Reaffirming Legal Ethics

Taking Stock and New Ideas

Edited by
Kieran Tranter,
Francesca Bartlett,
Lillian Corbin, Reid Mortensen
and **Michael Robertson**

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Reaffirming Legal Ethics

It has been over 30 years since the founding crises that birthed legal ethics as both a field of study and a discrete field of law. In that time thinking about the ethical dimension of legal practice has taken several turns: from justifications of zealous advocacy, to questions of process and connections to specific legal values, to more recent consideration of legal conduct as part of a wider field of virtue. Parallel to this dynamism of thought, there have also been significant changes in how legal professions, especially within those that possess a common law heritage, have been regulated and the values and conceptions of legitimate conduct that have informed this regulation.

This volume represents an opportunity for a comprehensive review of legal ethics as an international movement. Contributors include many of the key participants to the legal ethics field from the United States, Canada and Australia, including David Luban and Deborah Rhode, as well as many of the recognized emerging thinkers.

The theme of the book is taking stock of the last 30 years of legal ethics practice and scholarship. It is also a forum for new ideas and new thinking regarding the conduct of lawyers and the moral and social responsibility of the legal profession. The contributions also consider the topic of dynamism. Over the last decade significant developments in both the expectations of professional conduct and the regulation of the profession have been experienced in all jurisdictions, which has seen traditional, and once sacred, conceptions of lawyering challenged and reevaluated. The contributors also look at the theme of affirmation. Within an increasingly complex environment of change and dynamism, this volume reaffirms that there is value within the field of legal ethics as a legitimate and highly relevant field of inquiry.

Reaffirming Legal Ethics will be of great value for law students wanting an overview of the ethical dimension of contemporary legal practice, lawyers seeking a deeper and wider perspective on what it means to practise law, and researchers in the fields of ethics, legal ethics and the legal profession.

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Preface

This book, the first of three, arises out of papers delivered at the Third International Legal Ethics Conference held at the Gold Coast, Queensland, Australia in July 2008. The conference was hosted jointly by Griffith Law School at Griffith University and the T.C. Beirne School of Law at The University of Queensland. This conference, building on the successes of the first two in the series – in Exeter, United Kingdom in 2004 and in Auckland, New Zealand in 2006 – was one of the largest specialist gatherings of legal ethicists in the new millennium.

For us, the privilege of working with the contributors in this book followed on from the success of the conference itself. It is fitting that our expressions of thanks extend to colleagues from many countries who assisted in making the conference and this volume possible. We would first like to thank Kim Economides and Julian Webb for their foundational work in establishing the international legal ethics conference series, and for their encouragement in organizing the third conference. We would also acknowledge Tim Dare's role in organizing the second conference, which provided the platform for the third. We owe a particular debt to Brad Wendel, Christine Parker, Adrian Evans and Neil Watt for their help and enthusiasm over the two years of planning for the Gold Coast conference. Our thanks are also due to our respective Deans and others who contributed to the resources needed to run the conference: Charles Rickett and Ross Grantham from the T.C. Beirne School of Law and Paula Baron and Richard Johnstone from Griffith Law School; and to Teola Marsh from the University of Queensland and Linda Brauns from Griffith University. Substantial financial support for the conference was also given by College of Law Queensland, for which we are especially grateful.

We extend our thanks to the contributors to this volume for their willingness to work with us and for their patience during the editing process. We would also like to thank Katie Carpenter and Khanam Virjee from Routledge for their support and encouragement. And a special mention must go to Griffith Law student Stevie Martin, who not only worked tirelessly as the administrator for the conference, but also joyfully undertook the task of helping to edit the manuscripts in her final year at law school.

Finally, we wish to express our heartfelt thanks to colleagues, friends and, most importantly, to our families for their faith and support over these past few years.

—Kieran Tranter,
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Lillian Corbin,
Reid Mortensen and
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1 Introduction

Kieran Tranter, Francesca Bartlett, Lillian Corbin, Reid Mortensen and Mike Robertson

1.1 Reaffirming legal ethics

The contributors to this book reaffirm legal ethics. In doing so, they enable us to take stock of current thinking about the conduct of lawyers. All of the contributors assert, in no uncertain terms, the ongoing importance of legal ethics both as a practical matter concerned with the conduct of lawyers and as an area of sustained and critical scholarly inquiry. Therefore, at least in the common law world, legal ethics is viewed as a two-sided enterprise. On one side are the 'laws of lawyering',[1] the rules, regulations and disciplinary procedures that govern the practice of law in various jurisdictions. On the other side is the academic activity dedicated to understanding, probing and questioning the rules and institutions concerned with lawyers' behaviour and to articulating a coherent moral grounding for the work of lawyers.

