiming that he was not aware that he was going the wrong way. Given the design of interstates, his mistake is conceivable only supposing a gross departure from the standard of care expected of drivers. That departure, though not recklessness, is its legal equivalent.[2]

This description of tort law is, I believe, uncontroversial. Yet, Harris, Pritchard, and Rabins seem to have overlooked one important consequence of it in their characterization of the contrast between the minimalist and reasonable care conceptions. Near the end of their description of reasonable care, they observe: "Liability insurance is already an expense, and those whose aim is simply to minimize overall costs might calculate that a less than full commitment to standards of reasonable care is worth the risk." (p. 104)

Those who would make such a calculation must recognize that they are thinking about conduct that falls below the minimum standard set by law in <u>two</u> (related) ways. First, their conduct will violate the duty of reasonable care. There would be no need for insurance if it did not. Because their conduct falls below the legal minimum, what they are risking, beside harm to others, is being caught. Second, if they are ordinary employees, they are gambling with their employer's property and reputation. In other words, unless their employer has given them authority to engage in such gambles, they are not acting as faithful agents; they

are not doing what they were hired to do. They are breaching the legal (and moral) obligations of their employment contract. They have fallen be below the legal minimum in this respect too.

But that is not all. They seem to me to have misunderstood their legal situation. Even if what they are thinking of doing what would have been ordinary negligence if they had done it unknowingly, once they decide to "run the risk" of being caught, they are no longer risking ordinary negligence. They are engaged in reckless conduct. Such conduct may be criminal, even if the negligent form is not. And even if it is not criminal, it will add a new risk to consider, punitive damages. Punitive damages are not limited in the way ordinary damages are.[3] The only obvious principle governing punitive damages is that they tend to be so high that the company, knowing in advance how high they would be, would have seen running the risk as clearly a bad bet. The insurance that protects the company from losses due to negligence may or may not cover punitive damages. The insurance may fail to cover the punitive damages either because such damages are explicitly excluded from coverage or because the face value of the policy is not enough to cover those damages. Few employees have authority to "bet the company" in this way, but even those who do must fall below the minimum standard of conduct the law requires of everyone. From the law's perspective, the conduct of such employees falls below the minimum, reasonable care.

There is, I think, nothing in anything I have said so far that should be controversial. But, given what I have said so far, the minimalist standard is, if anything, substantially higher--and certainly no lower--than the reasonable care standard. How then is it possible for Harris, Pritchard, and Rabins to suppose that reasonable care is a standard higher than the minimalist? The answer, I think, is that their subject is not really a coherent conception but a set of attitudes--attitudes which, though incoherent, are often powerful factors in organizational decision-making.

Much of their discussion of the minimalist conception is, in fact, concerned with what anyone interested in organizations will recognize as "the blame game". There has been a spill of caustic chemicals because someone at a chemical plant forgot to close a valve. What is to be done? Of course, the valve should be closed. But what then? Should Rick Duffy, the worker who forgot to close the valve, be fired for the mistake? Should Carl, the young engineer who, on his first day on the job, thought the manual valve was an accident waiting

to happen, be blamed because he let Kevin, his immediate superior, dismiss his question with a shrug? Should Kevin be blamed because he dismissed Rick's question with a shrug? Should someone above Kevin bear the blame for not maintaining an environment where Carl's suggestion would have gotten more consideration?

Part of the blame game is to define one's "responsibilities" so narrowly that one can't be blamed for what happened--so that one can say truthfully, "That was not my responsibility." The blame must then go elsewhere. This defining is often described as "legalistic", but it has as much to do with logic or hermeneutics as it does with the law. It is generally an instance of what I have elsewhere called "malicious", "negligent", or "stupid" obedience.[4]

Harris, Pritchard, and Rabins are certainly right to point out that avoiding blame in this way interferes with fixing the underlying problem. Anyone who treats fixing the problem as her responsibility opens herself to questions about why she didn't do something about the problem before. In taking responsibility for the future, she invites blame for the past. She risks her reputation, her future in the company, and perhaps her present job.

Engineers have, I think, long appreciated the destructiveness of the blame game. That is why most engineering codes include some provision more or less forbidding engineers to play. So, for example, the NSPE Code (III.1.a) tells engineers to "admit and accept their own errors when proven wrong and to refrain from distorting or altering the facts in an attempt to justify their decisions."

But even if engineering codes lacked such provisions, there would be a problem about engineers--or, indeed, any other employees--playing the blame game. Employees are supposed to be faithful trustees of their employer's property. Fighting over blame in a way that interferes with fixing the underlying problem amounts to putting the job-related interests of the employee ahead of those of his employer, something a faithful trustee does not do. So, even in its natural habitat (the blame game), the minimalist conception is sub-minimum--and so, incoherent.

This incoherence is, I think, what Harris, Pritchard, and Rabins should stress in their text. They should stress the incoherence because engineers who appreciate it should be better able to cut the game short when it threatens to interfere with what they should be doing.

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1. Harold Gill Reuschlein and William A. Gregory, The Law of Agency and Partnership, second edition (West Group: St. Paul, MN, 1990), pp. 123-128.

2. William L. Prosser, The Law of Torts, fourth edition (West Publishing Co.: St. Paul, MN, 1971), pp. 145-166, 180-186; and Wayne R. LaFave and Austin W. Scott, Jr., Criminal Law (West Publishing Co.: St. Paul, MN, 1972), pp. 209, 211-215.

3. Prosser, 9-14.

4. See my "Professional Responsibility: Just Following the Rules?", Business and Professional Ethics Journal 18 (Spring 1999): forthcoming.