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

Fall 2015
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."¹ 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 Plato, The Republic (A. Bloom, transl., 1968), 352D
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 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 (is that an oxymoron? See the next paragraph) would have to acknowledge that, from Hitler's or the Klan's points of view, human 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 question, "what makes that statement objectively true?"

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."

Whether X is right or wrong to tolerate 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 (epistemologically) 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 claim to have all the answers, and only the Latter do so accurately.

Some (including prominent pragmatists from Holmes to Posner) believe that science is incompatible with morality. They are, in a word, science fetishists in my opinion. What one scholar has usefully termed “scientism” demeans both science and morality. Many modern

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3 This, by the way, is not necessarily my view.
4 Austin L. Hughes, "The Folly of Scientism," The New Atlantis, Number 37, Fall 2012, pp. 32-50
scientists, of course, have seen that objective morality and science are fully compatible.  

Difficulties in knowing the right moral answer, and resulting differences about ethical 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 isn'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 more confident of our judgments about what is right than we are of legal or factual appraisals.

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. 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. 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. 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:

"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.

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5 See, e.g., Richard Joyce, The Evolution of Morality, MIT Press, 2006
8 See Posner, The Economics of Justice, 48-83 (1983)
9 See Dworkin, Taking Rights Seriously, 1978
10 Dostoyevsky, The Brothers Karamazov 226 (C. Garnett transl., 1957)
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.\(^\text{11}\) 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.\(^\text{12}\)

- **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\(^\text{13}\) and given a push by recent work by Alasdair MacIntyre,\(^\text{14}\) 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**

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 twice each week, for seventy-five minutes each meeting. The first few sessions look at the forest, and are vital to setting the tone for middle sessions, which examine the trees. We return to the forest at the end of the course.

One session is a group viewing of a **film**. I'll bring (fat-free...) popcorn to the movie session, if you all supply soft drinks!

2. **Compulsory Books, Suggested Readings, Class Schedule.**

a) **Compulsory Books**

\(^\text{11}\) Kant, *Foundations of the Metaphysics of Morals*, 46 (L. Beck transl., 1990). There are ten far more famous deontological commands in the Bible.


\(^\text{13}\) Aristotle, *Nicomachean Ethics*

\(^\text{14}\) MacIntyre, *After Virtue*, 1981
There are two compulsory items to purchase (and two other purchases are recommended). All books are available used on Amazon, so check for bargains if you can:

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

2) Pages prefaced by L refer to

3) A recommended purchase (as background reading for the course, preferably before the course begins, though as a side reading during the semester it is also great) is a compendium of Rules. Many are available, and if I receive free examination copies I will raffle them off during the second class session. Buy a used copy (1 year old is fine, don’t go older than that) to minimize your cost.

b) Suggested Readings (including during the Xmas holidays preceding the course!)

The following books may be borrowed from a library. There are hundreds of books about legal ethics: I highly recommend you read some of the following before or during the semester or as part of your journal writing (in alphabetical order by author):

• P. Haskins (ed.), *The Relevant Lawyer: Reimagining the Future of the Legal Profession* (2015)
• A. Kronman, *The Lost Lawyer* (1994),
• S. Linowitz, *The Betrayed Profession* (1994)
• S. Rae, *Moral Choices: An Introduction to Ethics* (2009)
• C. Stracher, *Double Billing: A Young Lawyer's Tale of Greed, Sex, Lies, and the Pursuit of the Swivel Chair* (Morrow, 1999)

Seriously, look some of these books up. This course is NOT like other courses: it is about YOUR future lives. Give this course close attention.

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 passed the MPRE.

C) Class Schedule

Here is the tentative agenda for our meetings. As you will see, this is a problem-oriented course. We will spend a lot of time each class solving the problems assigned (as well as new problems I will spring on you), as opposed to all the rest of the text. Much of the casebook is self-explanatory.