Legal ethics, as with the ethics of any ancient profession, has a long history that predates modern conceptual distinctions between law and morality. However, once we as moderns assume the two distinct sides of legal ethics, critical points of its contemporary development can be identified. The law of lawyering itself has multiple beginnings. The legal profession has enjoyed and long cherished a professional freedom to self-regulate. Indeed, 2008 marked the centenary of the American Bar Association's 1908 'Canons of Professional Ethics'.[2] In addition, the common law courts have exercised authority to regulate entry (and exit) to the rolls of the legal profession. Further, as Fred Zacharias reminds us in Chapter 11, lawyers have always been subject to the rule of law, accountable to the general law of fiduciary duties, agency, contract and the like. The other side of legal ethics has had an even more sporadic development in the modern era, but the 'primers' on ethical conduct that began to emerge in the nineteenth century also remind us of recurring concerns in the profession about 'what is just and right'.[3] Nevertheless, it was the Watergate scandal in the 1970s that gave critical impetus to this side of legal ethics.

Many commentators credit the modern development of the field of legal ethics as a practical and intellectual reaction to Watergate.[4] The early 1970s represented a time of questioning of institutional legitimacy, and the legal profession was being called increasingly to public account.[5] In this context, the

partisan behaviour of the lawyers, and the legally trained, involved in the White House's illegal surveillance of political opponents and its attempt to cover up the 1972 break-ins at the Watergate Complex in Washington DC represented an internal crisis for the legal profession and also an external crisis in public confidence in the legal profession. For the moral philosopher Richard Wasserstrom, writing in 1975, the conduct of lawyers involved in Watergate could be explained by 'role differentiation': the idea that, once a person assumes a given social role, it is both appropriate and right for them to ignore moral standards that should not be ignored outside that role.[6] He regarded lawyering as an extreme example of role differentiation, to the point that – especially in litigation – the client's objectives should be promoted, regardless of the moral or political outcome: 'the lawyer as professional comes to inhabit a simplified universe which is strikingly amoral – which regards as morally irrelevant any number of factors which non-professional citizens might take to be important, if not decisive, in their everyday lives.'[7] Wasserstrom identified the central moral foundation behind lawyering in the common law world, which remained under-appreciated until Watergate: lawyers assumed that they were engaged for their technical competence, and viewed questions of moral responsibility as largely outside their purview.

Wasserstrom's identification and critique of 'role morality' represented a catalyst in the development of legal ethics as an area of law and a field of study. Post-Watergate, the American Bar Association's rules, which were restated in 1969, were again revised in 1983.[8] These expanded rules provided a clearer articulation of the freedoms and constraints that comprise the role of the lawyer, and the reform process spread to the professional rules of conduct issued by the organized profession in other jurisdictions. For the professional societies, role morality remained the touchstone in consideration of good lawyering, but it was a touchstone that needed to be expressly stated, justified and increasingly refined. This is still the case.

A factor that helped to ferment the articulation, justification, criticism and refinement of the rules of professional conduct was the emergence of legal ethics as a dedicated intellectual endeavour. Again, role morality was a touchstone for the growth of scholarship in the field. Wasserstrom's identification and critique of role morality challenged a generation of legal scholars to think more deeply about the morality and politics of the lawyer's role. Some scholars, like Charles Fried, met Wasserstrom's challenge directly and offered more sophisticated moral justifications for role morality.[9] Others echoed Wasserstrom's criticisms of role morality and suggested the need for alternative moral grounds for legal practice – at least in the hard cases where strong adherence to role morality would lead to morally repugnant outcomes. On this side of legal ethics, significant diversity became evident concerning the origins, legitimacy and acculturation of called-for alternative values. David Luban argued for common morality that lay within the wider community;[10] Thomas Shaffer argued for the virtue implicit in human potential;[11] Shaffer and Carrie Menkel-Meadow introduced ethics of care to the field;[12] and in the 1990s Anthony Kronman developed a strong Aristotelian theory of virtue ethics for lawyers.[13]

Legal ethics, in both of its senses, has been consolidated since the decade after Watergate when role morality was directly articulated and justified by professional societies, and when the modern foundational positions of the field as a scholarly enterprise were expressed. The reform process within the law of lawyering has continued. Successive scandals – especially lawyer complicity in corporate collapses[14] and dubious litigation[15] – and a consistently negative public image[16] have placed significant political pressure on lawyers for far-reaching reforms of the profession, climaxing with the partial loss of self-regulation for the profession in England and Wales and also in most Australian jurisdictions.[17] For scholarship on legal ethics, two concerns emerged. The first related to legal education questioning when and how legal ethics should be taught.[18] The second was a heightened awareness of the implications of departing from role morality for the rule of law. What was exposed was the relationship between fundamental values that are supposedly safeguarded by a technically neutral legal system, and the threat and dilution of those values when legal actors are encouraged to adopt some moral perspectives that are independent of the law. Following William Simon's argument that the values that should guide lawyers in professional conduct are values implicit within a functional legal system,[19] a subsequent generation of scholars, such as Brad Wendel, presented what amounted to political justifications for a refurbished and revitalized role morality.[20]

