

Cambridge University Press
978-0-521-86285-1 - Legal Ethics and Human Dignity
David Luban
Frontmatter
[More information](#)

Legal Ethics and Human Dignity

David Luban is one of the world's leading scholars of legal ethics. In this collection of his most significant papers from the past twenty-five years, he ranges over such topics as the moral psychology of organizational evil, the strengths and weaknesses of the adversary system, and jurisprudence from the lawyer's point of view. His discussion combines philosophical argument, legal analysis, and many cases drawn from actual law practice, and he defends a theory of legal ethics that focuses on the lawyer's role in enhancing human dignity and human rights. In addition to an analytical introduction, the volume includes two major previously unpublished papers, including a detailed critique of the US government lawyers who produced the notorious "torture memos." It will be of interest to a wide range of readers in both philosophy and law.

David Luban is University Professor and Professor of Law and Philosophy at Georgetown University.

Cambridge University Press
 978-0-521-86285-1 - Legal Ethics and Human Dignity
 David Luban
 Frontmatter
[More information](#)

Cambridge Studies in Philosophy and Law

GENERAL EDITOR

Gerald Postema
 (University of North Carolina, Chapel Hill)

ADVISORY BOARD

Jules Coleman (Yale Law School)
 Antony Duff (University of Stirling)
 David Lyons (Boston University)
 Neil MacCormick (University of Edinburgh)
 Stephen Munzer (U.C.L.A. Law School)
 Philip Pettit (Princeton University)
 Joseph Raz (University of Oxford)
 Jeremy Waldron (Columbia Law School)

Other books in the series:

Jeffrie G. Murphy and Jean Hampton: *Forgiveness and Mercy*
 Stephen R. Munzer: *A Theory of Property*
 R. G. Frey and Christopher W. Morris (eds.): *Liability and Responsibility: Essays in Law and Morals*
 Robert F. Schopp: *Automatism, Insanity, and the Psychology of Criminal Responsibility*
 Steven J. Burton: *Judging in Good Faith*
 Jules Coleman: *Risks and Wrongs*
 Suzanne Uniacke: *Permissible Killing: The Self-Defense Justification of Homicide*
 Jules Coleman and Allen Buchanan (eds.): *In Harm's Way: Essays in Honor of Joel Feinberg*
 Warren F. Schwartz (ed.): *Justice in Immigration*
 John Fischer and Mark Ravizza: *Responsibility and Control*
 R. A. Duff (ed.): *Philosophy and the Criminal Law*
 Larry Alexander (ed.): *Constitutionalism*
 R. Schopp: *Justification Defenses and Just Convictions*
 Anthony Sebok: *Legal Positivism in American Jurisprudence*
 Arthur Ripstein: *Equality, Responsibility and the Law*
 Steven J. Burton: *The Path of the Law and its Influence*
 Jody S. Kraus and Steven D. Walt: *The Jurisprudential Foundations of Corporate and Commercial Law*
 Brian Leiter: *Objectivity in Law and Morals*
 Christopher Kutz: *Complicity*
 Peter Benson (ed.): *The Theory of Contract Law*

Cambridge University Press
978-0-521-86285-1 - Legal Ethics and Human Dignity
David Luban
Frontmatter
[More information](#)

Walter J. Schultz: *The Moral Conditions of Economic Efficiency*
Stephen R. Munzer: *New Essays in the Legal and Political Theory of Property*
Mark C. Murphy: *Natural Law and Practical Rationality*
Philip Soper: *The Ethics of Deference*
Gerald J. Postema: *Philosophy of the Law of Torts*
Alan Wertheimer: *Consent to Sexual Relations*
Timothy MacKlein: *Beyond Comparison*
Steven A. Ketcher: *Norms in a Wired World*
Mark R. Reiff: *Punishment, Compensation, and Law*
Larry Alexander: *Is There a Right of Freedom of Expression?*
Larry May: *Crimes Against Humanity*
Larry Laudan: *Truth, Error, and Criminal Law*
Mark C. Murphy: *Natural Law in Jurisprudence and Politics*
Douglas E. Edlin: *Common Law Theory*
W. J. Waluchow: *A Common Law Theory of Judicial Review*

Cambridge University Press
978-0-521-86285-1 - Legal Ethics and Human Dignity
David Luban
Frontmatter
[More information](#)

*Legal Ethics and
Human Dignity*

David Luban
Georgetown University



Cambridge University Press
978-0-521-86285-1 - Legal Ethics and Human Dignity
David Luban
Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521862851

© David Luban 2007

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2007

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

ISBN 978-0-521-86285-1 hardback

Cambridge University Press has no responsibility for the persistence or
accuracy of URLs for external or third-party internet websites referred to
in this publication, and does not guarantee that any content on such
websites is, or will remain, accurate or appropriate.

