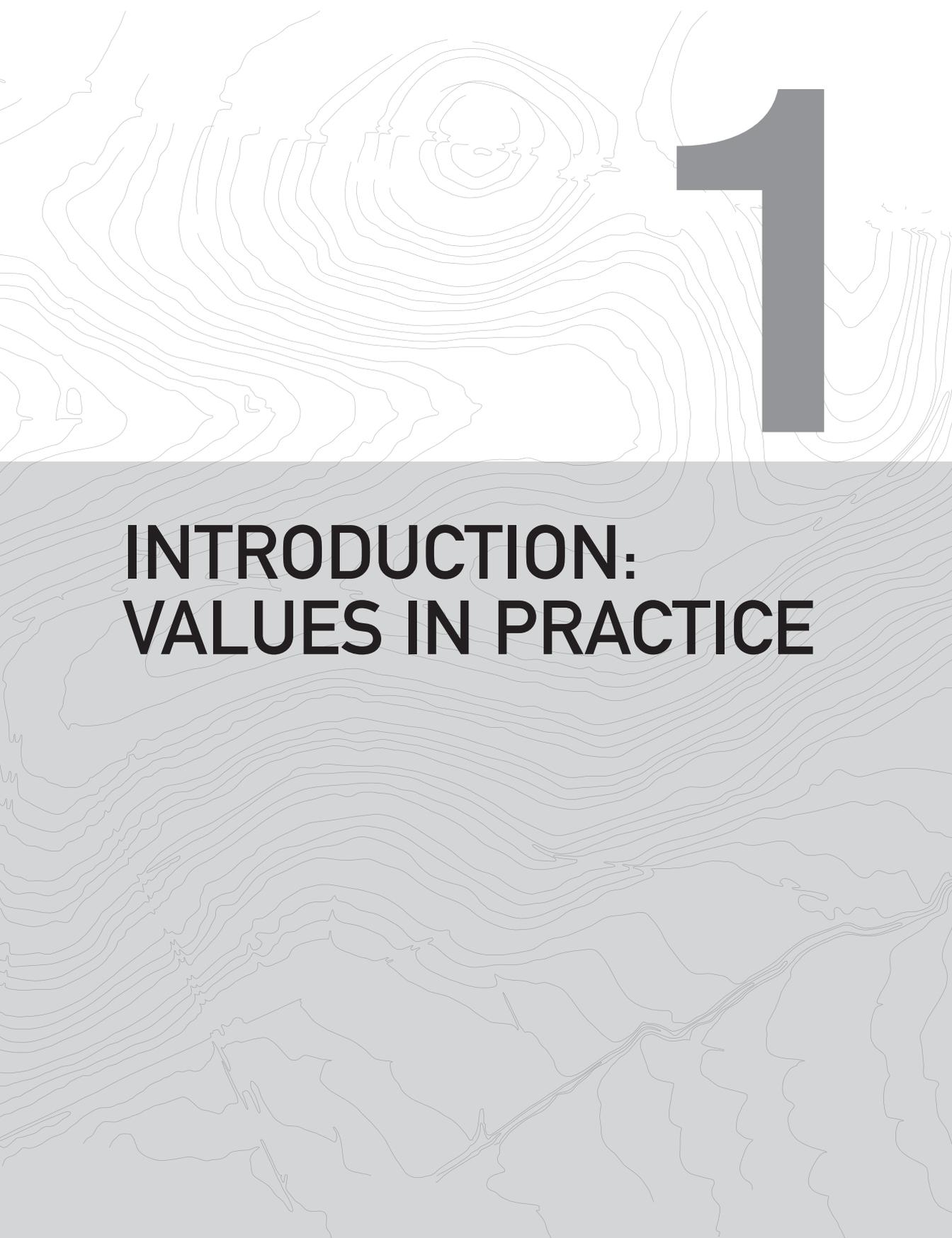


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1

# INTRODUCTION: VALUES IN PRACTICE

# Introduction: Ethics and Lawyering

## CASE STUDY 1.1 THE CASE OF THE PHILANTHROPIST QC AND THE TOBACCO COMPANY

In 2012 a leading commercial and constitutional law barrister and supporter of the arts, higher education, civil liberties and medical research was appointed to the board of the fundraising arm of Australia's highest profile cancer hospital. The relevant barrister is a prominent Queens Counsel (QC) who had previously acted in many important and high profile cases for a great variety of private clients, both for and against government agencies and in royal commissions. He is also a highly successful businessman in his own right who is now among Australia's wealthiest individuals. He has used his prominence and wealth for many philanthropic purposes focused particularly on supporting higher education, including through scholarships, promoting well-informed public policy debate, and medical research. He has donated generously to public art galleries and served on the boards of the most prominent art galleries in Australia and of various other non-profit organisations.

