Is Business Ethics Necessary?

Craig Ehrlich

Follow this and additional works at: https://via.library.depaul.edu/bclj

Recommended Citation
Available at: https://via.library.depaul.edu/bclj/vol4/iss1/3

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Business and Commercial Law Journal by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.
Is Business Ethics Necessary?

Craig Ehrlich*

I. INTRODUCTION

Written on the eve of the new millennium, an article about the ethical challenges of business stated that business has a series of responsibilities to society. The first is the profit making function, an essential ingredient in a free enterprise economy. The second is the responsibility to obey the law. The third is that, “[i]n addition to fulfilling their economic and legal responsibilities, businesses are expected to fulfill ethical responsibilities as well.” What might these ethical responsibilities be? The author gave no examples. Almost 20 years ago, another writer described business ethics issues as including “pollution, adequate wages and benefits, safe, even pleasant working conditions, non-discriminatory personnel policies backed by appropriate recruitment, training and even retraining programs, careful husbanding of non-renewable resources, honest, informative advertising, [and] production of safe durable products.” A business which is following the law and is concerned for its own long term profitability is probably doing all of this. Morality limits the pursuit of self interest by creating a duty to respect others, but self interest is already limited by the law, and myopic self interest is limited by the fundamental business judgment that sustainable long term gains will probably exceed those from short term opportunism. What, then, is the domain of business ethics?

Those who teach law at business schools may be especially concerned to know whether they are teaching useful knowledge or palatable euphemisms. The undergraduate and MBA business school curriculum includes classes about business ethics. The materials are taught by philosophers, ministers of religion and occasionally by lawyers. The cases often involve defective products, trade secret misappropriation, employment issues, and the like, and the ethical analysis tends to add little to the law. What a manager should do in these

---

*I am grateful for the many enlightening conversations with Terrence W. Mahoney, Esq., of Boston.


situations is answered fully, or almost fully, by the law. One has some basis for concern about the preemption of specific business skills by an amorphous concern for the well being of society.3

The great themes which this paper touches upon – self interest vs. social responsibility, stockholder vs. stakeholder – have been written about time and time again since at least the Berle – Dodd exchanges of the 1930s4 and the stream of discourse shows no signs of abating. It may be that I have one small contribution to make to the discussion. Has anyone else asked, simply, whether business ethics is necessary? Put another way, how, exactly, does an ethical manager behave differently than one who follows the law and is concerned for the long term profitability of his business? A celebrated 1968 article in the Harvard Business Review contended that “as long as a company does not transgress the rules of the game set by law, it has the legal right to shape its strategy without reference to anything but profits.”5

The point that law and a long term view of profit will channel business action towards the greater good is hardly a new one. Adam Smith wrote, in “The Wealth of Nations,” that in a free market people usually produce goods desired by their neighbors and thereby promote the good of society.6 Professor Dodd noted the point in his 1932 article, yet still he urged the “development of a business ethics which goes beyond the requirements of law and the dictates of enlightened self-interest.”7 He did not give examples of cases in which these forces proved inadequate, but Dodd wrote at a time that predated the employee, consumer, and environmental protections created and enforced by the modern regulatory state. He believed that business is permitted by law only if it is “of service to the community”8 and that society was undergoing a substantial change in public opinion - that business should become a profession of public service and not simply a source of profit for its owners.9 With respect it is questionable whether he was right.

4. A.A. Berle, Jr., Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049 (1931); E. Merrick Dodd, Jr., For Whom are Corporate Managers Trustees?, 45 HARV. L. REV. 1145 (1932); A.A. Berle, Jr., For Whom Corporate Managers are Trustees: A Note, 45 HARV. L. REV. 1365 (1932).
7. Dodd, supra note 4, at 1161.
8. Id. at 1149.
9. Id. at 1153.
Business, like any human activity, is permitted by our law simply because it is not harmful. We do not require people to be of benefit to themselves or to others, perhaps because the law does not presume to know what is of benefit. We tend to leave people alone. Also, the change in public opinion that Professor Dodd sensed has moved in a different direction. Much new regulatory law has been put in place since 1932 to protect the interests of employees and consumers and this has supplanted the sense that the unrestrained pursuit of profit ought to be mitigated by a sense of professionalism and public service. The shareholder wealth norm – that a corporation is to be run for the making of profit for its owners – is still the law, and the authority cited by Professor Dodd in support of his view, "Business: A Profession," by Justice Brandeis, has been cited in only a few judicial opinions since its publication in 1925. Indeed, the traditional professions have themselves become more like ordinary businesses.

This article proceeds as follows. Part II explores the relationship between business law and business ethics and concludes that many ethical issues are resolvable by existing law. Part III considers the need for a business operating in a competitive marketplace to behave efficiently, and concludes that long run profit considerations will often lead a firm to behave in a manner that most people find acceptable. Parts IV and V consider the duty of loyalty that a corporate manager owes to the stockholders and concludes that this precludes a manager from pursuing an idiosyncratic moral mission. Part VI applies standard ethical analyses to the sale of internet censoring software to foreign governments to determine whether these are likely to aid a manager in deciding how to act. Finally, part VII explores a handful of other reasons why business managers should not become the guardians of the public good.

II. THE RELATIONSHIP BETWEEN BUSINESS LAW AND BUSINESS ETHICS

The conventional view of the relationship between law and ethics, and the foundation of the discipline called business ethics, is that merely following the law does not exhaust a firm's ethical responsibilities. What is legally required may not be ethically correct; and many

10. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1971) (the vagrancy ordinance case). So too, the law does not require that contracts be of benefit to society or even to the immediate parties. A contract voluntarily entered into will be enforced even if it proves to have been an unwise or foolish bargain.
things required by ethics are not required by law.\textsuperscript{11} Thus, the American Bar Association Task Force on Corporate Responsibility is of the view that "‘corporate responsibility’ also embraces behavior beyond that demanded by minimum legal requirements."\textsuperscript{12}

While there is overlap, it is certainly true that law is not co-extensive with ethics.\textsuperscript{13} An individual is under no legal duty to rescue another who will surely die without the other’s help, help that the other might give easily and at no risk to herself.\textsuperscript{14} One who breaches a contract need merely pay damages; hence the concept of an efficient breach. While law may be the "conscience of the community" (sometimes said in closing argument to the jury), it is often amoral and pragmatic. The Uniform Commercial Code embodies this dual nature. It requires "good faith" in the performance of a contract,\textsuperscript{15} which sounds moralistic,\textsuperscript{16} but the Code’s overall purpose is to provide an infrastruc-


\textsuperscript{12} Preliminary Report of American Bar Association Task Force on Corporate Responsibility, July 16, 2002, at 5, available at http://www.abanet.org/buslaw/corporateresponsibility/preliminary_report.pdf. What might these additional behaviors include? The Task Force gives no examples and refers the reader to section 2.01 of the American Law Institute’s Principles of Corporate Governance, which is discussed in detail in section IV below.

\textsuperscript{13} William T Allen, Contracts and Communities in Corporate Law, 50 WASH & LEE L. REV. 1395, 1403 (1993) (characterizing the duty of loyalty as being “grounded in the moral order”). There are any number of similar examples: trade secret law is the embodiment of “commercial morality,” PepsiCo, Inc v Redmond, 54 F.3d 1262, 1268 (7th Cir. 1995), and consider the body of equity jurisprudence, rooted in a moral sense of fairness based upon conscience. Yet, any account of the relationship between law and morals in American jurisprudence must include Holmes’s discussion of the bad man, the amoral actor who may still care to predict whether his deeds will land him in prison, O.W. Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897).

