
ETHICS AND EXCUSES

*The Crisis in Professional
Responsibility*

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Preface

The genesis of this book belongs in large measure to discussions with students. In the course of teaching for nearly forty years in five different law schools, I noticed three traits widely held by students.

First, many had difficulty thinking in terms of probabilities. Everything had to be true or false, right or wrong, black or white. Subtleties, uncertainties, and complexities disturbed them mightily. If professional ethics pose difficult, nonstandard, and complex problems, which cannot be dealt with by clear rules or bright line analysis, these students are ill equipped to deal with them.

Second, most students were indifferent about ethical issues, except at the most general level. Their attitude is best described as “amoral,” rather than “immoral.” Ethical problems are seldom discussed in public arenas or private conversations. Some students were deeply concerned with morality, but their attitudes tended to be held privately and muted in the public forum of professional school.

Finally, there was an almost universal propensity to offer excuses, however implausible, whenever they did not perform properly, whether it was handing in a late paper, being unprepared for class, giving a less than satisfactory answer, or failing an examination. There was a reluctance to take personal responsibility for their failings, or offer apologies.

And yet nearly all these students were above average in intelligence, well educated according to current standards, and appeared to be decent. The contradictions between their behavior in avoiding responsibility and my perception of them as basically decent always puzzled me. The practice

of giving and accepting excuses is the most fruitful point to explore these inconsistencies. While excuses are ubiquitous in our dealings with each other, they are seldom formally discussed in the field of ethics or informally when people converse with each other. An excuse is given. It is summarily accepted or rejected, and there the matter ends.

A more basic paradox underlying the practice of giving and accepting excuses is that all human beings have competing impulses, which are rarely resolved satisfactorily. One is a genuine desire to be decent, ethical, trustworthy, and generous, living up to the aspirations that represent the good. However, each of us is capable of acting in ways that are egotistical, mean, and destructive to ourselves and others, traits we label as bad. Each one in the project of constructing his own life, and each society in struggling toward maintaining viable ways of functioning, face this eternal human conflict. A major indicator of where the struggle occurs and how it is progressing is the type and amount of excuses we offer ourselves and others.

This book is about practical ethics and more specifically professional ethics, a subcategory of practical ethics. For whom is the book written? Stated differently, what sort of reader do I have in mind? As an academic, it would be natural to address specialists in professional ethics, those who teach and write about the theoretical problems. My main concern, however, is to describe real problems professionals face and discuss how such problems are or might be dealt with by individual professionals and by society. In a rapidly changing and ever more complex world, the discussion has to be rooted in the reality of the world where students and practitioners must function.

One aspect of this analysis will be a comparison between legal defenses and ethical excuses. Lawyers have something to learn from ethical theory, and ethicists much to learn from legal experiences. In addition, ordinary people who themselves not only use excuses freely, but are also on the receiving end of professionals' excuses, have something to learn from lawyers and ethical theorists.

I owe greater debts than I can acknowledge to many people who supported me, stimulated my thoughts, or contributed ideas, which I could then develop. Some of the more important were Robert Baum, whose comments on my preliminary paper, "The Excuses that Make Professional Ethics Irrelevant," not only made that a better piece, but stimulated further thoughts developed here. Another is George Hole, who responded to that paper in ways that helped me see ramifications of some problems of excuses. A valuable insight came from a former secretary, Leslie Vigus, who showed me how closely excuses used by professionals track with those used by her teen-age daughters. Hans Mohr made clear the important difference between apology and excuse, and the value that apology has in many cultures for dealing with problems we associate with excuses. He also helped me see more explicitly the tensions, if not total inconsistencies,

between ethical behavior and economically efficient commercial activity. Sheila Reynolds, a former colleague, who teaches professional responsibility at Washburn Law School, gave me examples of excuses as well as citations to authorities. Mark Weisberg, in a critical reading of part of an earlier draft, helped tighten my language and analysis.

A great debt is owed to J. L. Austin, whose brilliant and provocative paper "A Plea for Excuses" was brought to my attention by Joel Levin after I had begun this project. I am not sure I say much that was not already anticipated in an abbreviated fashion in that spectacular essay.

A great and immeasurable debt is owed my wife, Ellen, who helped me to understand a culture other than my own and see a side of life more intuitive and aesthetic than my own personality and upbringing would allow. Furthermore, she has spent more than forty years listening to my excuses and reacting to them, sometimes with sympathy and often enough critically, so that I have had to take her opinions seriously.

As a teacher, I developed a style of analysis and discussion that strove for dialogue with my students. It emphasized my personal reaction to problems and tried to show the complexities of individual contexts of choice, rather than trying to always be objective, impersonal, and offering simple solutions. In trying to understand this world and its challenges, asking the right questions always seemed more important than finding the "right" answers. This was an invitation to my students to do the same. My preference for this approach to analyzing and communicating will be found throughout the following pages. It may make this book appear too personal and anecdotal, but whether or not there are true observations and analysis here depends on whether it is supported by the reader's experiences and observations, rather than by social science findings. Social science research is needed in the area of excuses, but I am not the person with the interest or the skills to undertake that project.

Finally, a comment on linguistic style. A book on ethics focuses inevitably on an individual accused of acting (or failing to act) in a way labeled unethical. I refer to that person either as the "actor" or, since this is about professional ethics, as the "professional." This individual focus may give rise to gender bias. While the actor can be either male or female, my generation was conditioned to use the male pronoun as the generic singular designation. I have tried in the past to overcome that by using plurals, difficult in this context, or using the female pronoun exclusively, which is an overcorrection. Here I use the singular male or female pronouns randomly and, I hope, equally.