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# Legal Ethics (a.k.a. Professional Responsibility)

Spring 2009

Professor Krauss

**SYLLABUS**

## A. Statement of Purpose: What is "Legal Ethics"?

You have a choice of instructors for Professional Responsibility. So it is fair that each instructor offer you a "Truth in Advertising" summary of his own approach to the subject matter. Mine is indicated by my preferred title for the course. This is a course on applied ethics. We will cover the Rules of Professional Responsibility (see below) but we will do much more.

I introduce this syllabus by asking whether you think there is a difference between saying, "A good person does not steal", and saying, "If you steal you are likely to be caught and punished"? I think there is a big difference between these statements, and my bias in this course is entirely for the first kind of statement. I approach our subject *not* principally as a matter of staying out of trouble, but as a matter of being good.

Here are the three main questions we will explore:

- What an American lawyer must and must not do (Professional Responsibility rules).
- What an American lawyer should and should not be (ethics and professionalism).
- Whether (and, if so, how) it is possible, in America, to be a good lawyer *and* a good person.

In a narrow sense, 'professional responsibility' refers to the system of enacted regulations governing the conduct of lawyers. But in a broader sense, 'legal ethics' is a special application of ethics in general, and in this sense it concerns the fundamentals of our moral lives. As Socrates noted about ethics, "It is not just about any question, but about the way one should live."<sup>(1)</sup> We will be studying the way one should live as a lawyer.

An axiom of this course is that the two components of legal ethics are inseparable. The study of codified rules apart from broader ethical principles runs the risk of superficiality. But a philosophical study of ethics that ignores the doctrinal bases of American legal practice can't succeed in a law school.

This course's purpose is *not* to show you how close you can come to the edge of the abyss without falling in. Its purpose is to encourage you to wonder how close you *should* come throughout your legal career.

Now for two important terminological clarifications. Please don't skim over what follows: Read it carefully.

### 1. Moral Relativism

A note about moral relativism is in order for the following reasons:

- Ethics are "applied morals." Yet values (which, according to many, are determinant of morality)

are observed to differ both between and within societies. In addition, law students are trained to argue "both sides" of most issues. To the unreflective student "both sides" may seem equally valid as a result. Such students are often tempted to conclude that values are subjective and normatively incommensurate. What right does X have to "impose" her moral beliefs on Y?

- To many people, moral relativism seems, in addition, to be a natural corollary of tolerance, which is surely a characteristic to be encouraged, right?
- Finally, moral relativism is an easy way to duck difficult questions, rack up billable hours doing whatever the client desires, and "get on with" one's life as a (wealthy) lawyer.

My resolute view is that, these temptations notwithstanding, moral relativism would be abominable, if it were not impossible.

First, the "abominable" part. It is an error to think that tolerance implies moral relativism. Certain acts are abhorrent, on any defensible analysis. A principled relativist (or is that an oxymoron? See the next paragraph) would have to acknowledge that, from Hitler's or the Klan's points of view, ovens and lynchings are good; therefore it would be morally illegitimate for the relativist to stop them. As for the "impossible" part, the point is that relativism is particularly subject to the charge of self-contradiction. The assertion, "nothing is objectively true except this statement" cannot adequately rebut the charge that "that statement is not objectively true".<sup>(2)</sup>

As a matter of fact, appropriate tolerance turns out not to have much to do with relativism. Tolerance properly understood has to do with the human condition of *ignorance*. Suppose, for example, that X asserts, "Assisted suicide is morally wrong, in my view. But this is a tough issue, and I might be wrong about it, so I'm not prepared to condemn those who assist suicides."<sup>(3)</sup> Whether X is right or wrong to hold this view on assisted suicide is of course not my point. My point is to insist that X is *not* uttering a relativistic statement here. X's statement avows (ontologically) that there *is* a right answer to moral questions, including to the question about the legitimacy of assisting a suicide; X merely denies certain (epistemological) *knowledge* of the right answer at this point in time. People who believe in right and wrong (hopefully, all of you) don't claim to have all the answers. Only the pompous and the divine have all the answers.

Difficulties in knowing the right moral answer, and resulting differences about moral requirements, lead many students to believe that Legal Ethics is 'empty', or 'fuzzy', or 'softer' than substantive law courses, and is therefore not to be taken seriously. But upon reflection talented jurists know this just ain't so. "Reasonable person", "business judgment" and "balancing test", among other legal concepts, are no less complex and "fuzzy" than judgments about ethical legal behavior. I believe very strongly that in most instances we both are and should be much *more* confident of our judgments about what is right than we are of legal or factual appraisals.<sup>(4)</sup>

## 2. Types of Moral Argument

The second terminological clarification is a reflection on what people *mean* when they assert that an action is morally right or morally wrong. To oversimplify, three basic approaches to this question can be identified. One focuses on the *consequences* of the act; a second examines on the *intrinsic nature* of the act; and a third looks at the *character of the actor*.