His appointment to the board of the cancer foundation was, however, criticised because he had previously represented a prominent tobacco company in its constitutional challenge to the Australian government's plain packaging legislation for cigarettes. The plain packaging law requires that cigarettes be sold without any branding (that is, no images, colours, logos or trademarks) and with only the name of the brand (in plain lettering and standardised size) and mandated health warnings and other information on a dull brown packet. Plain packaging was recommended by the International Framework Convention on Tobacco Control (to which Australia is a signatory) to reduce tobacco consumption, especially the uptake of smoking by young people, and therefore reduce the negative health impacts of smoking. Australia is the first country in the world to introduce plain packaging laws, and the three major international tobacco companies (Philip Morris, British American Tobacco and Imperial Tobacco) joined together to challenge the legislation in the High Court of Australia, arguing that it was an unconstitutional usurping of their property rights in their brands and trademarked logos without just compensation. British American Tobacco, unlike the other companies, accepted for the purposes of the case that smoking causes serious health consequences but argued that the plain packaging laws were

nonetheless an unjust appropriation of their property.<sup>1</sup> The High Court challenge was unsuccessful and plain packaging became law.<sup>2</sup>

In the previous year, the QC had acted for British American Tobacco in the High Court case and also appeared and spoke on behalf of British American Tobacco executives in hearings before a Parliamentary Committee inquiring into views as to whether the legislation should go ahead. The QC had also previously acted for British American Tobacco in its successful appeal against the Supreme Court of Victoria decision in favour of Rolah McCabe. McCabe died from lung cancer in 2002, just before that appeal was decided. She had earlier been successful in arguing that the tobacco companies had destroyed evidence relevant to determining whether her lung cancer had been caused by smoking cigarettes sold by British American Tobacco. (The *McCabe* case is further discussed below.)

The important question in 2012 was whether it was proper for the QC to sit on the board of the fundraising arm of the cancer hospital while also actively supporting the interests of tobacco manufacturers. The Chief Executive of the cancer hospital argued that the QC had a 'strong anti-tobacco stance', and that the High Court challenge 'wasn't about smoking, it was about whether aspects of the Tobacco Plain Packaging Act were inconsistent with the Constitution ... It was about intellectual property, appropriation of trademark and potential compensation.' He went on to comment that 'The key clinical staff involved in our anti-smoking areas were consulted and were respectful of [the QC's] right to advocate on behalf of his client. They felt it absolutely did not undermine our collective work, which is very strong on tobacco.'<sup>3</sup>

A Professor of Public Health at the University of Melbourne, on the other hand, argued that 'advocating for the tobacco industry was indefensible':

I can't think of why people would want to work for an organization whose products kill off the people who use them, particularly if you have alternative forms of employment. It certainly does seem odd that you would have someone so intimately involved in doing good for a hospital which is trying to cure people from tobacco-related disease, working for the industry that directly causes so many people to be in that hospital.<sup>4</sup>

1 Lenore Taylor, 'Health Issue Irrelevant, Tobacco Firms Tell Court', *The Sydney Morning Herald*, 13 March 2012, 4.

2 *JT International SA v Commonwealth of Australia* [2012] HCA 43 (5 October 2012); *British American Tobacco Australasia Limited v Commonwealth of Australia* [2012] HCA 43 (5 October 2012). See Matthew Rimmer, 'The High Court and the Marlboro Man: The Plain Packaging Decision', *The Conversation*, 18 October 2012, available at <https://theconversation.com/the-high-court-and-the-marlboro-man-the-plain-packaging-decision-10014>.