*We must reschedule two classes: September 15 and October 15. As the make-up dates for those classes has not been fixed, I am listing them as if they would occur. Obviously they will be altered.*

Classes with a "J" notation are those where journal entries (see below) must be submitted via TWEN’s drop box before the beginning of the appropriate class.

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 passes (after the first one) will affect your class participation grade. For the record, if I call on you (i.e., if you have not taken a pass) and you are not prepared for class, you will automatically be penalized 1/3 grade.

<table>
<thead>
<tr>
<th>CLASS #</th>
<th>DATE</th>
<th>SUBJECT</th>
<th>REQUIRED READING</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>8/20</td>
<td>Introduction to course</td>
<td>L 1-8. I will discuss <em>To Kill A Mockingbird</em> during sessions 2 and 4, so please re-read that book or view the film this week for session 3.</td>
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<tr>
<td>2</td>
<td>8/25</td>
<td>Approaches to Moral Choices in Legal Representation</td>
<td>S 1-65</td>
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<tr>
<td>3</td>
<td>8/27</td>
<td>Film viewing: <em>The Verdict</em></td>
<td>No readings. Read TKAM (see above).</td>
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<tr>
<td>4J</td>
<td>9/1</td>
<td>Moral Values for the Law Office</td>
<td>S 66-132</td>
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<td>5</td>
<td>9/3</td>
<td>Confidentiality I</td>
<td>L 159-179, 220-228; Problems 3-1 through 3-3</td>
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<td>#</td>
<td>Date</td>
<td>Topic</td>
<td>Notes</td>
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<td>6</td>
<td>9/8</td>
<td>Confidentiality II</td>
<td>L 179-198; Problems 3-4, 3-5</td>
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<td>7</td>
<td>9/10</td>
<td>Confidentiality III (client counseling exercise)</td>
<td>Readings will be given to each student individually in class on 1/26, in an envelope.</td>
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<tr>
<td>8J</td>
<td>9/15*</td>
<td>Confidentiality IV</td>
<td>L 198-228; Problems 3-6, 3-8, 3-9</td>
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<td>9</td>
<td>9/17</td>
<td>Attorney-client relationship I</td>
<td>L 279-312, Problem 5-1</td>
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<tr>
<td>10</td>
<td>9/22</td>
<td>Attorney-client relationship II</td>
<td>L 312-354, Problems 5-2, 5-4</td>
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<td>11</td>
<td>9/24</td>
<td>The attorney-client relationship III</td>
<td>L 354-377, Problems 5-6, 5-7</td>
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<td>12J</td>
<td>9/29</td>
<td>Conflicts between clients I (concurrent)</td>
<td>L 379-407, Problems 6-1, 6-2</td>
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<td>13</td>
<td>10/1</td>
<td>Conflicts between clients II (concurrent, ctd.)</td>
<td>L 407-421, Problems 6-3, 6-6</td>
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<tr>
<td>14</td>
<td>10/6</td>
<td>Conflicts between clients III (concurrent, ctd.)</td>
<td>L 423-450, Problems 7-2 through 7-5</td>
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<tr>
<td>15</td>
<td>10/8</td>
<td>Conflicts between clients IV (concurrent, ctd.)</td>
<td>L 450-469 Problems 7-6, 7-7</td>
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<td>16J</td>
<td>10/15*</td>
<td>Conflicts between clients V (successive/imputed)</td>
<td>L 471-519 Problems 8-1, 8-2, 8-4</td>
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<td>17</td>
<td>10/20</td>
<td>Conflicts between lawyer and client</td>
<td>L 521-566, Problem 9-1, 9-2</td>
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<td>18</td>
<td>10/22</td>
<td>Conflicts between lawyer and client II</td>
<td>L 566-593, Problem 9-3</td>
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<td>19J</td>
<td>10/27</td>
<td>Conflicts between lawyer and client III/Government lawyers</td>
<td>L 593-620 Problem 9-4</td>
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<td>20</td>
<td>10/29</td>
<td>Judges</td>
<td>L 621-642, Problems 10-2, 10-3</td>
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<td>21</td>
<td>11/3</td>
<td>Lawyers’ Duties to courts I</td>
<td>L 643-675, Problems 11-1, through 11-3</td>
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<td>22</td>
<td>11/5</td>
<td>Lawyers’ Duties to courts II</td>
<td>L 675-692 Problems 11-4 through 11-7</td>
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<tr>
<td>23J</td>
<td>11/10</td>
<td>Lawyers’ Duties to courts III</td>
<td>L 692-727 Problems 11-8, 11-9</td>
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### 3. Grading: Journals and Exam