- *Consequentialism*. Jeremy Bentham's utilitarianism is probably the most well known form of consequentialism.<sup>(5)</sup> Bentham emphasized the pleasure and pain that actions produce,

recommending behavior that results in the greatest "good" (i.e., the greatest excess of pleasure over pain) for the greatest number. From this perspective, one's moral obligation is always to maximize aggregate "utility." Legal economists led by Judge Richard Posner have substituted monetary wealth (easier to operationalize, and interpersonally comparable) for utility as the metric of maximization.<sup>(6)</sup>

Since consequentialism adds together gains and losses of different people, it endorses policies that help (or enrich) many at the expense of the few. Consequentialism is thus difficult to reconcile with *individual rights*, which by definition 'trump' consequences.<sup>(7)</sup> This is why Bentham called human rights "nonsense on stilts", and why Judge Posner also finds them normatively mystifying. In a passage in *The Brothers Karamazov*, the following challenge is posed<sup>(8)</sup>:

"Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last. Imagine that you are doing this but that it is essential and inevitable to torture to death only one tiny creature -- that child beating its breast with its fist, for instance -- in order to found that edifice on its unavenged tears. Would you consent to be the architect on those conditions?"

Many are troubled with the idea of, say, robbing, or harming, or enslaving, or killing a minority even if that will provide much greater wealth or leisure to the majority. Nobel Prize winner Robert Fogel [showed that slavery was efficient](#), but nonetheless condemned it on moral grounds. Note to GMUSL students: being an economist doesn't require normative endorsement of consequentialism!

- *Deontologists* repudiate "the end justifies the means" consequentialism and insist on the intrinsic moral nature of an action. A deontologist believes that actions are right or wrong independent of their consequences. Kant's 'Categorical Imperative', which enjoins us against using others solely as means to our own ends, no matter how compelling these ends may be, is perhaps philosophy's eleventh most celebrated deontological edict.<sup>(9)</sup> Of course, as indicated above, deontologists do not all agree about the content of the rights derived from deontological analysis. Communitarians and feminists, for instance, condemn theories that elevate individual rights over collective relationships.<sup>(10)</sup>

- *Virtue Ethics* is a name given to a third class of moral theories that emphasizes the character of the *actor* rather than the nature or consequences of her *act*. First expressed by Aristotle<sup>(11)</sup> and given a push by recent work by Alasdair MacIntyre<sup>(12)</sup>, this approach concentrates on what it means to be a good or virtuous *person*, as opposed to which *acts* are good or virtuous. Applied to law, the focus is not on the impact or nature of a lawyer's particular actions but rather on the methodology required to form the *character* of lawyers who perform these actions. Ethical is as the ethical lawyer does, as it were. Critics of this approach note that the main problem of legal ethics consists of characterizing actors who are subject to *conflicting* ethical pulls.

## B. Organization of the Course

I issue a warning that this is a syllabus, not a contract. It is a guide to where we will be going. If I perceive that we need to spend more (or less) time on a topic, we will do so.

## 1. Meetings

We will meet one each week, for two hours each meeting. The first four and the last three sessions look at the forest, and are vital to setting the tone for the twenty-one sessions that examine the trees.

Our second session is a class viewing of *To Kill A Mockingbird*. I'll bring (fat-free...) popcorn to the movie session, if you all supply soft drinks!

## 2. Compulsory Books, Suggested Readings, Etc.

There are three items to purchase (and a fourth is strongly suggested). Here we go:

1) In the table of class assignments below, pages prefaced by **S** refer to

- Shaffer & Cochran, *Lawyers, Clients and Moral Responsibility* (West, 1994).

2) Pages prefaced by **L** refer to

- Lerman & Schrag, *Ethical Problems in the Practice of Law* (2<sup>nd</sup> ed., 2008).

3) An additional required purchase (as background reading for the course) is:

- Cameron Streicher, *Double Billing: A Young Lawyer's Tale of Greed, Sex, Lies, and the Pursuit of the Swivel Chair* (Morrow, 1999) (available new or used at Amazon.com).

Other books I recommend, and that you might want to peruse before or during the semester or as part of your journal-writing, are:

- M. Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Changing American Society* (1994)
- D. Graham, *The Consciousness of the Litigator* (2005)
- C. Horn, *Lawyer Life: Finding a Life and a Higher Calling in the Practice of Law*, (2003)
- M. Kelly, *Lives of Lawyers Revisited* (2007)
- A. Kronman, *The Lost Lawyer* (1994),
- H. Lee, *To Kill a Mockingbird* (1960)
- S. Linowitz, *The Betrayed Profession* (1994)
- K. Roosevelt, *In the Shadow of the Law* (2006)
- R. Zitrin & C. Langford, *The Moral Compass of the American Lawyer* (1999)

As you can see, this course is not structured as an "MPRE practice course" -- that would, in my firm opinion, be the tail wagging the dog. I do note, however, that 100% of the graduates of this course have done splendidly on the MPRE.

