Ethics and Law

Can someone be a good person yet act in a professional role that may involve deception, procedural trickery, withholding information, and working on behalf of terrible people and institutions? This question is at the heart of legal ethics. Using cases from around the common-law world, W. Bradley Wendel looks at issues including confidentiality, the moral responsibility of lawyers, and truth and deception in advocacy. He then examines the classic questions of philosophy of law, including the nature of law, positivism, natural law, the relationship between law and morality, unjust legal systems, and the obligation to obey the law. Finally, he considers the ethical issues surrounding the role of lawyers, including criminal defense and prosecution, civil litigation, counseling clients on the law, and representing corporations. Combining the theoretical, philosophical, and practical, his book will be of vital interest to students of law, the philosophy of law, ethics, and political philosophy.

W. BRADLEY WENDEL is Professor of Law at Cornell Law School. He is the author of *Lawyers and Fidelity to Law* (2010) and *Professional Responsibility: Examples and Explanations, 4th Edition* (2013), and co-editor of *The Law and Ethics of Lawyering, 5th Edition* (with Geoffrey C. Hazard, Jr., et al., 2010).

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An Introduction

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Preface

This book is about the ethical principles that govern the professional activities of lawyers and the relationship of lawyers' ethics to two important normative domains: first, general moral considerations that apply to all of us, as moral agents; and second, to the law, with its characteristic ways of making and justifying demands on citizens of a society. In a modern, complex society in which people disagree about morality and justice, the law is an important source of social stability and solidarity. The law sets limits on what the government can do to its citizens and what citizens can do to each other. It gives people the right to establish the terms of relationships with others through contracts, wills, and trusts, and the form of various forms of property ownership. Criminal prosecutions and civil lawsuits provide a means for expressing collective disapproval of antisocial conduct and can empower far-reaching social change. But the law can also be an instrument of oppression, entrenching the privileges of powerful individuals and corporations and perpetuating injustices against marginalized individuals and groups. The law has protected the rights of slaveholders and established the principle of "separate but equal." The law can be used to harass or impose costs on others, and, instead of contributing to social solidarity, it can create a sense of individualism and disputatiousness. The law is neither inherently good nor inherently bad but is instead a tool that can be used for good or bad ends.

Although one commonly personifies "the law," the institutions and procedures of the legal system cannot exist apart from the people who administer them. Lawyers (subdivided in some countries into barristers and solicitors) are the means through which the law acts through the representation of clients – from individuals to corporations to "the people" or "the Crown." In a society characterized by a complex, highly technical

system of laws, ordinary citizens may take up a variety of ethical attitudes toward the law (including approval, support, resentment, resistance, indifference, etc.), but when they act with respect to the law, they generally do so with the assistance of legal professionals. Very few nonlawyers have the ability to do something as basic as prepare a will or residential lease document without potentially making serious mistakes and harming their legal interests. Whether lawyers are merely hired guns who cannot be blamed for representing nasty clients or doing nasty things for them or whether instead they should be held personally morally responsible for their actions is one of the great questions of practical ethics. The academic discipline of philosophical legal ethics seeks to use the tools of moral and political philosophy to analyze the responsibilities of those professionals who represent clients inside and outside the courtroom. Because citizens rarely encounter the law without professional assistance, the ethical problems facing lawyers are a helpful lens through which to view the more general issue of the nature of the relationships among law, state, and citizens.

Throughout the book, we will look at cases, most of which are based on actual events. The cases differ from those in many practical ethics textbooks in being fairly detailed. Legal and philosophical reasoning have a lot in common, but one crucial difference is that lawyers know the importance of facts. Cases in philosophical ethics are often outlandish ("you can push a fat man off the bridge to stop the speeding trolley"[1]), remote from the experience of most people ("you and two companions are adrift in a lifeboat in the middle of the Pacific Ocean and are running out of food"[2]), or lacking in crucial details (why in the world would an insurgent let his captive free if he shot a randomly selected hostage?[3]). If there is anything lawyers believe deeply in their bones, however, it is that the facts matter a great deal to the resolution of cases, and, as someone trained in both law and philosophy, I hope to bring the distinctive techniques of both disciplines to bear on the problems of legal ethics.

Although I am an American legal scholar, I have tried to include cases from other common law jurisdictions, including Canada, New Zealand, Australia, the United Kingdom, and Israel. I loathe "American exceptionalism" and

[1] Judith Jarvis Thomson, "The Trolley Problem," *Yale Law Journal* 94: 1395–1415 (1985).
[2] The famous "lifeboat case," *R v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).
[3] See Bernard Williams, "A Critique of Utilitarianism," in J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press 1973), pp. 98–99.

would like this book to be accessible to lawyers around the world. For example, many difficult legal ethics issues for American lawyers arise in the context of pretrial discovery in civil litigation, but because most other nations have had the good sense not to adopt American-style discovery rules, these issues would not arise in the same way. Nevertheless, many of the classic cases that are frequently discussed in the English-speaking legal ethics literature are from the United States, in part because it is a litigious society, but also because many of the first generation of theoretical legal ethics scholars were Americans, including Richard Wasserstrom, Deborah Rhode, Stephen Pepper, David Luban, Gerald Postema, William Simon, and Thomas Shaffer. The early prominence of American scholarship in legal ethics may simply be a historical accident owing to legal ethics having been made a compulsory subject in US law schools after the Watergate scandal in the early 1970s. The discussion here will not assume any knowledge of US law or any other jurisdiction's law for that matter. The point of the cases is to illustrate ethical issues, not legal ones. Lawyers in common law systems are regulated by some combination of the organized bar, the judiciary, legislative enactments, and administrative agency regulation. As a result, in each jurisdiction, there is a body of law governing lawyers, which is a fascinating subject in its own right. The cases in this book, however, have been written around the law as much as possible and do not presuppose any familiarity with the law.

This book is not intended as a contribution to an academic debate. I have said my piece in a book called *Lawyers and Fidelity to Law*. The aim here is to present the field of philosophical legal ethics fairly, to treat the contending positions sympathetically, and to let readers make up their own minds about who is right. At the same time, I will sometimes criticize and always engage with the participants in these debates. Nothing could be more dreary than going through a back-and-forth, he-says, she-responds presentation of the positions. Some of the analysis here is very much my own, and readers may disagree with it. I have tried to make clear where I am acting as an advocate for a position and to keep that advocacy to a minimum. In the end, there are significant questions that have no easy answers. I hope readers come away having formed views about what the right answers are, even if we may not agree.

I am grateful to the students I have taught over the years in seminars on philosophical legal ethics. The experience of teaching these readings and cases has done more than anything else to sharpen my own understanding

of the subject. I did substantial work on this book while teaching legal ethics at Tel Aviv University in May 2013, so discussions with those students played a particularly important role in defining the form in which the analysis is presented here. Similarly, my experience teaching legal philosophy at the University of Auckland in January 2012 was helpful in thinking through the discussion of jurisprudence in Chapter 4. Thanks to Tim Dare for sharing that course with me, for ongoing conversations about jurisprudence and legal ethics, and for work-related excuses to visit New Zealand. The book benefited immeasurably from the extensive comments provided by Dana Remus on each draft chapter, for which I am most thankful. Special thanks are due to Hilary Gaskin and three anonymous reviewers for the Press, as well as to David Luban for recommending me for this project. As always, I am grateful to my wife, Elizabeth Peck, and our children, Ben and Hannah, for putting up with the collateral damage of the writing process.