3 Quote from Jill Stark, 'Peter Mac Denies Tobacco Conflict', *The Sunday Age* (Melbourne), 2 September 2012, 8.

4 *Ibid.*

In other cases in recent years, a top criminal law barrister who is the son of Holocaust survivors and a prominent member of Melbourne's Jewish community, received newspaper coverage when he was asked to represent an alleged Nazi war criminal facing extradition proceedings.<sup>5</sup> Another successful QC was labelled anti-Semitic for having taken on the representation of the same accused, and was heavily criticised for having represented a coal company in a workplace death case when he stood for election as the Greens party candidate for Melbourne.<sup>6</sup> Further afield, in late 2012, a 23-year-old Indian student was raped and bashed by six men on a Delhi bus, before being thrown off and left to die. When she did die in a Singapore hospital some days later and the six alleged murderers were charged with her rape and murder, members of the Saket Bar Association refused en masse to represent the defendants and heatedly berated another lawyer in the court for offering to do so.<sup>7</sup>

These situations raise a range of questions about the proper role and conduct of lawyers. To what extent is it our role as lawyers to act as zealous advocates for any client that comes along? Should we advocate for clients and causes that we personally believe to be morally repugnant or socially irresponsible? Can we trust the legal system to sort out issues of truth and justice and to determine important questions of public policy? To what extent should we consider our duties to society, our relationships with our own families and communities, and our personal, social and political commitments outside of our legal practice in deciding what clients to take on, or how to advise and represent them? Is it appropriate for others to criticise us for the clients and causes we have advocated for?

Many of the questions raised by these scenarios are ethical questions. They raise issues like: Is it possible to be a good person and a good lawyer? What interests should we spend our life serving as a lawyer? How should we relate to clients? To what extent should we consider non-legal, particularly moral, relational and spiritual factors in attempting to solve clients' problems? What obligations do we, as lawyers, owe to others beyond our clients, for example, opposing parties, colleagues, the public interest, the courts, our families, and the communities (of social interest, faith, ethnic identity, sexuality etc) that we are a part of?

We might find answers to these questions in various ways that do not invoke ethics – our own financial interests, what others expect of us, what we find most convenient or fulfilling, and so on. Ethics is concerned with deciding what is the

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5 D Farrant, 'Leading QC May Defend Kalejs', *The Age* (Melbourne), 23 January 2001, 1; Richard C Paddock, 'Case Tests Australian Protection of Nazi War Criminal', *The Washington Post* (Washington DC, USA), 21 January 2001, A21.  
 6 Peter Faris, 'Top QC Lashes Green Lawyer and Melbourne Candidate Bryan Walters', *Sunday Herald Sun* (Melbourne), 7 November 2010; Royce Millar and David Rood, 'Labor's First-Day Distraction', *The Age* (Melbourne), 2 November 2010.  
 7 Ben Doherty, 'Secret Trial for Delhi Accused', *The Age* (Melbourne), 8 January 2013, 6.

good or right thing to do – the right or wrong action; and with the moral evaluation of our own and others' character and actions – what does it mean to be a good person? In deciding what to do and how to be, ethics requires that we look for coherent reasons for our actions and character – reasons that explain why it is right or wrong to act according to our financial interests, or to do what others expect in certain situations, et cetera. It asks us to examine the competing interests and principles at stake in each situation and have reasons as to why one should triumph over the other, or how they can be reconciled.

In Case Study 1.1, it is not enough to say that the QC should not represent tobacco companies because he finds it distasteful to do so, or because he might anger his friends and those with whom he wishes to work on philanthropic purposes or might suffer reputational loss in the wider community. The anger of friends and associates or personal distaste are not independent ethical reasons for refusing to do something. We need to look more deeply to determine whether they indicate that some ethical principle is at stake. For example, when does the 'cab rank' rule – the rule that barristers should be available to any client who asks<sup>8</sup> – apply? What about the related principle that obligates a lawyer to represent someone charged with a serious criminal offence if there is no one else available to represent them? Even if there is no possibility whatsoever that the tobacco company will be unrepresented, should the QC say 'no'? Are the possibility of disloyalty to the QC's philanthropic commitments and the undermining of important public health goals more or less important in this situation, for this QC, than the values that might be furthered by representing the client, such as ensuring that important public policy questions and constitutional issues are fully argued before the High Court so that an authoritative public decision can be made? Similarly, we cannot simply say that the QC needs to earn a living and therefore should take every paying customer.