Holmes announced in The Path of the Law that one of his goals was to “dispel a confusion between morality and law.” He added, “[w]hen I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law.” Legal positivists from John Austin to Holmes (and Holmes’ alter ego, John Gray) to Hans Kelsen to H.L.A. Hart have, despite their differences, treated the separation of law and morals as the defining characteristic of positivism. Lon Fuller and other critics of positivism have accepted the positivists’ formulation of the issue, although they have maintained that law and morals cannot be separated. Albert W. Altschuler, The Descending Trail: Holmes’ Path of the Law One Hundred Years Later, 49 FLA. L. REV 353, 380-81 (1997).


\textsuperscript{15} U.C.C. § 1-304 (2004).

\textsuperscript{16} See Restatement (Second) of Contracts § 205 cmt. a (stating that the duty of good faith forbids conduct that “violate[s] community standards of decency, fairness or reasonableness”); Robert S. Summers, The General Duty of Good Faith-Its Recognition and Conceptualization, 67 CORNELL L. REV. 810, 811 (1982) (good faith “is of a piece with explicit requirements of ‘contractual morality’ such as the unconscionability doctrine and various general equitable principles”). But see Market Street Assocs. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (“Despite its
ture for the facilitation of private transactions. So too, the rule of law and the substance of property, contract, and tort law can be traced back to moral reasoning. But as law emerged from felt instinct to align itself with the learning of cognate disciplines, these rules are understood today to be indispensable elements of a market economy.

It is not clear, though, that business ethics adds much to business law, or that a business enterprise has any ethical responsibilities. There is nothing surprising about this. Business law is well developed in the United States and apart from the usual rules that concern commercial transactions and the structure of the corporation, there are extensive rules that govern the terms and condition of employment, the protection of the environment and the protection of consumers. Hence, the in-house codes of business ethics, now widely adopted for reasons that may have little to do with business ethics, are simple moralistic overtones, it is no more the injection of moral principles into contract law than the fiduciary concept itself is.

17. U.C.C. § 1-103(a)(1) (2004) (stating that the purpose of the code is “to simplify, clarify and modernize the law governing commercial transactions”).

18. See Richard Posner, The Problematics of Moral and Legal Theory, 111 Harv. L. Rev. 1637, 1694-95 (1998) (“Many moral principles have no backing from law. ... On the other hand, the law prohibits or attaches sanctions to a great deal of morally indifferent conduct”).


20. There are at least two sorts of business ethics codes. A listed company must disclose whether it has adopted a code of ethics that applies to the company’s principal executive officer, principal financial officer, principal accounting officer or controller, or persons performing similar functions. Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002 Release Nos. 33-8177 and 34-47235, 17 C.F.R. pts. 228, 229, and 240 (January 23, 2003). Companies traded on the NYSE must adopt a code of business conduct addressing conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection of company assets, compliance with law and the reporting of illegal or unethical behavior. See Final NYSE Corporate Governance Rules Item 10; see NASD Rule 4350(n). The second code seeks to define the relation of the firm to the outside world. It includes a compliance program and an associated code of conduct, designed to enable the firm to police itself and to count as a mitigating factor under the Federal Sentencing Guidelines for Organizations. Id. It restates the outlines of employment law, antitrust law, environmental law, securities law, corrupt practices and economic espionage, the main fields for which employee misdeeds may bring substantial civil or criminal liability upon the firm, and has some sort of oversight and enforcement mechanism. See Note: The Good, the Bad, and their Corporate Codes, 116 Harv. L. Rev. 2123, 2126-27 (2003) (describing forces driving the adoption of codes). Other causes include:

- The Foreign Corrupt Practices Act, which amended Section 13 of the Securities Exchange Act of 1934. 15 U.S.C. § 78(m) (2002). Section (b)(2)(B) requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable safeguards against the unauthorized use or disposition of company assets and reasonable assurances that financial records and accounts are sufficiently reliable for purposes of external reporting. Id.

- The oversight obligation of a board of directors.
restatements of the law. To the extent that these add anything to pre-existing law, it is too vague to be actionable. For example, GM, which sells the Hummer, tells us that it believes in corporate responsibility and in protecting the global environment and natural re-

[C]orporate boards may [not] satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.


- The enforcement policies of governmental offices that reward self policing. See Report of Investigation Prusuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release No. 44969, October 23, 2001 (showing the policy of the SEC to consider the self policing efforts of an accused in deciding whether to take enforcement action.).

- A desire to minimize the risk of punitive damages (we don't need to be punished), an intention to conform one's actions to a generally accepted standard of practice and earn a presumption of being reasonable (e.g., conforming to industry standards being evidence of due care in a design defect case), to fend off threatened government regulation (e.g., web site privacy policies), and to glean whatever intangible public relations benefit one enjoys from appearing to be virtuous.


Is BUSINESS ETHICS NECESSARY?

In the “Responsibility Overview” on its website, Altria, the parent company of the tobacco giant Philip Morris, pledges to follow the law but it also undertakes a “responsibility effort” to its employees, the community, the environment, and to make not only lawful business decisions but “responsible” ones as well. The same is true of the ethics cases used in business schools. They tend to present obvious legal issues, such as employment discrimination, environmental protection, products safety, bribery, fraud (including deceptive advertising and consumer fraud), misappropriation of trade secrets and corporate opportunities, and insider trading. Most of the daily work of in-house corporate ethics officers is to answer questions about conflicts of interest, an aspect of the duty of loyalty and a question of law.

To some extent, then, what is called business ethics plainly overlaps law. One may wonder why legal issues have been misnamed as ethical issues, and why compliance with the law is not enough. After all, the most recent round of corporate scandals involved violations of law and have been prosecuted in courts of law. The scandals that are described in the Preliminary Report of the American Bar Association Task Force on Corporate Responsibility, July 16, 2002, including Enron, WorldCom, Adelphia Communications, Tyco International, and Global Crossing, involved fraud, insider trading, and breaches of the fiduciary duty of loyalty.

Does the label matter? By using language imprecisely, and calling law ethics, there is a chance that a business ethicist will be asked to answer a question of law and do so incorrectly, or that a manager will not understand he must act in such and such a way and that the choice is not wholly his to make. (The risk of misunderstanding is compounded by the business school curriculum. For a business school to be accredited by the Association to Advance Collegiate Schools of Business, its undergraduate curriculum must teach “ethical understanding”, and on both the undergraduate and graduate levels “ethical and legal responsibilities,” but there is no explicit requirement that

26. What is an Ethics Officer?, available at http://www.eoa.org/Whats.asp (includes managing legal and regulatory compliance among an ethics officer’s duties, which is concerning since this person may not even be a lawyer). An ethics officer may also be “tasked with integrating their organization’s ethics and values initiatives.” Id.
students study business law\textsuperscript{28} and many MBA programs do not require it).

There is also a danger of egocentrism, a belief that individuals are free to pursue whatever each thinks is just in his own eyes and, to paraphrase Roscoe Pound, that the individual conscience is the ultimate arbiter of legal obligations.\textsuperscript{29} There is no standard conscience, though. Absolute theories of morals passed with the Middle Ages. This is why the positivists extracted law from ethics centuries ago. Maybe people think that "ethics" means something more sublime than law, but the freedom to do as one pleases can be exercised in any direction. The emphasis on business ethics may unwittingly bring us back to the relativism that the law has sought to remedy.