Cambridge University Press
978-0-521-86285-1 - Legal Ethics and Human Dignity
David Luban
Frontmatter
[More information](#)

for
Deborah Rhode

Contents

| | |
|---|---------------|
| <i>Acknowledgments</i> | <i>page</i> x |
| Introduction | 1 |
| I The ethics in legal ethics | 17 |
| 1 The adversary system excuse | 19 |
| 2 Lawyers as upholders of human dignity (when they aren't busy assaulting it) | 65 |
| II The jurisprudence of legal ethics | 97 |
| 3 Natural law as professional ethics: a reading of Fuller | 99 |
| 4 A different nightmare and a different dream | 131 |
| 5 The torture lawyers of Washington | 162 |
| III Moral complications and moral psychology | 207 |
| 6 Contrived ignorance | 209 |
| 7 The ethics of wrongful obedience | 237 |
| 8 Integrity: its causes and cures | 267 |
| IV Moral messiness in professional life | 299 |
| 9 A midrash on Rabbi Shaffer and Rabbi Trollope | 301 |
| <i>Index</i> | 332 |

Acknowledgments

The essays in this book were written over many years, and I have presented them to a great many audiences. To acknowledge all the people whose comments, criticisms, and questions improved these papers is impossible. Even those whose names I know would number in the dozens.

Several debts, though, run deeper than help on individual papers. David Wasserman had the biggest philosophical influence on these papers, talking me through many of the arguments and a great deal of the social psychology that figures in the later chapters. Patrick Byrne has doubled as my relentless sparring partner and enthusiastic booster for more than twenty years. Julie O'Sullivan has changed the way I teach and think about law. Robin West has, over many years, become something akin to my alter ego. And Deborah Rhode, to whom this book is dedicated, has been both a great friend and an ideal co-author. Laboring with me through the four editions of our textbook, she has taught me most of the legal ethics I know.

Since I arrived at Georgetown, Carrie Menkel-Meadow and Mike Seidman have been steady sources of ideas and moral support. I've also gotten a great deal of help from my other Georgetown legal ethics colleagues Jeff Bauman, Heidi Feldman, Mike Frisch, Mitt Regan, Phil Schrag, and Abbe Smith – and, like all of them, I have drawn inspiration from the late Father Robert Drinan. Among legal ethics scholars elsewhere, Robert Gordon, Michael Kelly, Thomas Shaffer, and William Simon have had particular impact on the ideas in this book, through disagreement as well as agreement.

Equally important have been my clinical colleagues. Mike Millemann, one of the finest and most dynamic lawyers I've ever known, first fired my enthusiasm for clinical ethics teaching; at the University of Maryland, I also cut my teeth partnering in clinical ethics classes with Barbara Bezdek and Homer LaRue. At Georgetown, I have done half-a-dozen tours of duty in the Center for Applied Legal Studies (CALS), working side by side with student-lawyers and their advisors on political asylum cases. I owe a great deal to my CALS teammates Karen Bouton, Mary Brittingham, Anna Gallagher, Andrea

Acknowledgments

xi

Goodman, David Koplow, Michele Pistone, Jaya Ramji-Nogales, Phil Schrag, Rebecca Storey, Virgil Wiebe, and Diane Uchimiyu, as well as to our amazing students. None of them will take it amiss, I think, if I add that the greatest debt is to CALS's clients. All of them are human rights refugees, whose dignity, courage, and resourcefulness have opened my eyes to a great deal about my own country, about the wider world, and about what is best and worst in the rule of law. Above all, they have opened my eyes to the resilience of the human spirit.