We need to consider whether there is any justification for a socially conscious lawyer, or indeed any lawyer, to earn money to feed himself and his family by working for a firm whose products have killed millions of people and may be more likely to kill more people if the lawyer's arguments succeed. Does the need to earn money override the commitment to finding a 'cure' for cancer in the broadest sense? Can a lawyerly commitment to assisting the High Court decide important cases be more important than a personal commitment as a philanthropist and humanist? What about a personal commitment to earning money or arguing challenging cases? Are these good reasons for choosing certain cases over others? Is it appropriate to take on cases such as these that might pit lawyerly identity against personal identity, and do so in a way that influences the client or the court towards what the lawyer personally believes to be a better way of doing things?

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<sup>8</sup> Australian Bar Association, *Model Rules*, r 21.

We can also ethically evaluate social rules, practices or attitudes to determine whether they promote right action and good character. Most of us have our own ideas about the right thing to do or what good character is. Our personal ideas about ethics are likely to have come from our family upbringing, our friends and colleagues, and any political or faith commitments we might have – our *personal ethics*. There are also more public or shared expectations that go along with our various roles. For example, the community has ideas about what it means to be a good friend, a good parent, a good citizen or a good doctor. Some of these public ideas about ethics go formally unstated. Other ethical norms are codified in legal rules and regulations. Sometimes our personal ideas about ethics (for example, on issues like euthanasia or recreational drug use) can come into conflict with community ethical norms and/or legal rules. Good ethical reasoning demands that none of these assumptions about the right thing to do or the right way to be should go unexamined.

For lawyers, apart from our own personal ethics, there are two potential sources of ethical expectations that might affect the way we do, or *should*, behave – professional conduct principles and social ethics.

## Professional Conduct

Professional conduct is the law of lawyering – the published rules and regulations that apply to lawyers and the legal profession. In Australia these rules and regulations can be found in the legal practice or legal profession statutes in each State, in the various professional associations' self-regulatory professional conduct and practice rules and in the way the general law (particularly contract, tort and equity) applies to lawyers and their relationships with clients. In this book when it is necessary to refer to the statutory or self-regulatory rules governing Australian lawyers, we will generally refer to the *National Legal Practice Model Bill* (the '*Model Laws*') (2nd edn, 2006) and the Law Council of Australia's *Australian Solicitors' Conduct Rules* (2012) (the *ASCR*).<sup>9</sup>

Much teaching and practical discussion of lawyers' 'ethics' in the legal profession is dominated by legalism. Legalism treats legal ethics as a branch of

<sup>9</sup> The *Model Laws* have been agreed between the Attorneys-General of the Australian Commonwealth and each of the States and Territories with significant input also from the Law Council of Australia (the umbrella organisation for Australian lawyers and legal professional associations). As a result the provisions of the legislation governing the legal professions of the various states and territories are increasingly becoming consistent, although the ordering of provisions and section numbers will vary from jurisdiction to jurisdiction. Similarly, the *Model Rules* have been promulgated by the Law Council of Australia, and as a result the professional conduct rules of the various states and territories now increasingly copy this model. Further nationalisation has been attempted but at the time of writing has been unsuccessful. This is further discussed in Chapter 3.

law – ‘professional responsibility’ or ‘professional conduct’ law. The professional conduct approach may cater to the need for certainty, predictability and enforceability in a context where people often consider ethics to be subjective and relative. By definition it abandons ethical judgement for rules. The law of lawyering is significant as one way in which lawyers’ ethics are institutionally enforced or regulated, and can certainly be helpful in guiding behaviour. We refer in this book to the rules of conduct as being one of the sources of information that lawyers can and should use to make ethical judgements about what is the right thing to do in different situations, but these rules do not provide a basis for considering what values should motivate a lawyer’s behaviour and choices about what kind of lawyer to be.

This is not to say that it is not important for society to have and enforce a law of lawyering. However, lawyers must also have an ethical perspective on being a lawyer in order to judge what rules should be made (on a professional level) and also to decide (on a personal level) what the rules mean, how to obey them, what to do when there are gaps or conflicts in the rules and whether, in some circumstances, it may even be necessary to disobey a particular rule for ethical reasons. This book, therefore, will not provide a comprehensive coverage of the law of lawyering,<sup>10</sup> but will provide a basis for the ethical critique of professional conduct principles.