Most business ethics writing ignores existing law.\textsuperscript{30} One writer, for example, regards the fiduciary duty of loyalty as a "metaphor," and is concerned that his MBA students assume it to be true that corporate managers, they should work to maximize shareholder wealth.\textsuperscript{31} Maybe this is because ethics writers tend to be moral philosophers and not lawyers, or they distrust lawyers who too narrowly serve their clients' ends, or they find positivism distasteful because it separates law from morality and can result in unprincipled action. Maybe they mean to criticize the body of business law as immoral, or they find a virtuous man to be better than one who is merely law abiding.\textsuperscript{32} Perhaps ethics writers assume law to be declarative of moral ideals, an

\begin{itemize}
\item \textsuperscript{29} Roscoe Pound, \textit{Law and Morals} 88 (Augustus M. Kelley 1969) (1926).
\item \textsuperscript{30} John Hasnas, \textit{The Normative Theories of Business Ethics: A Guide for the Perplexed}, 8 \textit{Bus. Ethics} Q., 19, 22 (1998) (stating, that a significant amount of the criticism that is directed against the stockholder theory—that managers should maximize the financial returns of stockholders-results from overlooking constraints embodied in laws); Jeffrey Nesteruk, \textit{Reimagining the Law}, 9 \textit{Bus Ethics} Q. 603, 606 (1999) ("[b]ut viewing law as rules nonetheless positions it as external to our moral lives in a significant sense"). The writer also notes "the paucity of articles in business ethics examining the general relationship of law and ethics." \textit{Id.} at 615.
\item \textsuperscript{31} Ronald M. Green, \textit{Shareholders as Stakeholders: Changing Metaphors of Corporate Governance}, 50 \textit{Wash} & \textit{Lee} L. Rev. 1409, 1416 (1993).
\item \textsuperscript{32} One academic has stated:
What it is to fall into a vice cannot be adequately specified independently of circumstances: the very same action which would in one situation be liberality could in another be prodigality and in a third meanness. Hence judgement has an indispensable role in the life of the virtuous man which it does not and could not have in, for example, the life of the merely law-abiding or rule-abiding man.
\end{itemize}

ancillary structure which may be disregarded in favor of the primary foundation, and an aspect of what is wrong with the current order. Maybe they do not mean to describe the existing state of affairs, except to criticize the distributional inequities of a system based upon profit and efficiency.

Instead, ethics writers ask how the world might be made a better, fairer, more just place. They purport to write on a blank slate and invent the world of business anew, to serve society at large, in accordance with principles of normative ethical theory and ideals of justice and social welfare. Is the purpose of business ethics to construct an ideal world that values altruism and move us towards it, or is it to give useful advice to managers? If the latter, then one must appreciate that the manager operates in a world with existing legal responsibilities. The point has been made before, but it remains questionable whether it has been answered.

A practicing lawyer may have a different view, not meaning to offer an ideal alternative to the existing reality but rather to describe the world as it is. A lawyer may also assume that law has a pragmatic function, and that it does not exist simply because there are moral arguments against deceit and in favor of honoring one’s promises. Business law exists in order that markets may operate and that business may be done. Vague and confusing as lay people sometimes find law to be, it is reasonably well worked out. It gives guidance: deals are structured and closed, clients counseled, cases decided. If there are problems with the existing order, it may be that the solutions lie not in an imaginative recreation of an ideal world, but more simply, in a dedication to the enforcement of existing law.

One might point to the connection between law and morals and to the open-ended nature of legal reasoning (the occasional use of fuzzy standards instead of bright-line rules, the possibility of there being good legal arguments in support of both sides of a case) as justifica-

36. Philosophy may be able to tell us that an individual should have a right to privacy, but it is preposterous to imagine that philosophy can tell us whether there should be a right to privacy in a public telephone booth or in a department store dressing room. Charles Fried, The Artificial Reason of the Law or: What Lawyers Know, 60 TEX. L. REV. 35, 54-57 (1981). It is the peculiar task of law to complete this structure of ideals and values, to bring it down to earth; to complete it so that it is seated firmly and concretely and shelters real human beings against the storms of passion and conflict.” Id.
tion for paying less attention to law and more to moral philosophy. That would be a mistake. Whatever view one takes of the nature of law and its relation to morality, and how it is that judges do or should decide cases, all lawyers share a concept of law. They may disagree about the nature of law but a specialized legal profession exists. Lawyers do something that "not just anyone can do." Legal rules enjoy a kind of autonomy from morality as such. We deliberately render these rules susceptible to technical application and analysis . . . And to facilitate this application and analysis we bring into being a legal profession, from which we draw our judges, that is composed of people trained in programs of study that teach not, or not just, moral philosophy, but the specific tools and techniques of research, interpretation, reasoning and argument relevant to legal analysis.

A lawyer could, of course, use moral reasoning in advising a client not only about what means and techniques to use but about what ends to achieve. That might be part of what it means to be a wise counselor, but it goes beyond a technical understanding of the law. It is a mistake to confuse legal problems with ethical ones because one's personal moral views are irrelevant in a courtroom.

III. THE NEED FOR EFFICIENCY IN A COMPETITIVE MARKETPLACE

Since law does not fully determine business action, rarely compelling a specific mission or means, the criticism may amount to very little beyond an insistence on using language precisely. Perhaps there is a domain for business ethics, as long as its writers are careful to avoid the complementary perils of vagueness and redundancy with existing law. Is there any compelling reason why business should not be expected to somehow be "better" than the minimum required by law? Set aside for the moment the genuine difficulty of defining what "better" means, and assume that there are universal ethical norms which are not embodied in law. The law sets a minimum wage, which is not a livable wage. Why should a firm not do better and pay more? It can pay more to attract better workers, to keep turnover low, to attract a socially conscious consumer who will pay higher prices for its output, but if the firm pays more without corresponding benefit to itself, it has placed itself at a competitive disadvantage and, therefore, this is unlikely to happen. Since a business must survive in the competitive

marketplace, it cannot afford to be better to the point of sacrificing profit and gain without commensurate payoff.

Repugnant though some find this to be, it is the existing reality. A business is governed primarily not by law but by the requirements of the marketplace – by the need to be efficient, to satisfy customers, employees, and the like. A business exists to make profit for its owners; it must respond efficiently to the demands and opportunities of the marketplace. Shareholder wealth maximization may be controversial, reviled by some ethical theorists who prefer a social model that emphasizes some sort of community responsibility, but it reflects the basic commercial understanding, at least in the U.S. A board’s main goal is corporate profits.40

Profit is an obvious motivator, and it also allows the price mechanism to function. This is textbook economics about how markets work. Price competition among suppliers and consumers, who seek to maximize their own profit, allows the system to find a price that will match supply to demand. Competition thus allows for an efficient allocation of resources, minimizes waste and allows a complex economy to be organized. The system creates wealth. But, one might ask: wealth for what purpose? Efficiency and profit are not ends in themselves. Some grow rich while others stay poor. One might believe that self-interest and the profit motive are bad, that altruism is good, that less should go to owners and more to workers and the community, that managers should be nicer to stakeholders.41 The current reality, though, is that business leaders are almost exclusively bottom line oriented, and stakeholder theory (that managers should manage the business for the benefit of all stakeholders) is not the current state of the law.

40. A.A. Sommer, Jr., It All Comes Down to Money, ABA General Practice, Solo & Small Firm Section Magazine (September 1999), available at http://www.abanet.org/gen-practice/magazine/bestofsept99/sommer.html “[A] corporation...should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain.” Principles of Corporate Governance: Analysis and Recommendations § 2.01(a) (1992) [hereinafter Principles].

