LEGAL ETHICS

THIRD EDITION

DEBORAH L. RHODE

DAVID LUBAN

UNIVERSITY CASEBOOK SERIES

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THIRD EDITION

by

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This book is dedicated to the memory of

Helen Luban
1912–1988

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1918–1980

*

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INTRODUCTION

A course on legal ethics is unique in many ways, but the most prominent is its relevance to all areas of practice. Every lawyer, in every practice specialty, confronts issues of professional responsibility and professional role. The daily life of most attorneys involves often undramatic but crucial choices about relationships with clients, colleagues, adversaries, judges, governmental officials, and "the law."

This book explores how lawyers forge their professional identities. Its analysis proceeds on two levels. The first concerns issues of personal responsibility; attention centers on the innumerable individual choices that define the kind of lawyers we become, as well as the larger professional self-images that justify or challenge those choices. A second set of issues involves collective responsibilities. Emphasis here focuses on broader questions of social, economic, and political justice: the distribution of legal services, the regulatory structure of the bar, and the impact of professional norms on public and private lives.

From this perspective, the "law of lawyering"—the codes of ethics and the other bodies of law governing legal practice—structures but by no means limits our analysis. Lawyers' professional identities are shaped by a vastly more complex set of values and pressures than those captured in codified rules. For that reason, this textbook takes the law of lawyering as its point of departure but not its only guide. Our conviction is that the subject also requires attention to the structure of practice—to what lawyers actually do and to the moral ideals that give meaning to their activities. Our aim is therefore to provide a full array of materials—drawing from law, history, philosophy, psychology, economics, and sociology—that will place questions of professional identity in broader context.

For many years, the subject of legal ethics was unique in most law schools for reasons other than its overarching relevance. The course was the ugly duckling of the curriculum, viewed with distaste by many students and most law professors. Traditionally, the class was short on intellectual content and long on platitudes: students were admonished in the most general terms to be not just good, but very, very good. All too often the result was like a semester-long commencement speech, and its delivery often fell by default to overworked deans or adjuncts.

How could it happen that the course of broadest relevance was so often devalued? Part of the difficulty involved the shortage of substantive law; until quite recently, issues of legal ethics seldom reached the courts and

received little searching inquiry. So too, the normative assumptions of the course long remained in an undeveloped state, largely insulated from developments in moral philosophy and political theory. And until the last two decades, little systematic empirical information was available about the legal profession; war stories often expanded to fill the gap. Underlying all of these deficiencies was a sense that the subject was neither very controversial nor very interesting. In some institutions, the field was reduced to a single lecture, and in one celebrated case, the dean focused his remarks to the incoming class on a single instruction: never commingle personal and client funds.

One of the most striking changes in the legal world over the past two decades has been the increasing attention to professional responsibility and regulation. Issues concerning the ethics of lawyers and the distribution of their services have become matters of broad concern, both within and outside the profession. Since the 1970s, the law of lawyering has developed at an explosive rate; empirical research has expanded at a corresponding speed; and the philosophical underpinnings of professional roles have attracted more searching examination.

These rapid developments underscore a final sense in which courses in legal ethics are distinctive. Compared with other substantive areas, the subject involves fewer settled principles and more fundamental unanswered questions. Partly for that reason, this book centers on problems, together with discussion notes and questions. Yet the issues raised in these materials are rarely simply hypothetical; they draw on experiences from reported cases, books, interviews, and journalistic accounts. They involve real lives and real consequences.

Our reliance on relatively short, distilled versions of actual problems has its limitations. No classroom analysis can replicate the pressures of practice, where job security, professional status, economic rewards, personal friendships, moral principles and social consequences are often at stake. Yet by the same token, the absence of such pressures in law school settings makes it possible to address fundamental questions of professional role without having vested interests in a particular resolution. Our hope is that this relative freedom from self-interest—coupled with attention to supplemental materials that are not usually accessible under workplace constraints and deadlines—will permit informed reflection. That should, in turn, make it easier to recognize and resolve issues of professional responsibility when they arise later in practice.

It is, of course, far easier to take the "moral high road" in class than in life. This book, however, focuses on contexts where the appropriate course of conduct is not self-evident. Our attention centers not on issues such as commingling but on areas where there are strong competing values or unresolved doctrinal and policy issues at stake. While many of the problems that follow do not have determinate answers, the materials can suggest better and worse ways of analyzing the right questions. Before addressing these problems, however, it is helpful to focus on certain assumptions about the subject of legal ethics.

NOTES: WHAT IS THE "ETHICS" IN LEGAL ETHICS?

