Legal Ethics (a.k.a. Professional Responsibility)
Spring 2020

Professor Krauss
Office 316
Office Hours: Tuesdays, 9AM – 5:00PM or by Skype on Thursdays

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 a "Truth in Advertising" summary of his or her own approach to the subject matter. A clue to mine is my preferred title for the course. This course is a course on applied ethics. We will of course cover the Model Rules of Professional Responsibility (see below) but we will do much more. The Model Rules are the tail, not the dog. As I use these terms, 'professional responsibility' refers to the system of enacted positive regulations governing the conduct of lawyers. But 'legal ethics' is a special application of ethics in general, and concerns the fundamentals of the moral lives of lawyers. As Socrates noted about ethics in Plato’s Republic, "[Ethics] is not just about any question, but about the way one should live." We will be studying the way one should live in the Law.

I introduce this syllabus by asking whether you think there is a difference between these statements: 1) "A good person does not steal"; and 2) "If you steal you are likely to be caught and receive the following punishment." I think there is a huge difference between these statements, and my orientation in this course is entirely to the first kind of statement. In other words, I approach our subject not principally as a description of how close you can come to the edge without being pushed off, but as an exploration of what it means to be a good lawyer.

Here are the three “macro” questions we will explore in this course:
   • What, legally, must an American lawyer do and not do (Professional Responsibility rules)?
   • What, ethically, should an American lawyer be and not be (ethics and professionalism)?
   • Is it possible, in America today, to be a good lawyer and a good person?

An axiom of this course is that any study of codified rules that abstracts from broader ethical principles runs the risk of superficiality and even of neo-nihilism. At the same time, a philosophical study of ethics that ignores the positive rules of American legal practice is simply inappropriate in a professional school. This course kills two birds with one stone (and gives you three credits for doing so)!

This course's purpose, in brief, is to encourage you to reflect on how close you should
come to the edge of the abyss provided by the positive rules throughout your legal career. [Should you ever sometimes “jump” – that is, violate a positive rule? Well, stay tuned, there’ll be no spoilers in this syllabus.] Be not mistaken: no matter what kind of law you practice, the abyss will never be far away.

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

1. Moral Relativism

Is anything “really” ever morally right or wrong? 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) appear to differ both among and within societies. [Goodness knows, in today’s viciously divided America, few values seem shared.] In addition, law students are trained to argue "both sides" of issues. To the unreflective student, "both sides" may therefore be equally valid, otherwise why would we be trained to argue them? Law students stumped by Socratic questioning from their professor are often tempted to conclude that since one can “argue anything,” and since the professor declines to give THE answer, values are therefore subjective and normatively incommensurate. What right, many Millennials wonder, 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 an attitude strongly encouraged in 21st Century America.

• Finally, moral relativism is an easy way to duck difficult questions, to rack up those billable hours while not losing sleep, to do whatever the client desires with a clear conscience, to "get on with" one's life as a (wealthy) lawyer.

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

First, the "abominable" part. It is simply lazy thinking to think that appropriate tolerance implies moral relativism. Certain acts are abhorrent on any defensible analysis. A principled relativist (is that an oxymoron? See the next paragraph) would acknowledge that, from Hitler's or the Klan's points of view, human ovens and lynching are morally good and even required. From the relativistic position only brute power, not morality, condemns them. Surely you don’t believe that might makes right, do you?

Not to worry: moral relativism escapes this abomination, because it is impossible. The point is that relativism is fatally subject to the charge of self-contradiction. The assertion, "nothing is objectively true" cannot adequately rebut the question, "what makes that statement objectively true?" [See Minow and Spelman, "In Context", 63 U.S.C. L. Rev. 1597 (1990)]
As a matter of fact, appropriate tolerance turns out not to have much to do with relativism at all. Tolerance properly understood has to do with the human condition of (epistemological) uncertainty about what the Truth is, not with the (ontological) non-existence of Truth.

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 frankly not prepared to legally punish 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. Rather, X merely denies (epistemologically) that she is certain of the right answer to this question at this point in time. People who believe in right and wrong (hopefully, all of you, otherwise woe is us) don't have to claim to have all the answers! Only the pompous, and Prophets, can know all the answers. The rest of us rely on reason and faith.

Some (including pragmatists from Oliver Wendell Holmes, Jr. to Richard Posner, both of whom publicly belittle the very idea of Ethics) believe that science is incompatible with morality. This is an example of “science fetishism,” or what one observer has usefully termed “scientism.” Scientism demeans both science and morality. [Austin L. Hughes, "The Folly of Scientism," The New Atlantis, Number 37, Fall 2012, pp. 32-50] To the contrary, loads of modern scientists understand that objective morality and science are fully compatible. [E.g., Richard Joyce, The Evolution of Morality, 2006.]