Several chapters of the book originated during my year as a Fellow of the Woodrow Wilson International Center for Scholars, an ideally collegial host. I wrote chapters 4 and 5 – the two new chapters of the book – during my visiting year at Stanford Law School, where Barbara Fried and Mark Kelman gave me especially helpful comments. Chapter 5 benefited greatly from an ongoing dialogue with Marty Lederman. I also wish to thank Colonel Bill Mayall and Captain John Yeager, who invited me on half-a-dozen occasions to present material from this book to multinational classes of military officers at the Industrial College of the Armed Forces in the National Defense University. The acute comments of the officers worked their way into the final versions of several chapters.

I would also like to thank Judy Areen and Alex Aleinikoff, my deans at Georgetown, for the tremendous support they've given me, both institutional and intellectual; Kathleen Sullivan and Larry Kramer for making possible the visit at Stanford Law School during which I finished this book; Gerald Postema, editor of Cambridge Studies in Philosophy and Law, who advised me on the early stages of the project; Hilary Gaskin, Cambridge University Press's philosophy editor, for moving the project along; and two anonymous readers for the Press whose comments helped in the final revisions. Tselane Holloway and Mary Ann Rundell turned the papers into a revisable manuscript.

I owe an enormous debt of gratitude to my students, who have always been my main source of inspiration. Among the Georgetown students, special thanks goes to Brian Shaughnessy, my friend and workout partner.

Above all, I must thank my family – my children, Daniel and Rachel, now old enough to spot the flaws in my arguments, and my wife Judy Lichtenberg, who has tolerated my endless kvetching about writing deadlines with nearly superhuman love and patience. As a philosopher in her own right, Judy read and commented on nearly every chapter in this book, and shared ideas on a daily basis for enough years that I barely know whose are whose. Their love makes everything else possible.

Several of the papers collected here were given as named lectures, and I wish to thank the host institutions and sponsors. I will also give information and acknowledgments for the initial publication of these chapters.

Chapter 1, "The Adversary System Excuse," was the Catriona Gibbs Memorial Lecture at Queen's University Law School in Kingston, Ontario.

It appeared in my anthology *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, Rowman & Allanheld [now Rowman & Littlefield], 1984. The current version incorporates an excerpt from "Rediscovering Fuller's Legal Ethics," *Georgetown Journal of Legal Ethics*, vol. 11, no. 4, pp.801–29 (1998), also in Willem J. Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam University Press, 1999), pp. 193–225.

Chapter 2, "Lawyers as Defenders of Human Dignity (When They Aren't Busy Attacking It)," was the Van Arsdell Lecture on Litigation Ethics at the University of Illinois School of Law. It appeared in *University of Illinois Law Review*, vol. 2005, no. 3, pp. 815–46 (2005).

Chapter 3, "Natural Law as Professional Ethics: A Reading of Fuller," *Social Philosophy and Policy*, vol. 18, no. 1, pp.176–205 (2001), reprinted in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, eds., *Natural Law and Modern Moral Philosophy* (Cambridge University Press, 2001), pp. 176–205.

Chapters 4 and 5 were written for this volume, but include brief excerpts from "Liberalism, Torture, and the Ticking Bomb," in Karen Greenberg, ed., *The Torture Debate in America* (Cambridge University Press, 2005).

Chapter 6, "Contrived Ignorance," was my inaugural lecture as Frederick J. Haas Professor of Law and Philosophy at Georgetown University Law Center. I also delivered it as the Blankenbaker Lecture at the University of Montana School of Law. It appeared in the *Georgetown Law Journal*, vol. 87, no. 4, pp.957–80 (1999).

Chapter 7, "The Ethics of Wrongful Obedience," originated as the Keck Foundation Award Lecture to the Fellows of the American Bar Foundation; it was also delivered as the Condon-Faulkner Lecture at the University of Washington School of Law and in the Kennedy School lecture series at Harvard University. It appeared in Deborah L. Rhode, ed., *Ethics in Practice* (Oxford University Press, 2000), pp. 94–120.

Chapter 8, "Integrity: Its Causes and Cures," *Fordham Law Review*, vol. 72, no. 2, pp. 279–310 (2003). Written for a symposium on integrity in the law in honor of John D. Feerick.

Chapter 9, "A Midrash on Rabbi Shaffer and Rabbi Trollope," *Notre Dame Law Review*, vol. 77, no. 3 (2002), pp.889–923. This paper was written for a *Propter Honoris Respectum* for Thomas L. Shaffer.