41. See e.g., Allen, supra note 13, at 1402 (discussing the “social or realist perspective”); see also David Millon, New Directions in Corporate Law: Communitarians, Contractarians and the Crisis in Corporate Law, 50 Wash & Lee L. Rev. 1373, 1374-75 (1993) (noting that managerial pursuit of shareholder wealth may result in laid-off workers, and that efficiency may be at odds with individual dignity and social welfare); see also Lyman Johnson, New Approaches to Corporate Law, 50 Wash & Lee L. Rev. 1713, 1718 (1993) (noting the “antipathy” and “revulsion” that some feel towards the shareholder primacy norm); see Benedict Sheehy, The Importance of Corporate Models: Economic and Jurisprudential Values and the Future of Corporate Law, 2 DePaul Bus. & Comm. L. J. 463 (2004) (noting that economic efficiency and shareholder primacy devalue people and create distributional inequities, hence non-shareholders must have access to corporate power).
Perhaps the current model of economic organization is not optimal, but who is wise enough to say? It should merely be pointed out that many of those who write about business ethics are also teachers in business schools and law schools. These are, to an extent, vocational schools. Students often come to these professors to be trained as business managers and business lawyers. If the professional schools mean to teach their students the skills they need to find good employment within the existing system, then the faculty should acquaint its students with useful knowledge. If one means instead to condemn the existing system as unjust, then the faculty should clearly label its comment as editorial.

There is another point about the requirements of the marketplace. The market itself can serve as a policeman and compel a firm to behave in accordance with prevailing social norms. For example, the law would allow a business to hire only short people; can this be morally acceptable? The hypothetical is absurd, though, because any business so foolish as hire on some basis other than talent will not long endure. The need to be efficient in a competitive marketplace, and to succeed in the long run, explains much business action that we would like to call ethical, and further reduces the need for a manager to understand moral theory.

There are costs for misbehaving, apart from legal sanctions. The marketplace sometimes punishes bad acts. Selling shoddy goods drives customers away; bad workplace conditions drives employees away; wasteful use of resources drives costs up. In the long run, these practices tend to fail. This is particularly true when there will be repeated transactions and enduring relationships, because the gain from future cooperation exceeds the immediate gain that cheating might bring. Hence, the importance of one’s reputation and the special solicitude that the law gives for one defamed in his trade or profession. It is not that good ethics is good business. It is the other way around. Good business practices happen to be fair and square. Maybe this is why the law regards compliance with trade custom as evidence not only of due care, but of good faith as well.\footnote{Texas and Pacific Railway Co. v Behmer, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done..."), U.C.C. § 2-103(1)(j) (good faith means honesty in fact and the observance of reasonable standards of fair dealing in the trade).}

Generally, "socially responsible deliberation will not lead management to decisions different from those indicated by long run profit considerations."\footnote{Stark, supra note 34, at 39 (quoting Wilbur Katz).} When Johnson & Johnson promptly withdrew TYLENOL after the first evidence of tampering appeared, that was an ethical
thing to do, but it also made good business sense and probably pleased the general counsel.\textsuperscript{44} A paper products company replants trees. That is good for the environment, but it is also good for the long term health of the company.\textsuperscript{45} Best HR practices may require more than minimal legal compliance in order to attract the best talent, for example by offering better benefits and by hiring from a broader pool than the law may require, but this makes competitive sense. A firm that takes a long term view of profits will try to preserve good relations with those with whom it deals.\textsuperscript{46} This is a matter of strategy, not ethics.

Does it matter whether this sort of thinking is called business judgment instead of ethical analysis? Consider the following example. In April 2005, Pfizer voluntarily reformulated Sudafed, so that it no longer contained pseudoephedrine, a key ingredient that can be used by illegal labs to make methamphetamine. Congress and various state legislatures were considering bills to require the reformulation, but none had been enacted into law.\textsuperscript{47} It is unclear whether Pfizer acted for ethical reasons, in consideration of the well-being of the community, or was simply responding to the likelihood that the change would soon be forced by law, or hoped to preempt legislation by acting voluntarily.

There is a difference between action motivated by ethical concerns and action designed to respond to the ethical demands of the marketplace. A response to the marketplace simply requires that managers be cognizant of the conditions of the marketplace and consider the "generally accepted moral conventions current at the time".\textsuperscript{48} They

\textsuperscript{44} A.A. Sommer, Jr., \textit{Comment on Dunfee}, 62 \textsc{Law \& Contemp. Probs.} 159, 160 (1999).
\textsuperscript{46} Carr, \textit{supra} note 5, at 149.
\textsuperscript{47} Heather Won Tesoriero, \textit{Pfizer Reversal on Curbing Cold Pills May Help company}, \textsc{Wall St. J.}, April 13, 2005, at B1.
\textsuperscript{48} Repouille \textit{v United States}, 165 F.2d 152, 153 (2d Cir 1947) (quoting United States \textit{v. Francioso}, 164 F.2d 163 (2d Cir. 1947) In \textit{Repouille}, Judge Learned Hand was required to decide whether a man who had euthanized his son under tragic circumstances was of "good moral character" as required by the Nationality Act. \textit{Id.} Hand's biographer wrote:

Applying the "good moral character" requirement presented special difficulties for a judge like Hand. His was a modest rather than activist view of judging, and he considered it beyond a judge's duty and competence to impose his own moral standards upon the community. Moreover, he was of course a skeptic, doubtful of any absolute moral standards. Yet Congress had commanded the judges to give content to the vague phrase "good moral character" . . . His resort to the "common conscience" formula was an effort to escape judicial subjectivism by relying on some outside source.
need not conform to it and are free to assign it whatever weight they consider appropriate in the exercise of their business judgment. An ethical decision, in contrast, would require that managers undertake their own original ethical analysis and then follow it even if it adversely affects long term shareholder value. (What is the point, otherwise?) The former requires managers to think primarily about the well-being of their enterprise, the latter about the well-being of third party stakeholders. A manager who is exercising business judgment will be concerned to know if the proposed action will result in a net gain. If there is none, then the action is not likely to be taken. If there is gain to be gotten from pleasing customers, motivating employees or fending off regulators, there is no need to justify the action further in the language of ethical analysis.

In an article that appeared in 2000, an ethics scholar wrote that it is not sufficient for managers to tell the truth and keep their promises because doing so happens to be good business. The professor worried that managers will not do so when being ethical is no longer good for business.49 (Set aside the probable liability for breach of contract or fraud; the professor did not consider the law.) How often does it happen that lawful action, undertaken for the long term well-being of the business, will violate the prevailing ethical mindset? If there are not likely to be many cases in which it is good for long run profit to be sleazy, then perhaps the current emphasis on business ethics is misdirected.

The flaw is not with the economic motive that drives a business, but rather with the short term perspective that some managers take. The pressures for short term gain are "broad and systemic."50 Maybe the pressure to meet Wall Street's expectations every quarter, and to satisfy not just a small group of seasoned institutional investors but the whole investing public, drives a short term agenda. Maybe stock incentive compensation encourages short term manipulations to drive

Gerald Gunther, Learned Hand: The Man and the Judge 629-30 (1994). Perhaps this is what Milton Friedman meant when he wrote of "ethical custom:"[A] corporate executive . . . has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.


49. Duska, supra note 33, at 120; see also Hooker, supra note 25, at 1-2 ("Ethics exists precisely because ethical conduct does not always pay.").

up share prices.\textsuperscript{51} Perhaps the likelihood that one will have a series of jobs and careers in different fields diminishes the importance of reputation at any single place and time. Addressing this structural problem so that managers of large publicly traded companies (the ethics movement hardly seems driven by the behavior of local merchants, not even the used car dealer) can afford to take a long-term perspective to their relationships with investors, employees, customers, and the like, instead of seeking gain in one-shot schemes, would be better than preaching morality to our students, since people are more likely to respond to incentives than exhortations to be virtuous.\textsuperscript{52}

Reconsider the long term manager. Common sense dictates that there are cases in which a well run, profitable business follows the law, but the outcome seems bad and the law insufficient. Examples come easily to mind, though of course value judgments are often quirky: tobacco products, assault weapons, wasteful SUVs, polluters in places or at times of inadequate environmental law, employers who pay a lawful but inadequate minimum wage (the standard example of this being a Third World sweat shop), purveyors of violent or vulgar pop culture, sellers of unwholesome fast foods or useless nutritional supplements, etcetera.\textsuperscript{53} One faculty colleague suggests that Wal-Mart should stay out of bucolic Vermont.