Difficulties in knowing what the correct answer to difficult moral questions is, and resulting differences about ethical requirements, lead many students to conclude that Legal Ethics is 'empty', or 'fuzzy', or 'softer' than substantive law courses, and therefore not to be taken seriously. But upon reflection talented jurists know that that conclusion is, as the Brits are fond of saying, “rubbish.” "Reasonable person", "business judgment," "balancing test," and “proximate causation,” among other legal concepts, are easily as nuanced and "fuzzy" as judgments about ethical lawyering. Yet Law is not a nihilistic sham. Indeed, I believe that in most instances we are and should be more confident of our judgments about what is right and wrong than we are about technical legal evaluations.

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 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; 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 (or utility) and pain
(or disutility) that actions produce: the morally correct behavior is the one that results in the greatest "good" (i.e., the greatest surplus of pleasure over pain) for the greatest number. From this perspective, one's moral obligation is to maximize aggregate "utility." Some legal economists, led by former Judge Posner, 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 impossible to reconcile with individual rights, which by definition would 'trump' consequences. [Dworkin, Taking Rights Seriously, 1978]. This is why Bentham believed that individual rights were "nonsense on stilts", and why former Judge Posner also found 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 (including, hopefully, you) are troubled with the idea of, say, robbing, or incinerating, or enslaving a minority just because that spoliation, enslavement, or genocide provides a net benefit of joy or wealth or leisure to the majority. Nobel Prize winner Robert Fogel showed that slavery was “efficient,” but nonetheless properly condemned it on moral grounds.

Special note to Scalia Law students: understanding Economics, or even being an economist, doesn't compel you to normatively endorse consequentialism! [See, e.g., John Timestra’s Stories Economists Tell: Studies in Christianity and Economics, 2012]

• Deontologists repudiate the “ends justify the means” maximizations 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 other people deliriously happy. Kant's 'Categorical Imperative', which enjoins using others solely as means to our own ends, no matter how compelling these ends are, is perhaps the eleventh most celebrated deontological edict.

Of course, as indicated above, deontologists are not all certain that they know the content of the rights derived from deontological analysis. Communitarians and feminists, for instance, are deontologists who condemn the elevation of individual autonomy over collective relationships. [Tushnet, "An Essay on Rights", 62 Tex. L. Rev. 1363 (1984)]

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1 I'm not proselytizing, as those who know me know well.
• **Virtue Ethics**, a third class of moral theory, 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 moral actions. Ethical is as the ethical lawyer does, in other words. 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 this year, we will do so.

1. **Meetings**

We will meet once each week, for one hundred seventy minutes each meeting. The first few sessions look at the forest and are vital to setting the tone for the remaining sessions, which focus on the trees. We all must hit the ground running, as it were, for the course to be a success. See suggested readings below to do so.

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

2. **Compulsory Books and Suggested Readings.**

a) **Compulsory Books**

There are two compulsory items to purchase (a third is recommended):

1) In the table of class assignments below, pages prefaced by S refer to
   • Shaffer & Cochran, Lawyers, Clients and Moral Responsibility (2nd Ed., West, 2009). [S]
2) In the table of class assignments below, pages prefaced by L refer to
   • Lerman & Schrag, Ethical Problems in the Practice of Law (4th ed., 2016). [L]
3) A recommended purchase is a compendium of Model Rules. Many are available, and you can buy a recent used copy (1-2 years old) on the cheap on Amazon.

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 (herewith in alphabetical order by author):

- S. Linowitz, The Betrayed Profession (1994)
- D. Luban, Lawyers and Justice: An Ethical Study (1988)
- 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) [to be read for end-of-term discussion]

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.

3. **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 that I will spring on you, many of which are made up by me).