## Social Ethics

The second source of ethics for lawyers (apart from their own personal ethics) is general philosophical theories of *social ethics*. Social ethics come from general moral theory or ethical theory – philosophical work devoted to understanding what it means for something to be good or right or a duty.<sup>11</sup> Particularly relevant for lawyers are philosophical ideas about justice, social and environmental responsibility, minimising harm and respecting others.

Some commentators on lawyers’ ethics go to the opposite extreme from legalism, and propose that general and abstract moral theories or methodologies should be applied, without elaboration or modification, to the practice of law. These fundamental moral theories generally divide into ‘deontological’ or rule-based theories, on the one hand, and ‘teleological’ or consequentialist theories, on the other. Deontological ethics and utilitarian ethics are used, respectively, as the main examples of each approach.

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<sup>10</sup> Other books already provide adequate coverage of the law of lawyering, particularly G E Dal Pont, *Lawyers’ Professional Responsibility* (Lawbook Co, Pyrmont, NSW, 5th edn, 2013).

<sup>11</sup> For a good overview, see Noel Preston, *Understanding Ethics* (Federation Press, Leichhardt, NSW, 3rd edn, 2007); Russ Shafer-Landau, *The Fundamentals of Morals* (Oxford University Press, New York, 2nd edn, 2011).

The most famous philosophical formulation of deontological ethics is Kant's 'categorical imperative': 'Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.'<sup>12</sup> This is similar to the Golden Rule in the Judaeo-Christian tradition and other religious traditions, which requires people to always treat others as they would want to be treated themselves.<sup>13</sup> Religious formulations of ethics based on divine command are generally deontological because they set absolute rules that tend to emphasise the idea of *fairness* as important to deciding individuals' rights and entitlements. According to Kant, 'right' actions or policies are those that primarily respect individual autonomy by promoting fairness. Kantian methods refute the notion that 'the end justifies the means'. Hence it is a 'categorical imperative' – an absolute and unconditional requirement – that people never be treated merely as means to an end, but always as ends in themselves. Kantian theory argues that the means, since they often involve what happens to individuals, are at least as ethically significant as outcomes. Thus, for example, feminists have used Kantianism to argue that prostitution and pornography should be forbidden as they are dehumanising.

In a teleological approach, by contrast, right actions or policies are those that maximise good consequences and minimise bad consequences. On a teleological approach the (good) ends of an action can justify the means used to obtain those ends, even if they involve otherwise unfair treatment of individuals or organisations. Kantian ethics were a response to utilitarian ethics – a type of consequentialism, developed first by Jeremy Bentham and John Stuart Mill. Utilitarianism proposes that ethical actions are those that produce the greatest good for the greatest number of those affected by a situation.<sup>14</sup> Jeremy Bentham and John Stuart Mill particularly developed utilitarianism as a way for legislators and public policy makers to decide what laws to make. A famous contemporary utilitarian ethicist, Peter Singer, argues that animals should be included in the calculation of the greatest good for the greatest number as they can suffer, and argues that, to the extent young babies or people who are profoundly intellectually disabled cannot feel pleasure or pain, then they can be disregarded if someone else's happiness is at stake, as for example with abortion or the infanticide of a severely disabled child.<sup>15</sup>

Standard deontological and teleological moral theories can be contrasted with both virtue ethics and the ethics of care.

12 Immanuel Kant, *Grounding for the Metaphysics of Morals* (James W Ellington trans, Hackett, 3rd edn, 1993) 30 [1785].

13 For example Matthew 7:12.

14 Jeremy Bentham, *Political Thought*, Bhikhu Parekh (ed) (Barnes and Noble, New York, [1748–1832] 1935); John Stuart Mill, *Collected Works of John Stuart Mill*, J M Robson (ed) (Toronto, University of Toronto Press, 1963ff): *On Liberty* (1859), *CW*, v 18, 213–310 and *Utilitarianism* (1861a), *CW*, v 10, 203–59.