OK -- 'nuff said. Here is the tentative agenda for our meetings. There are no wasted meetings in this two-credit course; we hit the ground running from the first meeting, as you will see. Class #2 will take place outside normal classroom hours. Stay tuned for scheduling on this one.

Classes with a "J" notation are those where journal entries (see below) must be handed in before the beginning of class. Also, all required readings must be done **before** class. *If you don't intend to*

*prepare for each class, this course is not for you.* If you have not completed required readings in time for class, inform me before the start of class and I will give you a "pass". Unlimited "passes" are allowed, but your passes may affect your class participation grade. For the record, if I ever call on you (i.e., you have not taken a pass) and you are not prepared for class, *you will automatically be penalized 1/3 grade in your final grade.*

<b>CLASS #</b>	<b>SUBJECT</b>	<b>REQUIRED READING</b>
<b>1</b>	Approaches to Moral Choices in Legal Representation	<b>S</b> 1-55
<b>2</b>	Film viewing: <i>The Verdict</i> <b>SUNDAY AFTER FIRST CLASS OR AFTER LAST CLASS</b>	<b>S</b> 56-135
<b>3J</b>	Confidentiality I	<b>L</b> 151-176, Problems 3-1 through 3-3
<b>4</b>	Confidentiality II	<b>L</b> 176-215; Problems 3-4 through 3-9
<b>5</b>	Attorney-Client Privilege and Work Product	<b>L</b> 215-265; Problems 4-1 through 4-3
<b>6J</b>	The attorney-client relationship I	<b>L</b> 265-309, Problems 5-1, 5-2
<b>7</b>	The attorney-client relationship II	<b>L</b> 309-350, Problems 5-4, 5-5, 5-7
<b>8</b>	Conflicts of Interest I (concurrent)	<b>L</b> 351-383, Problems 6-2, 6-4
<b>9J</b>	Conflicts of Interest II (concurrent, ctd.)	<b>L</b> 383-433, Problems 7-2 through 7-4
<b>10</b>	Conflicts of Interest III (successive/imputed)	<b>L</b> 433-481 Problem 8-3
<b>11</b>	Conflicts between lawyers and clients	<b>L</b> 483-561, Problem 9-1, 9-3
<b>12J</b>	Special rules for government lawyers and judges	<b>L</b> 563-593, Problems 10-2, 10-3
<b>13</b>	Duties to courts	<b>L</b> 598-634, Problems 11-2, 11-3, 11-6
<b>14</b>	Evidentiary issues	<b>L</b> 634-677 Problem 11-7, 11-8
<b>15J</b>	Deception	<b>L</b> 679-729 Problems 12-1, 12-2

### 3. Grading: Journals and Exam

There are two components to your final grade. **40% of the final grade** will be an evaluation of your **journal entries**. **60% of the final grade** will come from a two-hour **final exam**. Once these grades are combined, a **class participation** adjustment will also likely affect the final grade.

#### a) Your journal entries

Law students rarely get a chance to engage in personal, reflective, moral/ethical writing. To the extent that ethical decision-making requires the exercise of practical judgment guided by moral/ethical principles, "practice" is needed. Hence the bi-weekly journal, which commences at session 4.

**A journal entry is not a short LW&R paper:** it can be more personal, for example. Content and form are up to you. For example, journals might relate your reaction to class discussions, to a session's film or assigned readings, or to other texts you have consulted for the course. Alternatively, your journal can be an analysis of a problem or experience personal to you, which bears on the subject matter of the course. Your journal can certainly also address, in whole or in part, my own comments to previous journals. Length is up to you – there is no strict minimum or maximum. But one page will almost certainly be too short, and before submitting more than about five pages *please* remember that I will have up to thirty journals to read and to respond to that week...

Your journal must be handed in **BEFORE THE BEGINNING** of class every week when a journal is due. This rule is a strict one. If you are going to miss a class, you must e-deliver or fax your journal entry to me (993-8124) before the beginning of class. But emailed submission using the TWEN drop box is always best. So please create your journal entry using MS Word or Apple Pages. Then submit the Word or Pages file electronically using the TWEN "drop-box." [The official Time-Stamp integrated into the TWEN drop-box will certify timely submission.] Later in the week, you will receive by return email an annotated version of your journal, along with an approximation (pass/good/honors) of the grade I have assigned you. Pass is a C grade (C-, C or C+), Good is a B grade (B-, B or B+) Honors is an A grade (A-, A or A+). Note that the class is on a mandatory curve (2.85 – 2.95), so by definition I cannot give everyone an Honors grade.