These two sides of legal ethics sometimes rub against each other. For instance, as reiterated in the 'roundtable' published in this volume (see Chapter 2), Deborah Rhode protests that Wendel's views amount to 'legal ethics without the ethics'. The field undoubtedly has its ambiguities, evident even when we are trying to define its boundaries. However, we suggest that the friction generated when the two sides of legal ethics confront each other has helped motivate the contributors to this volume to reaffirm the field's importance. All of the contributors also demonstrate and assume the importance of sustained and critical inquiry into lawyering. Within an increasingly complex environment of change and dynamism, what is affirmed is the value of the project of reflecting on the special, if not unique, conduct requirements of lawyers who simultaneously serve the needs of clients and their community. This explains the two themes that weave through these contributions. The first theme concerns the dynamism of the current and changing context of legal practice. The second concerns the ongoing relevance of legal ethics to third millennium lawyering.

1.2 The current and changing context of legal practice

Social scientific studies of lawyering from the 1960s and 1970s painted a picture of the form and structure of legal practice from the decades that contemporary legal ethics emerged. Despite the rise of the mega-firm over those decades, most lawyers in the common law world practised as sole practitioners or in traditionally structured firms comprising a handful of partners.[21] In this pattern of legal practice, lawyers served the discrete communities to which they belonged, and the

lawyer–client relationship could be seen as a personal one.[22] Lawyers were still predominately male, white and middle class.[23]

This rather homogenous picture of who lawyers were and what they did presents a baseline from which the revolutions that have occurred in lawyering over the ensuing 30 years become clearer. Legal practice has become more specialized and stratified. The mega-firm with a national, and indeed international, presence has emerged to serve the legal needs of transnational corporations. Organized according to Fordist principles of repetition and standardization, these firms have arguably given rise to patterns of production line lawyering. This has also transformed the experience of lawyering for junior lawyers from one that was predominantly a personal relationship with clients to one that is often a depersonalized routine.[24] Furthermore, women have entered the legal profession in increasing numbers.[25] There are more law schools that are producing more graduates, so that old class and cultural prejudices that erected social barriers to entering the legal profession have been diluted.[26] Lawyers now must compete for work with other professions. Lawyering is seen increasingly as a business pursued for profit – or, perhaps even more challenging, just a job rather than a calling. This is a long way from the image of lawyering that underpinned early work on legal ethics.

However, in other respects the world of lawyers has not changed much at all. The profession still largely comprises private practitioners and, as has been the case since the reforms of the nineteenth century, they are necessarily motivated by a need to generate income. Lawyers are educated and trained through traditional university education. The legal profession nevertheless retains a basic orientation towards client needs, advice-giving and agency work, which itself sometimes leads to representation of clients in litigation. There are still professional associations, and lawyers – officers of the court – retain a formal affiliation with the justice system. To be a lawyer involves accreditation and meeting standards established by professional associations and the courts. Alice Woolley and Jocelyn Stacey's discussion in Chapter 10 demonstrates the significant power exercised by these professional and judicial communities in dictating qualification standards that are imbued with ethical meanings. While much has changed, and the extent and implications of the changes in the context of lawyering over the past 30 years should not be under-estimated, contemporary patterns of legal practice preserve some core continuities from the traditional picture of legal practice.

It is this tension between the changing context of lawyering and the traditional conception that is explored in many of the chapters in this volume. In Chapter 5, David Luban considers a particular change in lawyering: the rise and rise of in-house government counsel. Much legal work now occurs 'behind the scenes' in reports and memos by lawyers employed, directly or indirectly, by government and corporations. Luban, considering the now infamous 'torture memos' issued by the US Justice Department in 2004 that authorized certain interrogation techniques as lawful, suggests that the partisanship championed by role morality is misplaced when applied to in-house counsel. He argues that lawyers acting as in-house counsel must exercise informed and critically independent judgement

when advising client/employers. Instead of producing partisan perspectives based on what the lawyer believes the client/employer wants, in-house counsel must maintain a sense of integrity of the law. Luban also charts the changed context of lawyering in the impact of international humanitarian law in operational planning by the US military, and the tension that arises from 'lawfare' – that is, the manipulating and selective interpretation of humanitarian law as another arena for combat.