Classes with a "J" notation are those where journal entries (see below for details) 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).** Worst of all, if I call on you (i.e., if you have not taken a pass) and you are not prepared for class, you will have behaved unethically and you will be penalized 1/3 grade.
<table>
<thead>
<tr>
<th>CLASS # and DATE</th>
<th>SUBJECT(S)</th>
<th>REQUIRED READING BEFORE CLASS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 1/22</td>
<td>a) Introduction to course</td>
<td>L 1-8, Problem 1-3 on p. 61</td>
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<td></td>
<td>b) Approaches to Moral Choices in Legal Representation</td>
<td>S 1-65 [Note, S book]</td>
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<td>2 1/29</td>
<td>a) Film viewing and book discussion: <em>The Verdict</em> and <em>To Kill A Mockingbird</em></td>
<td><em>Please re-read To Kill A Mockingbird. If you prefer, see the TKAM film (available on Netflix)</em></td>
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<td></td>
<td>b) Moral Values for Law Office</td>
<td>S 66-132</td>
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<tr>
<td>3J 2/5</td>
<td>Confidentiality I</td>
<td>L 141-196; Problems 3-1 through 3-6</td>
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<tr>
<td>4 2/12</td>
<td>a) Client counseling exercise</td>
<td>Materials will be emailed confidentially to each student individually after class on 9/5.</td>
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<td></td>
<td>b) Confidentiality II (ctd)</td>
<td>L 197-238; Problems 4-2, 4-3</td>
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<td>5J 2/19</td>
<td>Attorney-client relationship I</td>
<td>L 239-312, Problems 5-1, 5-2, 5-4, 5-5</td>
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<tr>
<td>6 2/26</td>
<td>Attorney-client relationship II</td>
<td>L 312-356, Problems 5-6, 5-7, 6-1, 6-2</td>
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<tr>
<td>7J 3/4</td>
<td>Conflicts between clients</td>
<td>L 356-405, Problems 6-3, 6-4, 6-5, 6-7, 7-2 through 7-5</td>
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<tr>
<td>8 3/18</td>
<td>Conflicts between clients II</td>
<td>L 405-473 Problems 7-6 through 7-8, 8-1 through 8-3</td>
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<td>9 3/25</td>
<td>Conflicts between lawyer and client</td>
<td>L 477-554, Problems 9- through 9-3</td>
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<tr>
<td>10J 4/1</td>
<td>a) Conflicts between lawyer and client II/Government lawyers</td>
<td>L 555-596 Problems 10-2, 10-3</td>
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<td>b) Lawyers’ Duties to courts I</td>
<td>L 597-650, Problems 11-1 through 11-4, 11-6, 11-7</td>
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<tr>
<td>11 4/7 [note special date]</td>
<td>Lawyers’ Duties to courts, adversaries and third parties</td>
<td>L 650-719 Problems 11-8, 12-1 through 12-3</td>
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<tr>
<td>12J 4/15</td>
<td>a) Duties to adversaries and third parties II</td>
<td>L 719-743 Problems 12-4, 12-5</td>
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<td></td>
<td>b) Judicial Ethics</td>
<td>Cases to be assigned on TWEN.</td>
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Film: “Dinner at Sharswood Café” movie (exam review)
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. The other 50% of the final grade will come from a two-hour final exam. Once these grades are combined, your average will likely be between two grade points. You will be rounded down to the lower grade point (if your average is exactly a grade point that is what you will get), unless good class participation (TWEN and in-class) earns you a bump to the next grade point.

Please note that there is a mandatory GPA mean for this compulsory course, and that I may only deviate from this mean by convincing the Dean that this is appropriate. In 2018 I convinced the Dean that my exceptional group deserved an average GPA that was above the mandatory range.

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 3.

A journal entry is not a short LW&R paper: it is much 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 a film or book or article you have recently read/seen in order 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 (not necessarily legal ethics). Your journal entry can also address, in part, my own comments to a previous journal entry. Length is up to you – there is no strict minimum or maximum. But 2-3 pages will usually be too short, and before submitting more than about 8 pages please remember that I will likely have 25-30 journals to read and respond to that week…

Your journal must be uploaded to the TWEN site BEFORE THE BEGINNING of the class session when a 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 responded to by me just as with any other journal entry, but it will receive a grade of zero. The time stamp on TWEN is dispositive. If the class when the journal entry is due starts at 1PM, 1:00 is fine, 1:01 is not. Just like an SOL....

Create your journal entry using Word, then submit the Word file electronically to TWEN’s "drop-box. A few days later, you will receive by return email an annotated version of your journal. My annotations will include an indication (passable/good/excellent) of the grade range I have assigned. Passable = C grade (C-, C, or C+); Good = B grade (B-, B or B+) Excellent = A grade (A-, A or A+). The mandatory GPA 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. **Agreement or disagreement with me on a substantive issue is irrelevant to your journal grade! And, for goodness' sake, failure to get an “excellent” grade does not mean that I think you’re unethical!** The more and deeper the ethical reflection I see in a well-expressed journal, the better its grade will 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/hated, about regrets they have had since taking their first Torts class, or about the joy or guilt they feel about their future 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 the law or about lawyers (Michael Clayton; A Few Good Men; The Rainmaker; The Devil’s Advocate; The Keepers on Netflix, 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 all these films, officers of the court are get the opportunity to "do 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", there's a journal project for you!]

My toughest challenge is advising folks who get non-excellent journal grades what they can do to improve. Part of my challenge is that, unlike exams, I cannot show these students "better" journal entries because of confidentiality (see below). So, several years ago, I asked a student who had just obtained the high "A" in this course 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 Atlanta whom I am proud to call a personal friend, 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 several possible routes. Some excellent journal entries wax much more philosophical than she did, while others still were the product of
substantial outside preparatory research. If you prefer to research a current event and report on it, or reflect on a book you have just read, those are also ways to write thoughtful journal entries.

I am member #32230 of the Virginia State Bar. I assure you that, unless you announce your intention to commit a felony, 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” (S book) and the “trees” (L book) must be demonstrated.

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