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FUNDAMENTAL MORAL  
RESPONSIBILITY

Second Edition

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# LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY

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Second Edition

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MATTHEW  BENDER

# *Dedication*

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This book is in honor of our parents, who set the foundation for our interest in issues both ethical and pragmatic, and our families, who have blessed us with their love and support.



# Preface

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It is a dangerous illusion that codes of professional responsibility “can and ought to provide clear and generally acceptable guidance to [all] attorney conduct.”<sup>1</sup> The toughest ethical problems faced by lawyers often cannot be solved by a standardized process or set of rules, at least not by individuals who value their moral character.

The greatest flaw of many standard professional responsibility texts is their failure to acknowledge the connection between ethics and moral philosophy. These books rarely investigate the relationship between “professional ethics,” narrowly construed in the context of attorney regulation and discipline, and “ethics” as seen in a broader historical, philosophical, or religious context. The most sensitive and intelligent authors of such texts have acknowledged this challenge quite frankly.<sup>2</sup>

This book was conceived as a way to fill that gap. It can be used as a supplement to a traditional professional responsibility course, or as the basis for a seminar in its own right. But by using the word “supplement,” we do not want to characterize the book as being some kind of ancillary enrichment. Teaching professional responsibility wholly outside the context of moral philosophy condemns the field to a second-class intellectual status. Even worse, it is simply unrealistic.

The book’s historical and philosophical structure is of great help to law students. The materials are organized around specific problems designed to encourage and focus class discussion. (Indeed, most class groups quickly split into differing philosophical camps, a great boon to course interest!) We have deliberately avoided assigning reported cases. Law students read too many of these already, and not enough philosophy.

There are two other inherent organizing principles for the book that are less obvious, at least initially. First, the philosophical materials are roughly ordered as the ideas themselves evolved in the history of philosophy. For example, Chapter One focuses on Pre-Socratic, Socratic, and Platonic themes, taken from early classical Greek philosophy, Chapter Two focuses on ideas introduced later by Aristotle’s *Nicomachean Ethics*, Chapter Three focuses on notions of legal reasoning first developed by the Romans, Chapter Four explores the moral philosophy of Thomas Aquinas, etc. Later chapters

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<sup>1</sup> E.H. Greenebaum, *Attorneys’ Problems in Making Ethical Decisions*, 52 IND. L.J. 627, 628–629 (1977). See generally Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 39 (1997) (identifying circumstances where “the lawyer must make a decision within prescribed bounds or limits, but within those limits the grounds on which the lawyer exercises discretion are left to personal conscience”).

<sup>2</sup> “What is left out, except in bits and pieces relating to specific topics, is any historical, comparative or sociological study of the profession or any study of the relationship between professional ethics and ‘ethics’ considered in an appropriate philosophical context.” ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* xix (1976). “So far there has been little cross-fertilization, as a *practical* matter, between the philosophical and the professional enterprises.” STEPHEN GILLERS, *REGULATION OF LAWYERS* 14 (2009). See also ANDREW L. KAUFMAN & DAVID B. WILKINS’s excellent 4th edition, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION* (2002), which fills in many of these gaps.

## *Preface*

introduce students to more modern theorists such as Reinhold Niebuhr, Lawrence Kohlberg, and Martha Nussbaum.

There is also a structure based on the topics of ethical philosophy itself. For example, Chapter One asks students to contemplate Plato's classical Greek question: "Is there any true test of goodness?" Chapter Two asks Aristotle's key question, "Assuming I can tell good from bad, what is the extent of my responsibility for the evil around me?" Chapter Three explores whether legal order and the threat of legal sanction set the limits of moral responsibility, and so forth. The book concludes with a discussion of pragmatism, moral realism, and the political and organizational impediments to principled individual decision making.

This book is intended to give law students a grounding in moral philosophy so that they may have a more sophisticated approach to issues of legal ethics. It not only assists them in relating this course to earlier studies in college and elsewhere, but also provides them an intellectual framework for analyzing tough ethical issues when these problems arise in the complexity of human life, and more particularly in law practice. While it could be seen as a highly theoretical form of study, many former students have reported, after using the book, that it was one of the most practical and useful subjects they studied in law school.

We are indebted to our students Caitlin Akins, Andrew Bender, John D. Holden, and Jessica Yau (Boston College Law School, Class of 2011) for their very capable assistance with researching and editing this second edition. Charles Riordan, Editorial Assistant to the Monan Chair and also a student at Boston College Law School, was invaluable, as always. We are very grateful to Pali Chheda at LexisNexis for her constant and patient assistance. We also thank our distinguished colleagues Profs. Scott Fitzgibbon and Paul Tremblay for their generous and thoughtful comments on earlier drafts.



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