In Chapter 6, Charles Sampford considers changes in lawyering due to the increasingly globalized nature of contemporary legal practice. Sampford has previously written about the importance of the institutionalization of ethical constraints in the practice of domestic law.[27] In this chapter, he begins with the historical recognition that the modern legal profession (like the profession of arms) is a product of the sovereign nation state. In the modern era, legal ethics has been considered a domestic matter concerning the domestic legal profession. However, Sampford reminds us that prior to the modern period, lawyers in Western Europe did not consider that sovereign boundaries determined how they should practise. Taking inspiration from this older ideal he argues that lawyers – like soldiers – are well placed to think and act as a global profession, and when doing so assist in globalizing the value of the rule of law.

Christine Parker in Chapter 7 addresses a perennial concern that some suggest corrupts a lawyer's understanding of legal ethics: the influence of commercialization on legal services. Taking as her case study the recent opportunity that Australian law firms have been given to incorporate, and the subsequent incorporation of the well-known Australian 'plaintiff' firm Slater and Gordon, Parker argues that incorporation need not be seen as a further step away from the ethical profession ideal. Indeed, she argues that requirements of reporting and accountability that attach to incorporation and public listing can be seen as encouraging responsible and ethical lawyer conduct in ways that more traditional firm structures have not done. Parker's chapter affirms the view that unethical conduct is more likely the product of a micro-level context of an immediate lawyer than resulting from macro-level factors concerning structure and ownership of a firm. Thus Parker points to the complexity of the social and legal environment in which lawyers work and, when considered with the Sampford thesis, the importance of diverse perspectives which account for the internal and external realities of lawyering.

Lawrence Hellman in Chapter 8 examines the tensions between the traditional and contemporary understandings of lawyers. He reaffirms a consistent theme in legal ethics: that law schools are key institutions in the formation of a more responsible and ethically aware profession. Taking as his starting point the influential 2007 report on legal education by the Carnegie Foundation, Hellman argues that Carnegie missed a fundamental stage in the professional development of new lawyers. The last 30 years have seen a significant body of social scientific research into ethics and the ethical formation of lawyers that suggests that a newly admitted lawyer's 'professional personality' is not firmly formed at law schools, but crystallizes over the first few years of practice. Further, the evidence from this

research seems to suggest that early experiences in law firms shape how new lawyers define what is ethical and unethical. Faced with this empirical reality, Hellman sees law schools as needing help from the profession and its regulatory bodies in developing and maintaining an ethical profession. Yes, law schools should attempt to 'inoculate' law students against unethical conduct. But, lawyers in practice must be trained and expected to administer frequent 'booster shots' if the value and understandings sought to be instilled by the law schools are to remain potent. Lawyers who act as supervisors for new entrants to the profession particularly require this training.

In Chapter 9, Lorne Sossin deals with a question that is often discussed in contemporary thinking about legal ethics: how does ethics relate to access to lawyers?[28] For Sossin, it is clear that an ethical profession has obligations of working *pro bono publico*. However, the relationship is not as simplistic as some *pro bono* advocates suggest. Sossin examines the various justifications for *pro bono* work, emphasizing that the context behind the lawyer offering and a client seeking *pro bono* should be considered in any formal *pro bono* scheme. While reflecting on the Canadian situation, Sossin makes a significant general contribution to the development of *pro bono* schemes by offering a matrix through which possible *pro bono* relationships can be assessed.

In Chapter 10, Alice Woolley and Jocelyn Stacey consider another common question for legal ethics: the standards of conduct or morality that should be imposed on those wishing to join the profession. They observe that the profession has a long history of using the concept of 'good character' as a gatekeeping criterion. Controversially, they argue for the removal of the good character test. They base this claim on recent psychological research, which renders problematic the assumption that past conduct in one context is indicative of similar conduct in another context. It has not been proven that inappropriate conduct prior to seeking admission is predictive of unethical conduct as a lawyer. As such, they expose the good character requirement as a cover for prejudice. In conclusion, they argue that entry to the legal profession should be based on technical competencies and not character judgements.

Fred Zacharias examines the traditional concept in legal ethics of professional self-regulation in Chapter 11. His first step is to canvass the various meanings possessed by self-regulation. He argues that self-regulation in the United States tends to refer to the Bar's standard-setting and disciplinary powers, but that this emphasis on standards and discipline ignores the plethora of ways in which the contemporary profession is regulated by other laws, institutions and professional associations. In perpetuating the self-regulation misnomer – and Zacharias sees the American Bar Association as the chief culprit in this process – he suggests that there is an opportunity now to discuss the more important question of the appropriate method of regulating those in the legal profession.

Unifying these contributions is the tension between tradition and change, between the context of lawyering pertaining to when legal ethics was in its infancy and the myriad influences that render contemporary legal practice dynamic, changed and different. While Woolley and Stacey and Sossin argue for changes