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

Fall 2016

Professor Krauss
Office 316

Office Hours: Wed., 10AM – 3:30PM

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. Legal Ethics is a course on applied ethics. We will cover the Rules of Professional Responsibility (see below) but we will do much more. Those rules are the tail, not the dog.

I introduce this syllabus by asking whether you think there is a difference between stating that, "A good person does not steal", and, "If you steal you are likely to be caught and receive the following punishment." 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 list of the costs of being bad, but as an exploration of what it means to be 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.

To summarize this far: '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

An axiom of this course is that these two components are inseparable. The study of codified rules apart from broader ethical principles runs the risk of superficiality and positivistic neo-nihilism. 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, in brief, 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 reflect on how close you should come throughout your legal career. Be not mistaken: no matter what kind of law you practice, the

¹ Plato, The Republic (A. Bloom, transl., 1968), 352D
abyss will never be far away.

Now for two important terminological clarifications. Please don't skim over what follows.

1. Moral Relativism

My first terminological clarification is a reflection on whether anything is “really” morally right or morally wrong. This 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 issues. To the unreflective student "both sides" may seem equally valid, since either side can be argued. Law students exposed to Socratic dialogue are often tempted to conclude that values must therefore be 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 lynching are good; therefore only brute power, not morality, could condemn them.

As for the "impossible" part, the point is that relativism is exceptionally 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 here. My point is to insist that X is not uttering a relativistic statement. X's statement avows (ontologically) that there is a right answer to moral questions, including to the question about the legitimacy of assisting suicides in general or any given suicide in particular; X merely denies (epistemologically) that she has knowledge of the right answer at this point in time. People who believe in right and wrong (hopefully, all of you or woe is us) don't have to claim to have all the

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3 This, by the way, is not necessarily my view.
answers. Only the pompous and Prophets can Know all the answers. The rest of us rely on reason and faith.

Some (including prominent pragmatists from Holmes to Posner, both of whom belittle Ethics) believe that science is incompatible with morality. This is an example of “science fetishism” in my opinion. What one observer has usefully termed “scientism” demeans both science and morality. Many modern scientists, of course, have understood that objective morality and science are fully compatible.

Difficulties in knowing what is the correct moral answer to difficult questions, 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 that that view is, as the Brits say, “rubbish.” "Reasonable person", "business judgment," and "balancing test", among other legal concepts, are no less nuanced and "fuzzy" than judgments about ethical lawyering. I strongly believe that in most instances we both are and should be more confident of our judgments about what is right than we are of technical appraisals.

2. Types of Moral Argument

My second terminological clarification is a reflection on what people mean when they assert that an action is morally right or morally wrong. To simplify, 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: the correct choice is of 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:

4 Austin L. Hughes, "The Folly of Scientism," The New Atlantis, Number 37, Fall 2012, pp. 32-50
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
"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 incinerating, or enslaving a minority even if that will provide much greater joy or 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 that you normatively endorse consequentialism!

• **Deontologists** repudiate "the end justifies the means" essence of consequentialism, and insist on the intrinsic moral nature of an action. A deontologist believes that actions are right or wrong independent of their consequences. Killing an innocent person is wrong even if the killing makes 1000 sadists deliriously happy. 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. 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, are deontologists who the elevation of individual rights over collective relationships.

• **Virtue Ethics** is 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 and given a push by Alasdair MacIntyre, 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, says Virtue Ethics. 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**

10 Dostoyevsky, *The Brothers Karamazov* 226 (C. Garnett transl., 1957)
13 Aristotle, Nicomachean *Ethics*
14 MacIntyre, *After Virtue*, 1981
We will meet twice each week, for seventy-five minutes each meeting. The first few sessions look at the forest, and are absolutely vital to setting the tone for the remaining sessions, which pick apart the trees.