Markets sometimes fail. Ignorance can cause this. Consumers may lack information. There may be inadequate competition. Employees may not be able to find another job so easily. There may be high switching costs, or a lack of bargaining power. There may be negative externalities and costs passed along to outsiders. The marketplace is not a perfect cop. When it fails, there may be a role for regulation by law. What if the law is inadequate, though? The law is not a perfect institution. Wrongdoers sometimes evade responsibility through gaps in the structure or enforcement of the law. Should a firm not consider the well-being of the environment and the community and refrain from discharging harmful pollution even if permitted by law? Should it not pay more than the prevailing minimum wage, even if it can at-

\begin{footnotes}
\item 51. See Joseph Stiglitz, \textit{The Roaring Nineties} 120-21 W.W. Norton & Company, Inc. 2003) (stock options did not provide incentives to increase the long term value of the firm).
\item 52. See Winkler, supra note 19, at 126 (discussing some suggested solutions to the short term mentality).
\item 53. An obvious addition would be the field of medical research. Bioethics is a necessary topic of inquiry, even if business ethics is of doubtful value. Medicine has traditionally been understood to be a profession, motivated not by the profit motive but by a concern for the well being of the patient. The problems related to advances in biomedical science and technology are so closely bound up with life and death, and a concern about playing God, that they are not comparable to ordinary business problems.
\end{footnotes}
tract a sufficient labor force by paying only the legal minimum? Similarly, should a firm not refrain from advocating its own selfish cause, and not lobby against proposed legislation that would force it to bear the cost of an externality?

Assume the strongest possible case for business ethics: a product that is expensive and harmful, laws that are grossly inadequate, and a consumer who is poor, ignorant and illiterate. Assume, too, that the market is far away so that the chances of negative publicity and angry boycotts back home are small. This is similar to what happened in the Nestle infant formula case. Nestle sold its breast milk substitute in Africa to women who could not read well enough to follow instructions and prepare the formula properly, who lacked access to clean water and sufficient fuel to sterilize the equipment, and who could not afford to buy enough of the formula to prepare it full strength. The babies were fed diluted formula made with dirty water.\(^{54}\) If there is a case to be made for business ethics, this must be it. It is too cold-blooded to pursue lawful profits at such appalling cost, and yet one must be careful not to allow such exceptional cases to serve as a basis for a general discipline. Even if special rules ought to apply to multinational activity in failed nations, this does not make a case for the widespread teaching and adoption of business ethics in the developed world.

Ethical thinking might come into play if one were considering to forego a profitable and legal opportunity (for example, marketing, without false advertising, a useless but harmless product), or to incur voluntarily a cost that one might legally avoid (for example, some sort of environmental remediation in excess of regulatory standards), where doing so brings no offsetting payoff. It seems unlikely that this would happen since altruism is not the dominant motivator of people in market transactions. But even if it is assumed that a firm will place itself at competitive disadvantage out of a sense of duty to the greater good, this clearer focus still does not make the case for business ethics. Even if there are problems not fully solved by law and basic business judgment, by what method will the business ethicists deal with them?

One does not have to be a trained philosopher to understand that mistreating someone today will diminish the chances of earning their custom and goodwill. To add to the stock of human understanding, business ethics should teach something other than basic business judgment. It should teach something other than law. To be really useful,

business ethics should also teach something other than moral theory, since knowing what is moral has little or nothing to do with wanting to do a moral act. \(^{55}\) (At least the burden should be on the proponents of academic moral theory to prove that their discipline actually matters to the conduct of business.) As well, a proponent of business ethics should explain why it is better for a single firm to put itself at competitive disadvantage than it is for the legislature to revise the law so that all firms are similarly burdened. Finally, a proponent of business ethics should explain why it is the job of business to be considerate of my well-being or my tastes, beyond the concern of any prudent business not to alienate those whose good will it requires. Why should the managers of Wal-Mart decline a profitable opportunity to enter upon the pristine soil of Vermont if the legislative bodies of that state have not seen fit to enact exclusionary rules?

IV. The Manager’s Duty of Loyalty

The preceding arguments apply equally to all forms of business enterprise, from a sole proprietorship to a public corporation. Law and enlightened self-interest will resolve most questions of business ethics in a way that most people will find appealing, without the need to resort to questions of social responsibility. If the business is a corporation and there is not a strict identity between its owners and managers, then there will be still another reason why the managers should not be motivated by public service concerns. To curtail the possibility of self-dealing, the law requires that they be accountable to the stockholders of the corporation.

Is a corporate manager ever ethically obligated to act in ways that do not promote the fundamental purpose of the business? If there are no such cases, then ethical analysis has no practical application. If there are such cases, though, then ethical analysis may require a manager to breach his legal duty to his employer. Does the law permit a manager to make an “ethical” decision when doing so diminishes gain and profit, and when the contrary action would be lawful and profitable and within the scope of a corporate opportunity? This is the relevant question, narrowly framed.

The state of the law is not entirely clear. While the American Law Institute acknowledges that the case law was not “entirely harmonious,\(^{56}\) its effort at clarification of a manager’s ability to take into ac-


56. PRINCIPLES, supra note 40, § 2.01 cmt. a.
count ethical considerations\textsuperscript{57} has not been cited by a single court in the 13 years since it was published. The scholarly commentary is extensive, probably vaster than need be and certainly vaster than need be cited here. The debate is between the communitarians, who favor a "multi-fiduciary" model, and the contractarians, who favor the shareholder primacy norm, and it has gone on "ad nauseam."\textsuperscript{58} All of the law review articles have one thing in common, though. They all cite the same small body of case law. The "shareholder primacy norm" – that a corporation is to be run primarily for the profit of the shareholders - appears to be the accepted rule.\textsuperscript{59} The board and officers are supposed to run the business with the objective of maximizing corporate wealth and shareholder profit.\textsuperscript{60} "It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others . . . does not for that reason constitute a breach of duty."\textsuperscript{61} They may take a long term view of this, however, and need not squeeze every penny out of every opportunity. (A specific example of this is the ability of a board to say no to an offer to buy the company for more than its current value, if they believe their own strategy will generate even greater value in the future.)\textsuperscript{62} They may spend a bit today to earn a bit more tomorrow. They may even donate money to charity and philanthropy.\textsuperscript{63} They may not however waste the assets of the business, though it is a difficult burden to prove waste.\textsuperscript{64} Whatever the prevailing standard may be, a court will hardly ever second guess the substance of management's decisions, as long as

\textsuperscript{57} Id. § 2.01(b).
\textsuperscript{59} Sommer, supra note 40; Stephen H. Bainbridge, \textit{In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green}, 50 Wash. & L. Rev. 1423, 1423-35 (1993); Allen, supra note 13, at 1406; William H. Bratton, \textit{Confronting the Ethical Case for Constituency Rights}, 50 Wash. & L. Rev. 1449, 1462-65 (1993); Licht, supra note 58, at 688; Winkler, supra note 19, at 110.
\textsuperscript{60} The classic case, cited by every writer, is \textit{Dodge v Ford Motor Co.}, 204 Mich. 459 (1919). \textit{E.g} \textit{Principles}, supra note 40, § 2.01 Reporter's Note.
\textsuperscript{61} Katz v Oak Industries, Inc., 508 A.2d 873, 879 (Del. Ch. 1986).
\textsuperscript{62} The "Just Say No" principle that is available to a board when it is in the Unocal mode or when it has agreed to a merger of equals. Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989).
\textsuperscript{63} The standard case cited here by every writer is \textit{A.P. Smith Mfg. Co. v Barlow}, 13 N.J. 145 (1953). \textit{E.g}, \textit{Principles}, supra note 40, § 2.01 Reporter's Note 2. It is no secret that "corporate executives too often take liberties with corporate money and, in the name of charity, bestow benefits upon themselves." Winkler, supra note 19, at 118. Money given to the symphony results in front row tickets, etc. \textit{Id}.
\textsuperscript{64} MJ Pritchett III, \textit{Corporate Ethics and Corporate Governance: A Critique of the ALI Statement on Corporate Governance Section 2.01(B)}, 71 Calif. L. Rev. 994, 997-998 (1983).
the decision was made by an informed, disinterested and independent body, which is to say that the business judgment rule in effect gives management fairly broad discretion in running the business.\textsuperscript{65}