In one sense, the term "legal ethics" refers narrowly to the system of professional regulations governing the conduct of lawyers. In a broader sense, however, legal ethics is simply a special case of ethics in general, as ethics is understood in the central traditions of philosophy and religion. From this broader perspective, legal ethics cuts more deeply than legal regulation: it concerns the fundamentals of our moral lives as lawyers. As Socrates noted about the subject of ethics, it "is not about just any question, but about the way one should live."[1]

One of this book's principal assumptions is that these two aspects of legal ethics cannot be separated. The study of codified ethical rules apart from broader ethical principles runs the risk of superficiality: legal codes of personal conduct that ignore the moral commitments of the people they govern are doomed to irrelevance. On the other hand, a purely philosophical study of legal ethics that ignores the institutional and doctrinal basis of law practice cannot succeed. Our aim is to integrate both dimensions of ethical analysis.

The study of legal regulations is a familiar part of the law school curriculum; to a certain extent, it is the law school curriculum. On the other hand, the study of ethics in the sense Socrates defined it forms the subject matter of moral philosophy, a discipline in which many lawyers, law students, and law teachers lack extended training. However, for our purposes, no such background is necessary: most academic moral philosophy concerns technical questions of theory-building that have little direct bearing on legal ethics, even in the broad, Socratic sense. In this book we will frequently consider philosophical arguments but we need not concern ourselves with their technical dimensions. Our discussion begins with certain recurrent questions that frequently arise in legal ethics classes.

1. *Ethics and Morality*

An obvious threshold issue is what exactly is ethics. Is there, as many people believe, a difference between ethics and morality? In everyday conversation the terms often carry different connotations. When we call lawyers or other professionals "unethical," we usually mean that they have been somehow dishonest—that they have lied, cheated, accepted bribes, or become involved in a conflict of interest. By contrast, calling a person "immoral" may conjure up an image of depravity—of cruelty, sexual misconduct, or otherwise illicit behavior. Moral philosophy however, does not generally use the words "ethics" and "morality" in these restrictive senses, and neither does this textbook. Since we do not believe that there is any important difference between ethical and moral standards, we treat the words as synonymous.

This is not to imply that all philosophers have used the terms interchangeably. Some theorists, including the prominent nineteenth century

1. Plato, *The Republic of Plato* 31 (Allan Bloom trans. 1968), 352D.

German philosopher Hegel, have reserved the word "ethics" to refer to the customary norms within a specific society—the society's *ethos*.[2] In Homeric Greece, for example, concern with personal honor dominated other ethical considerations, while in Confucian China the emphasis lay on prudence, moderation, and balance. The term "morality," on the other hand, Hegel took to refer to a philosophical system involving abstract universal norms of right and wrong.[3] Immanuel Kant's famous "categorical imperative"—act so that you treat humanity "always as an end, and never as a means only"—is an example of such a universal moral principle.[4] The categorical imperative, Kant believed, is valid at all times and in all cultures, and he offered a purely philosophical demonstration of its truth.

This distinction between theory-based morality and custom-based ethics suggests a sharp separation between everyday judgments and philosophical theories. Yet we doubt that any such neat separation exists. On the contrary, we believe that philosophical theories of morality arise from common sense ethical reflection and, in turn, influence it. For example, Kant's categorical imperative has two distinctive prescriptions, neither of which is peculiar to abstract philosophy. First, Kant insists that the moral law applies to everyone, regardless of nationality or culture: it speaks of "humanity" in general. Second, Kant instructs us to treat others as ends and not merely as means. The first injunction—to treat strangers, foreigners, and those of other races or religions with full moral consideration—is hardly an invention of academic philosophers. Similarly, in everyday life we often criticize people for treating others merely as means. Statements like "he is just using her" form a familiar, almost clichéd, part of common moral discourse. What is distinctively philosophical about Kant's approach is not the moral insights he develops, but the extended argument on which he grounds these insights. Since philosophical moral theories such as Kant's overlap with less theoretical ethical intuitions and religious traditions, we doubt the usefulness of any general distinction between ethics and morality.

There is, however, an important difference between accepting customary ethical beliefs on faith and subjecting them to critical reflection. Philosophers capture this difference by distinguishing *positive morality* from *critical morality*. Positive morality consists of the dominant moral traditions in a particular society. Critical morality results from systematically examining those traditions, and inquiring whether they should be obeyed, modified, or abandoned.

One of the most important functions of legal ethics is to offer critical scrutiny of the positive morality of legal practice. In the chapters that follow, conventional norms such as those regarding client loyalty, confidentiality, and access to legal services are subject to such analysis.

2. Georg Wilhelm Friedrich Hegel, *The Phenomenology of Spirit* 266–94 (A. Miller trans. 1977).

3. Id. at 364–74.

4. Immanuel Kant, *Foundations of the Metaphysics of Morals* 46 (Lewis White Beck trans. 1959 2d ed.1990).