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!


a) Compulsory Books

There are two compulsory items to purchase (and a third purchase is recommended). One is new, so there will be few bargains there:

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

2) In the table of class assignments below, 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, so don’t buy any until you know whether you’ve won the raffle; if you don’t win one, buy a recent used copy on the cheap.

b) Suggested Readings

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 and/or during the semester or as part of your journal writing (in alphabetical order by author):

- M. Kelly, Lives of Lawyers Revisited (2007)
- S. Linowitz, The Betrayed Profession (1994)
• S. Rae, *Moral Choices: An Introduction to Ethics* (2009)
• C. Streicher, *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. Don’t blow off this course it is NOT like other courses. It is about YOUR future lives. Drop this course NOW if you want to treat it non-seriously. Note, finally, the obvious, this course is not structured as an "MPRE practice course" -- that would be the tail wagging the dog. I do note that to the best of my knowledge 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 ones that I will spring on you), as opposed to all the rest of the text. Much of the casebook is self-explanatory.

Classes with a "J" notation are those where journal entries (see below) must be submitted via TWEN’s drop box before the beginning of 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". Taking more than one pass will preclude a bonus class participation grade (see below). Conversely, 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.

Note that Class 14 is on a rescheduled date, because of Rosh Hashanah

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<thead>
<tr>
<th>CLASS #</th>
<th>DATE</th>
<th>SUBJECT</th>
<th>REQUIRED READING BEFORE CLASS</th>
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<tr>
<td>1</td>
<td>8/18</td>
<td>Introduction to course</td>
<td>L 1-8, Problem 1-3 on p. 61</td>
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<tr>
<td>Date</td>
<td>Description</td>
<td>Notes</td>
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<tr>
<td>8/25</td>
<td>Film viewing: <em>The Verdict</em></td>
<td>I will discuss <em>To Kill A Mockingbird</em> at some length in session 4, so please re-read that book or view the film this week.</td>
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<td>8/30</td>
<td>Moral Values for Law Office</td>
<td>S 66-132 [S book again, NOT L]</td>
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<td>9/1</td>
<td>Confidentiality I</td>
<td>L 141-169; Problems 3-1 through 3-4</td>
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<tr>
<td>9/6</td>
<td>Confidentiality II</td>
<td>L 170-196; Problems 3-5, 3-6</td>
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<td>9/8</td>
<td>Confidentiality III [client counseling exercise]</td>
<td>Materials will be emailed <strong>confidentially</strong> to each student individually after class on 9/1.</td>
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<td>9/13</td>
<td>Confidentiality IV</td>
<td>L 197-238; Problems 4-2, 4-3</td>
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<td>9/15</td>
<td>Attorney-client relationship I</td>
<td>L 239-274, Problem 5-1, 5-2</td>
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<td>9/20</td>
<td>Attorney-client relationship II</td>
<td>L 275-312, Problems 5-4, 5-5</td>
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<td>9/22</td>
<td>The attorney-client relationship III</td>
<td>L 312-329, Problems 5-6, 5-7</td>
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<td>9/27</td>
<td>Conflicts between clients I (concurrent)</td>
<td>L 329-356, Problems 6-1, 6-2</td>
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<tr>
<td>9/29</td>
<td>Conflicts between clients II (concurrent, ctd.)</td>
<td>L 356-377, Problems 6-3, 6-4, 6-5, 6-7</td>
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<td>10/5</td>
<td>Conflicts between clients III (concurrent, ctd.)</td>
<td>L 377-405, Problems 7-2 through 7-5</td>
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<td>10/6</td>
<td>Conflicts between clients IV (concurrent, ctd.)</td>
<td>L 405-426 Problems 7-6 through 7-8</td>
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<td>10/13</td>
<td>Conflicts between clients V (successive/imputed)</td>
<td>L 427-473 Problems 8-1 through 8-3</td>
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<td>10/18</td>
<td>Conflicts between lawyer and client</td>
<td>L 477-514, Problem 9-1, 9-2</td>
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<tr>
<td>10/20</td>
<td>Conflicts between lawyer and client II</td>
<td>L 514-554, Problem 9-3</td>
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<td>10/25</td>
<td>Conflicts between lawyer and client III/Government lawyers</td>
<td>L 555-596 Problems 10-2, 10-3</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. Please note that I am bound by the mandatory GPA mean for this compulsory course.