Beyond this, a board may consider the interests of employees and the community when determining its response to a hostile takeover. Delaware case law allows this and many states have statutes that allow it, but no law (except Connecticut) mandates that stakeholder interests be considered, and in no state may the statutes be enforced by stakeholder plaintiffs. The American Bar Association concluded that the constituency statutes added little to existing law, in part because only shareholders may vote in the election of corporate directors.\textsuperscript{66} Stockholders can also bring a derivative suit; stakeholders cannot. The consensus is that the effect of these laws has been to benefit management, by confirming or expanding their discretion in making decisions, and their resulting ability to keep control.\textsuperscript{67}

The ALI Principles build upon this foundation. They state that the chief objective of the business corporation is "the conduct of business activities with a view to enhancing corporate profit and shareholder gain."\textsuperscript{68} This "economic objective," which is a "basic proposition,"\textsuperscript{69} is qualified by the three subparts of § 2.01(b) of the ALI Principles. The first qualification is that the corporation, in the pursuit of its economic objective, must follow the law, even if doing so means that corporate profit and shareholder gain are not enhanced.\textsuperscript{70} This is unexceptional. Skipping for a moment, the third qualification recognizes the practice of donating money for philanthropic purposes, which may be of questionable direct benefit to the corporation but if it is an abuse, it is a long standing abuse to give corporate funds to one's alma mater or to the symphony.\textsuperscript{71} The second qualification, like the third one and un-

\textsuperscript{65.} The universally cited case is Shlensky v. Wrigley, 95 Ill.App.2d 173 (1st Dist. 1968). E.g., Principles, supra note 40, § 2.01 Reporter's Note 2.
\textsuperscript{66.} Preliminary Report of the American Bar Association Task Force on Corporate Responsibility, supra note 12. See also Bratton, supra note 58, at 1468 ("unlikely to see an expansive interpretation" of the constituency statutes); Eric W. Orts, The Complexity and Legitimacy of Corporate Law, 50 Wash. & Lee L. Rev. 1565, 1598 (1993) ("the statutes only reaffirm traditional prerogatives of managerial discretion").
\textsuperscript{67.} Winkler, supra note 19, at 124; Gary von Strange, Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?, 11 Hofstra Lab. L.J. 461, 489 (1994); Kathleen Hale, Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes, 45 Ariz. L. Rev. 823, 834-838 (2003); Licht, supra note 58, at 703 (the constituency statutes "have received only cursory attention from the courts and have played a negligible part, if any, in litigation involving directors' decisions.").
\textsuperscript{68.} PRINCIPLES, supra note 40, § 2.01(a).
\textsuperscript{69.} Id. § 2.01 cmt. e.
\textsuperscript{70.} Id. § 2.01(b)(1).
\textsuperscript{71.} Id. § 2.01(b)(3).
like the first, is permissive and not mandatory.\textsuperscript{72} It states that the corporation 
"[m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business" even if profit and gain are not enhanced.\textsuperscript{73} What does this mean?\textsuperscript{74} The reporter noted that "(t)here is very little direct authority on the permissibility of taking ethical considerations into account in framing corporate action when doing so might not enhance profits."\textsuperscript{75} The very little authority turns out to be none at all. The cited cases concern voluntary payments made to retiring executives for past services, or to their widows.\textsuperscript{76} This is probably not the sort of thing that current business ethicists have in mind. The comments, illustrations, and reporters' notes shed some light. We are told that "such conduct will usually be consistent with economic self-interest."\textsuperscript{77} This is because treating fairly "employees, customers, suppliers and members of the community in which the corporation operates" will probably contribute to long term profit and shareholder gain.\textsuperscript{78} Apart from this, a decision which is protected by the business judgment rule will also satisfy § 2.01.\textsuperscript{79} There are illustrations of hypothetical cases in which an "ethical" approach does not involve a departure from the basic economic objective. For example, a corporation enters into a contract that is unenforceable under the Statute of Frauds. Performance will result in a small loss, about two percent of annual earnings, but the management decides to honor its verbal agreement because doing so will bolster market confidence in the corporation's willingness to honor its commitments and likely lead to greater long term gains.\textsuperscript{80} Other illustrations include cases in which employee morale is boosted or unfavorable regulation or public reaction is forestalled.\textsuperscript{81} Comment h of the Principles of Corporate Governance states that "(i)t is sometimes argued that because adherence to ethical principles typically involves long-run financial benefits, the concept of the long

\textsuperscript{72} Id. § 2.01 (b)(2).
\textsuperscript{73} Id. § 2.01 (b)(3).
\textsuperscript{74} The provision was criticized in draft form a decade before its adoption and at the time of its adoption, as being unnecessary since existing law allowed corporate officials sufficient latitude and conversely, because the provision was an unwarranted deviation from existing law. Pritchett, supra note 63, at 1010; Bainbridge, supra note 58, at n. 4.
\textsuperscript{75} PRINCIPLES, supra note 40, § 2.01 Reporter's Note 5.
\textsuperscript{76} See id.
\textsuperscript{77} Id. § 2.01 cmt. f.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} See id. Ill. 1.
\textsuperscript{81} PRINCIPLES, supra note 40,ills. 2-5.
run dissolves any apparent tension between financial and ethical considerations." This brings to mind the question asked in section III of this paper. When, if ever, do these considerations diverge? One example is given. Reconsider the oral contract case, but change one fact. Assume that the corporation is going out of business and that it will be dissolved. There is no long term gain to be gotten from performing the contract. What should management do? The given answer is, they may do whatever they like, as long as they have made a considered decision within the scope of the business judgment rule. Management may, if it wishes, think about ethical considerations, or not, in the exercise of its business judgment. Apart from the dissolving firm, in which ethics may or may not matter, ethics and long term profitability appear not to be in tension. This view is reinforced by Illustration 19: A publicly held corporation with assets of $100 million and annual earnings of $13 to $15 million owns three profitable aluminum plants and one plastics plant that loses $4 million a year. The plastics plant has no prospect of becoming profitable. The firm decides to sell it but the only interested buyer intends to convert the plant to a new use and lay off many of the workers. Do ethical considerations justify the firm refusing to sell and continuing to operate the plastics plant in order to save jobs?

It cannot be justified under § 2.01(b)(2) [the ethical exception to the general rule], because a corporation is not ethically obliged to continue indefinitely the operation of a business that is losing large amounts of money, equal to more than one fourth of the corporation's earnings, for the purpose of keeping workers employed. The action cannot be justified under § 2.01(a) [the economic objective general rule], because the action is not motivated by profit considerations, and on the facts it would not be within the realm of business judgment to conclude that the action will result in short- or long-term profits exceeding the costs involved.