There are two components to your final grade. **50% of the final grade** will be an evaluation of your journal entries. **50% of the final grade** will come from a two-hour **final exam**. Once these grades are combined, a **class participation** adjustment will also 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 should be more personal. 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 articles/films/books you have consulted. As well, your journal can be an analysis of a problem or experience personal to you that bears on ethics in some way. Your journal may also address, in part, my own comments to previous journals – yes, I will comment! Length is up to you – there is no formal minimum or maximum. But one or two pages will almost always be too short, and before submitting more than about six pages please remember that I will have 29 other journals to read and to respond to that week…

Your journal must be handed in **BEFORE THE BEGINNING** of class when a journal is due. This rule is strict, just as strict as the rule about timely submission of motions or about statutes of limitation. A late journal entry will be read and annotated by me, but will get a grade of zero.

Please create your journal entry using Word. Then submit the Word or Pages file electronically using TWEN’s "drop-box." [The official Time-Stamp integrated into the TWEN drop-box will certify your timely submission.] Later in the week, you will receive by return email an annotated version of your journal, along with the grade range (passable/good/excellent) for your entry. Passable is a C grade (C-, C or C+), Good is a B grade (B-, B or B+) Excellent is an A grade (A-, A or A+). **Note that this class has a mandatory GP mean.**

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 an excellent journal grade! And, for Goodness' sake, failure to get an “excellent” grade does not mean I think you’re unethical! The more and the deeper 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 before -- about their summer jobs with a lawyer, about lawyers (or law students, or even law professors…) whom they have known and loved (or hated), etc., about the regrets they have had since taking their first Torts class, or about the joy or guilt they feel about their chosen profession…. But other students are at a loss for the subject of their first journal. As an absolutely non-mandatory suggestion for the latter group, consider for your first journal a film: either a film depicting lawyers, judges, or the justice system (Michael Clayton; A Few Good Men; The Rainmaker; The Devil’s Advocate; etc), or perhaps a classic such as Kubrick's Paths of Glory; or a much more unconventional movie about the justice system, such as The Green Mile. 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 toughest challenge is advising folks who get non-excellent journal grades what they can do to improve their grades. I find that I often fail at this task. I cannot show these students "better" journal entries because of the confidentiality of journal entries (see below). So several years ago I asked a student, who had just obtained the high "A" in Legal Ethics, to explain to students how to write effective and highly graded journals. The student, Jennifer Lattimore, now a personal friend practicing law in Richmond, allowed me to share her reflections:

I have to think on this. I didn't have any trouble with journals because we used to journal-write 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. Others have waxed more philosophical, or done substantial outside reading to ground their journal entries. If you prefer to do research on a current event and report on it, or write me about a book that has moved you, 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 of course free to decline without penalty.

b) The final exam
50% 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. Evidence of understanding of both “forest” and “trees” must be demonstrated.

c) Class and TWEN participation
Unacceptable performance in class (see above) will result in a full grade penalty. Superb class participation earns a full one-level bump up.

The combination of your participation and exam grades will, for almost all students, produce a number that is between two letter grades. Most will therefore go to the nearest letter grade up or down, depending on my evaluation of your class and TWEN performance. The number of absences and of passes taken becomes relevant here.

Thank you for reading this syllabus. I look forward to seeing you in Legal Ethics.