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 texts you have recently read to prepare your journal entry. 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 can also address, in part, my own comments to previous journals. Length is up to you – there is no strict minimum or maximum. But one or two pages will usually be too short, and before submitting more than six 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

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<th>Week</th>
<th>Date</th>
<th>Topic</th>
<th>Cases to be assigned</th>
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<tr>
<td>20</td>
<td>10/27</td>
<td>Judges case studies</td>
<td>Cases to be assigned</td>
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<tr>
<td>21</td>
<td>11/1</td>
<td>Lawyers’ Duties to courts I</td>
<td>L 597-627, Problems 11-1 through 11-3</td>
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<td>22</td>
<td>11/3</td>
<td>Lawyers’ Duties to courts II</td>
<td>L 628-650 Problems 11-4, 11-6, 11-7</td>
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<td>23</td>
<td>11/8</td>
<td>Lawyers’ Duties to courts III</td>
<td>L 650-686 Problem 11-8</td>
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<td>24</td>
<td>11/10</td>
<td>Duties to adversaries and third parties I</td>
<td>L 687-719 Problems 12-1 through 12-3</td>
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<td>25J</td>
<td>11/15</td>
<td>Duties to adversaries and third parties II</td>
<td>L 719-743 Problems 12-4, 12-5</td>
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<td>27</td>
<td>11/22</td>
<td>Modern Practice: Open Forum</td>
<td>Sells OR Stracher [respond to poll by 9/1]</td>
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<tr>
<td>28J</td>
<td>11/29</td>
<td>Movie/Exam Review: Dinner at Sharswood’s Cafe</td>
<td>No reading. <strong>NB 1 HR 30 MINUTE CLASS</strong></td>
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journal is due. This rule is a strict one, just as strict as the rule about timely submission of motions or briefs to a court once you are a practicing lawyer. A late journal entry will be read and annotated by me, but will receive a grade of zero.

Please create your journal entry using Word. Then submit the Word file electronically using TWEN’s "drop-box." [The official Time-Stamp integrated into the TWEN drop-box will be your proof of timely submission.] Later in the week, you will receive by return email an annotated version of your journal, along with an indication (passable/good/excellent) of the grade range I have assigned. Passable is a C grade (C+), Good is a B grade (B-, B or B+) Excellent is an A grade (A-, A or A+). The mandatory GP mean signifies that excellent grades are reserved for those that really stand out.

My evaluation of the thoughtfulness of your journal, along with traditional criteria (grammar, organization, etc.) will determine your grade. You don't have to agree with me on a substantive issue to get a good journal grade! And, for goodness' sake, failure to get an “excellent” grade does not mean that 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 even before -- about their summer jobs with a lawyer, about lawyers or fellow law students (or law professors…) they have known and loved (or hated), 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 this latter group, consider for your first journal a film depicting lawyers, judges, or the justice system. In addition to the obvious examples of films about lawyers (Michael Clayton; A Few Good Men; The Rainmaker; The Devil’s Advocate; etc), you could consider a classic such as Kubrick's Paths of Glory, or a 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." You will soon be an officer of the court. Did these people 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. I mostly fail at this task, and a few students each year remain upset with the way I have evaluated their journals. Part of the problem is that, unlike exams, 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. That student, Ms. Jennifer Lattimore, today a mother and an attorney practicing in Richmond, wrote me as follows:

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 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 an awful 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 absolutely 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” (see above) must be demonstrated.

c) Class and TWEN participation

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

In addition, for most students the averaging of your journal grades with your exam grades will almost always produce a number that is between two grade levels. All will go to up or down to the nearest grade levels, depending on my evaluation of your class and TWEN performance. The number of absences and of passes taken, along with the quality and quantity of volunteer statements in class, are relevant here.

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