A manager's ability to take into account ethical considerations is further discussed, if not clarified, by other language in comment h. It states that "a manufacturer of consumer goods may owe an ethical obligation to produce safe goods" and that "the content of the fairness obligation owed to groups such as employees may depend in part on past statements and practices that have engendered reasonable reli-

82. Id. § 2.01 cmt. h.
83. Id. Ills. 11-12.
84. Id. § 2.01 cmt. h.
85. Id. Ill. 19.
86. PRINCIPLES, supra note 40, Ill. 19.
87. Id.
88. Id.
ance or legitimate expectations." 89 But the duty of a manufacturer to produce safe products is the concern of products liability law, as well as various other regulatory schemes, and is also affected by market driven self regulation such as Underwriters Laboratories. So too, past statements or practices that engender reliance or create expectations is the concern of employment law (the implied in fact contract) and the doctrine of promissory estoppel. The ALI gives no indication how ethical conduct in these cases differs from simple legal compliance. (This is the same sort of confusion noted in section II of this paper.) Nor, in general, does § 2.01 explain how ethical considerations add to basic business judgment exercised with a view towards long term profitability.

Current law embodies the shareholder wealth norm but we may still ask whether the law makes sense. The duty of loyalty runs to the corporation and its stockholders because of a concern that managers who are not subject to a clear duty will manipulate corporate property for their own personal benefit. Professor Berle expressed the point this way:

[W]hen the fiduciary obligation of the corporate management and 'control' to stockholders is weakened or eliminated, the management and 'control' become for all practical purposes absolute. The claims upon the assembled industrial wealth and funneled industrial income which managements are then likely to enforce (they have no need to urge) are their own. 90

Were it otherwise, and managers required to maximize the interests of multiple stakeholders, then whose interests should management pursue when shareholder and other interests conflict? One cannot serve two masters. "Freed of both and answerable to neither," agency costs rise and wealth falls. 91 This does not mean that management may deal at will with customers, creditors, employees, and other stakeholders since these relationships are governed by contract and regulation, but managers must still "work for the best interests of the stockholders" 92 and seek to maximize profit for their benefit. While a manager may consider the effects of business action upon the market, the environment, the community, and public opinion in deciding what is best for the corporation and its owners, their interest must be determinative because a manager cannot simultaneously maximize the val-

89. Id.
90. Berle, supra note 4, at 1367.
91. Licht, supra note 58, at 706 (quoting Frank H Easterbrook & Daniel R Fischel, The Economic Structure of Corporate Law 38 (1991); see also Bainbridge, supra note 59, at 1435; see also Bratton, supra note 58, at 1451.
92. Dodd, supra note 4, at 1153.
ues of several independent variables. Stockholders cannot receive the greatest returns if workers (and managers!) receive super premium salaries, if the community receives munificent charity, if output is sold to consumers at cost. Ends collide; one cannot have it all. Hard choices must be made. "The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament." If he has several first objectives, the manager has no true objective and no principled basis upon which to make his choices. If he serves several constituencies, the manager can pursue his own interests by playing off one against the other.

Management can say to stockholders that the business lost money because management had to take employees' interests into account, and then management can turn around and tell employees that their pay will not go up because the stockholders will not allow it — when in fact the reason for both is that management has done a terrible job running the company, but they would rather not admit that and get fired, and so the stakeholder concept can have the practical effect of sanctioning managerial irresponsibility. There are no clear measures for qualifying as a responsible executive, if gain and profit are not the standard.

V. "Felt Moral Obligations"

Professor Ronald Green has asked to move beyond the "metaphor" of manager as fiduciary because if managers are not permitted to fol-


Surely if we have learned anything from the history of morals it is that the thing to do with a moral quandary is not to hide it. Like nettles, the occasions when life forces us to choose between the lesser of two evils must be grasped with the consciousness that they are what they are. The vice of this use of the principle that, at certain limiting points, what is utterly immoral cannot be law or lawful is that it will serve to cloak the true nature of the problems with which we are faced and will encourage the romantic optimism that all the values we cherish ultimately will fit into a single system, that no one of them has to be sacrificed or compromised to accommodate another. . . . This is surely untrue and there is an insincerity in any formulation of our problem which allows us to describe the treatment of the dilemma as if it were the disposition of the ordinary case."


94. Licht, supra note 58, at 726 (citing Michael C. Jensen, Value Maximization, Stakeholder Theory, and the Corporate Objective Function, 7 EUR. FIN. MGMT. 297, 300-01 (2001)).

95. Bainbridge, supra note 59, at 1438.

96. Licht, supra note 58, at 707 (citing Oliver Hart, An Economist's View of Fiduciary Duty, 43 U. TORONTO L.J. 299, 303 (1993) (taking interests of all constituencies into account allows management to justify almost any action on the grounds that it benefits some group)).

97. Sommer, supra note 40; Pritchett, supra note 64, at 1007; Allen, supra note 13, at 1406.
low their “felt moral obligations,” then disasters like the deaths at Bhopal, the Dalkon Shield infections, and Johns-Manville asbestos poisoning will continue to happen. In all cases, protracted, massive litigation ensued and there was profoundly negative publicity. No rational manager would choose a course of action that would lead to this, even if in the end the damages awarded against the corporations were less than the plaintiffs had sought. These cases suggest a need for managers to be better skilled in the rudimentary calculations of ordinary business judgment and to understand the probability, costs and risks of litigation, more than they suggest a need for training in moral theory.

Imagine instead that the misconduct had been less extreme, and that the firm was not inflicting serious harm upon others but that the moral sense of the employee happened to be out of sync with the employer’s business. An employee is not supposed to pursue his idiosyncratic sense of morality on the job. According to the ALI Principles, ethical considerations are admissible only “as appropriate to the responsible conduct of business.” This is part of what it means to work for another. “Chaos would result” if a single employee were able to determine, according to the dictates of his or her individual conscience, whether the work of the firm should continue, assuming that the firm is conducting its business wholly within the law.


99. Following unsuccessful efforts to sue Union carbide in the US, ensuing litigation in India eventually produced a settlement agreement, which gained the final approval of the Supreme Court of India in 1991. Bano v Union Carbide, 273 F.3d 120 (2d Cir. 2001); aff’d in part, vacated in part, 361 F.3d 696 (2d Cir. 2004); see In re A.H. Robins Co., 89 B.R. 555 (Bankr. E.D. Va. 1988) (disallowing punitive damages claim where allowance would frustrate successful reorganization); see In re Johns-Manville Corp., 68 B.R. 618 (Bankr. S.D.N.Y. 1986) (finding “inequitable on its face” recovery of punitive damages which would deplete trust assets to benefit some creditors at expense of others), aff’d in part, rev’d in part, 78 B.R. 407 (S.D.N.Y. 1987), aff’d sub nom. Kane v. Johns-Manville Corp., 843 F.2d 636 (2d Cir. 1988).

100. PRINCIPLES, supra note 40, § 2.01(b)(2).

VI. Applying Standard Ethical Analyses: The Sale of Internet Censoring Software to Foreign Government

The usual ethics cases may be behind the times, conceived when the law gave less protection to workers, consumers and the environment, so maybe it is unfair to criticize them as being redundant with existing law. Consider instead the current case of the U.S. technology firms such as Microsoft, Yahoo, and Cisco Systems, reported to be helping foreign governments censor the content of the Internet. Does ethical analysis illuminate the issues more clearly than law and long term profit considerations do?

The firms apparently sell off the shelf equipment that can be used to filter content, and may also design custom made equipment for that purpose, though the news reports are unclear. China, Iran and Saudi Arabia filter content that offends local religious beliefs, or political content of which the government disapproves, such as discussions of freedom and democracy. The sales to Iran violate U.S. export controls and it is unclear how the U.S. technology came into Iranian hands. Existing law makes ethical analysis of this case unnecessary. The sales to China and Saudi Arabia do not violate the comprehensive system of embargoes, sanctions and export controls set forth in U.S. law, but advocacy groups and watchdog organizations have condemned the U.S. sellers as lacking ethics.