My evaluation of the **thoughtfulness** of your journal, along with traditional criteria (grammar, organization, etc.) will determine the grade. You don't have to agree with me to get a good journal grade! And, for goodness' sake, failure to get an "honors" grade does *not* mean I think you're unethical! There *is* a mandatory grading curve, so journals are graded relatively to some extent. [I can go as high as 3.0 for the class average, if I understand the new grading rules correctly.] The more ethical reflection I see in the journal, the better its grade will tend to be. *But don't write these journal entries for the grade* – otherwise you'll be showing me that you're probably the kind of budding lawyer you shouldn't be!

Some students have been itching to write ethics journals since 1L, or even before -- about their summer jobs with a lawyer, about lawyers (or law students, or law professors...) they have known and loved (or hated), etc, about the regrets they have had since taking their first Torts class.... But others are at a total loss for the subject of their first journal. So as an **absolutely non-mandatory suggestion** for the first journal, consider a film depicting lawyers, judges, or the justice system. In

addition to the obvious examples, you could consider a classic such as Kubrick's *Paths of Glory*, or a more recent movie like *The Green Mile*. [I highly recommend these two movies, by the way.] In these films, officers of the court are confronted with decisions about "doing the right thing". Do they make the correct decisions? Are their decisions justifiable? Excusable? [If you do not know the difference between "justification" and "excuse", now *there's* a journal project for you right off the bat!]

My thorniest problem is showing folks who get non-excellent journal grades what they can do to improve. I cannot show them "better" journal entries because of obvious privacy concerns. So three years ago I asked the student who obtained the high "A" in the 2005 Legal Ethics course to explain to students how to write effective and highly graded journals. The student, Jennifer Lattimore, wrote me as follows:

*I have to think on this. I didn't have any trouble with this because we used to journal-writing in my freshman Boston College English class. We were required to do it every day so it just came to me. Perhaps you might want to explain the "art" of journaling, which is more of the free-flowing sort of writing - writing without thinking, just writing what you're thinking. That's going to be hard for most people since they know you're reading it and they admire you and of course want to do well in your class. But I would suggest not trying too hard, if that doesn't sound bad? Don't try so hard to be philosophical or worry about how it sounds - just write about your day, your thoughts, something that struck you as weird, or something that happened to you a long time ago that impacted your life in some lasting way. I would even recommend having a glass of wine first, just to force yourself to relax about it, but that might not be something you can say :) You could also tell them that if it's too much all at once, write a little each day before going to bed or while waiting between classes*

Ms. Lattimore's suggestion is one of many possible routes. If you prefer to do research on a current event and report on it, or tell me about a book you have just read, or even a movie you have just seen, those are also ways to write thoughtful journal entries!

I am active member #32230 of the Virginia State Bar. *I assure you that, unless you announce your intention to commit a crime, the confidentiality of everything you write in your journal will be respected.* I will not show anyone else your journal, nor will I refer to your journal (even anonymously) in class or on TWEN without advance permission from you, which permission you are free to decline without penalty.

## **b) The final exam**

60% of your grade will be the result of a two-hour **final exam**. The exam will test your understanding of the Model Rules in the light of ethical approaches to lawyering examined in our course.

## **c) Class participation**

Unacceptable performance in class (e.g., if you have not taken a pass, I call on you, and you're not prepared for class), or excessive passes, will result in a one-level grade penalty.

In addition, the combination of your participation and exam grades will produce a number that is likely between two letter grades. You will go to the nearest letter grade up or down, depending on

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your class performance. So to a limited extent everyone's performance will affect their final grade. Thank you for reading this syllabus. I look forward to seeing you in *Legal Ethics*.

Notes.

1. Plato, *The Republic* (A. Bloom, transl., 1968), 352D
2. See Minow and Spelman, "In Context", 63 U.S.C. L. Rev. 1597 (1990)
3. This, by the way, is not necessarily my view.
4. See Rhode, "Ethical Perspectives on Legal Practice", 37 Stan. L. Rev. 589, 620 ff. (1985)
5. Bentham, *An Introduction to the Principles of Morals and Legislation*. See generally H.L.A. Hart, "Between Utility and Rights", 79 Colum. L. Rev. 828 (1979)
6. See Posner, *The Economics of Justice*, 48-83 (1983)
7. See Dworkin, *Taking Rights Seriously*, 1978
8. Dostoyevsky, *The Brothers Karamazov* 226 (C. Garnett transl., 1957)
9. Kant, *Foundations of the Metaphysics of Morals*, 46 (L. Beck transl., 1990). There are ten far more famous deontological commands in the Bible.
10. See Tushnet, "An Essay on Rights", 62 Tex. L. Rev. 1363 (1984)
11. Aristotle, *Nicomachean Ethics*
12. MacIntyre, *After Virtue*, 1981