15 Peter Singer, *Animal Liberation* (Avon Books, New York, revised edn, 1990).

The ethics of care focuses attention on people's responsibilities to maintain relationships and communities, and to show caring responsiveness to others in specific situations. It was developed by feminists, and particularly Carol Gilligan, in the second half of the twentieth century as a correction to the traditional emphasis in deontological and utilitarian ethical theories on individual rights and duties and formal, abstract, universalist reasoning.<sup>16</sup> It has now been developed by theorists well beyond feminism who emphasise the interdependence of humans and the importance of sensitivity and emotional response in ethical action. Deontological and consequential ethics tend to assume that each person decides on their actions individually, in isolation from others, and that the choices they make then impact on others. The ethics of care, however, points out that most of the time our actions are so intertwined with our relationships with other people and our emotional responses to them, that the most important ethical questions are about how we relate with and respond to others, rather than how our actions impact on them. The ethics of care recognises the importance of modern psychology in understanding the intricacies of human relationships, and would stress that interpersonal skill and sensitivity are crucial tools for ethical decision-making.

Virtue ethics shifts the focus of ethical attention from particular conduct and its impact onto the inherent quality or character of the actor. Virtue ethics approaches derive from ancient philosophy and especially Aristotle's emphasis on right character as a personal virtue. A virtue ethics approach is not necessarily inconsistent with deontological, consequentialist and ethics of care approaches, but rather asks a different question. Virtue asks: What kind of person should I be in order to be a good person? The other theories by contrast ask: What is a good action? A central virtue for Aristotle was therefore 'phronesis' – practical wisdom; the ability to choose wisely. It sits alongside 'sophia' – theoretical wisdom – and other virtues such as courage, generosity, gentleness, honesty about oneself, justice and fairness, magnanimity and fortitude. Thomas Aquinas, the medieval Catholic philosopher, summarised the virtues as prudence, temperance, justice and fortitude in relation to other people, and faith, hope and virtue in relation to God. Like the ethics of care, virtue ethics sees how one relates to others as being central to ethics, but looks beyond this and asks us to consider our identity, character and motivations at a profoundly personal level.<sup>17</sup>

Virtue ethicists assert that intentional, ethically defensible behaviour is more likely to emerge from the ongoing process of genuine personal reflection about our

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<sup>16</sup> Carol Gilligan, *In a Different Voice* (Harvard University Press, Cambridge MA, 1982).

<sup>17</sup> See Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, Cambridge, 2001). See also Robert Eli Rosen, 'Ethical Soap: LA Law and the Privileging of Character' (1989) 43 *University of Miami Law Review* 1229.

virtues (and our lack of some of them) than if we attempt to act without regard to our inner virtues (values).

Moral theories are so abstract that it can be difficult to apply them to concrete situations. Applying general moral theories to legal practice also begs one of the main questions debated in lawyers' ethics, which is: To what extent should lawyers' ethics be determined by the idea that lawyers should play a special and unique role in society? Or to what extent should lawyers be held to the same general ethical standards as anyone else? In Case Study 1.2, for example, it may be all very well for a non-lawyer to state that their highest loyalty is to their sibling.

## CASE STUDY 1.2 UNDERSTANDING DIFFERENT ETHICAL APPROACHES IN PRACTICE

You are very close to your older sister, Lee, who is also a University student. You have always felt able to discuss your secrets with each other without other friends or family members finding out.

For the last few years Lee has been indulging regularly in alcohol binges and certain illegal drugs. It does not appear to be seriously affecting her study or part-time work yet, but she has exhibited increasingly erratic behaviour in the last few months. Last week Lee was found lying in the middle of the road after a party and there have been a number of times in recent months when friends had to make sure she got home safely before doing something that might harm herself or others.

Lee tells you that she is probably indulging 'a bit too much', but is planning to 'pull back' and has the situation 'under control'. Lee says she does not need your concern or help, and demands that whatever happens you do not let other members of your family know anything about the situation until she is 'out the other side'. You feel that Lee may need professional help to find her way 'out the other side'.

### DISCUSSION QUESTIONS

1. Role-play (or imagine) how a conversation between yourself and Lee, after the lying in the middle of the road incident, might play out. What approach might you take to trying to get help for Lee? Should you talk to other friends or family members if you feel that Lee is not going to be able to get through to 'the other side' on her own? How would Lee view the different approaches you might take?
2. What arguments might each of you use to support or explain your preferred approach? Can you identify how the different potential