Assume the strongest case for the relevance of an ethical analysis, that this is simply an unintended gap in the law which reflects no underlying policy determination. First, does it matter whether the goods are off the shelf or custom designed? It seems that the sellers know the buyer’s purpose in both cases, so this question can be set aside. Second, what is the effect of the sales? It seems likely that some Internet access is better than none at all, but assume the strongest possible case for ethics, that the sole purpose and effect of the sales is to aid censorship and repression and that there is no question of incitement to violence or other grounds that might justify the suppression of speech under U.S. law. Third, does it matter whether the censorship is rooted in cultural and religious concerns or whether it is politically motivated? Given current sensibilities, perhaps a more readily acceptable rationale is based upon cultural diversity and censorship of explicit sexual or violent content than the suppression of political discourse by an unelected government, though in both cases freedom of expression has been curtailed by the government. For purposes of argument, the focus will be on the latter case since it seems the less palatable.
A. What is Ethically Acceptable?

The precise question is whether it is ethically acceptable for a U.S. firm to sell goods to a foreign government, knowing that the purpose and effect is to impede the discourse of political dissent? The Markkula Center for Applied Ethics’ publication, Thinking Ethically: A Framework for Moral Decision Making102 summarizes five common approaches to moral questions.

1. The utilitarian approach

To analyze an issue using the utilitarian approach, one asks which option will produce the greatest benefits and do the least harm.103 This approach raises more questions than it answers. From whose perspective will this be judged? Will it be that of the U.S. sellers, the U.S. government, the foreign government, or the foreign population? As well, how will incommensurables be balanced, real dollars to the U.S. sellers as against the intangible cost of restricted Internet access?

2. The rights approach

The basic right is the right to dignity and to have one’s choices respected by others.104 If dignity includes the right to choose freely, then MS has the right to deal with whom it pleases. Other rights include the right to the truth, to privacy, not to be injured and to receive what has been agreed.105 These are legal rights, so there is no special ethical analysis to be done.

3. The fairness or justice approach

This is the equal protection view, that equals should be treated equally, that there should no favoritism or discrimination.106 This is irrelevant to the case.

4. The common-good approach

Examples of the common good, general conditions that are to everyone’s advantage,107 include affordable health care, effective public safety, an unpolluted environment, and world peace. It is a wonderful

---

103. Id.
104. Id.
105. Id.
106. Id.
107. Id.
list, but seems irrelevant to the case and is not helpful in deciding what the U.S. sellers should do.

5. The virtue approach

The virtue approach suggests that we should strive towards the ideals of honesty, courage, compassion, generosity, and the like. This, too, is a fine list but offers little guidance in resolving the case.

In *Thinking Ethically: A Framework for Ethical Decision Making*, the Markkula Center writers suggest that in deciding how to act, a manager must ask the following questions: Which option respects the rights and dignity of all stakeholders; Will everyone be treated fairly; Which option will promote the common good; But how is a business manager to know what is best for everyone? It is hard enough to figure out what is best for us or for our firm, and that is precisely what the sellers should be thinking about.

There is short term profit to be had in the sales to countries such as China, but are the sales in the long term economic interest of the sellers? Make the case stronger still. Suppose that the seller deals in arms. What if through a surprising gap in the law it was legal to sell weapons to al Qaeda? If the sales present a threat to the security and economy of the US or other principal markets, then the sales would not be in the long term economic interest of the company and no ethical analysis is required. If the sales have no such effect, then should the firm forego the profits because it is behaving unethically by aiding an evil organization? Surely there is a core of universal moral wrongs – genocide, war crimes, slavery, torture, summary execution but as we move away from this toward more uncertain terrain, it is unclear why the opinions of self appointed watchdogs should be heeded. Similar arguments have been made about firms that invest in or trade with Israel, and there are those who seek boycotts and disinvestment because of perceived Israeli repression of Palestinians. But what one perceives as repression may be from another perspective legitimate measures to preserve security or social order. Who is to judge? Recourse to the law and long term profitability penetrates the fog of moral relativism.

109. Id.
110. These are some of the acts that constitute violations of customary international law for purposes of the Alien Tort Claims Act. Flores v. S. Peru Copper Corp., 343 F.3d 140, 150 (2d Cir. 2003).
Suppose that the foregoing analysis is flawed and that neither law nor business judgment is an adequate substitute for ethical analysis, and that the law does not compel shareholder wealth maximization. There are still good reasons not to entrust corporate managers with the responsibility of caring for the public good.

The expected profit from a transaction must come to rest in someone's pocket. Maybe it will be paid to the workers as a better salary, or to the stockholders as dividend or to charity as a donation, or maybe it will not exist because a higher price for inputs has been paid to the vendors, or because a lower price for outputs has been charged to consumers. Doing good deeds requires money. When a business decides that it will practice virtue, the funds for that activity must come from somewhere, and so the question is not whether acts of kindness ought to be done but rather who should do them, or rather still why one should in effect be taxed so that another can act out his moral desires.

A local grocer, for example, has signs in its stores announcing that it takes its community responsibilities seriously. It not only complies with law but it also performs what its managers consider to be good deeds. But if the store concentrated on selling to customers at the lowest possible prices, they would have more money with which to support the causes in which they believe. Why is it desirable for the grocer to take a bit more of its customers' money to support the causes it likes? Milton Friedman's familiar argument — "Why should corporations decide the charitable purposes that should be supported by the income of their stockholders? Why shouldn't each stockholder decide that?" — applies not only to stockholders. From the point of view of the consumer, the worker, and the vendor, there is a similar objection to the practice of business ethics.

There are other reasons why matters of public good are more properly for the legislature to consider. The public interest is its reason for being. Its members are elected by the people and are not responsible to a single subset, as business managers are responsible to the business owners. Legislators profess an oath of office and do not seek

---


112. Not all rules that govern business come from the government, but the purpose of voluntary self regulation is to make business more uniform, more predictable, to lower transaction costs or to preempt threatened governmental action. The direct and intended beneficiary is business itself.
profits from their decisions. There is also the matter of institutional competence. A firm may be able to calculate its own well being ("people are rational maximizers of their satisfaction"), but can it calculate another's? Will it? A market economy gives an individual the will to act (profits) and the information they need to figure out how best to produce valuable goods and services (prices). An individual can calculate how to act in their own self interest. But does the marketplace give them the knowledge to calculate another's best interests? Does it give them the motivation? In contrast, the state has access to better institutional mechanisms that aggregate information, achieve coordination, and minimize the sort of opportunism one might expect if business managers were to become the guardians of the public good.

People are not their brother's keepers. That is the Tragedy of the Commons. Israeli kibbutzim have reorganized themselves into corporations. Professions too have come to resemble ordinary businesses, motivated more by profit than concern for the client or patient. It is unlikely that a firm will voluntarily place itself at a competitive disadvantage by incurring a cost associated with ethical behavior when others in the field do not do so, unless bigger firms attempt to promulgate rules that will disadvantage smaller competitors by saddling them with costs that the larger firms can afford to bear. (This assumes that there is no commensurate payoff from the ethical behavior. If there is, then the ethical analysis becomes superfluous.) If society wants business to behave in a certain way that escapes the discipline of the market (an externality), then it is better to regulate by law so that all competitors are burdened proportionately.

Here is something that I want to do, says someone in business. I can do it lawfully and profitably. There are people who have freely chosen to deal with me, yet someone tells me that I should not proceed because it is not "responsible." The language of ethics suggests that you are right and I am wrong; that you speak with moral authority and that you have the right to tell me how to live my life. Work to

113. The phrase is the name of an essay by Garret Hardin. Garret Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968). It refers to a situation wherein a commons, that is, a shared resource, is used inefficiently because no one has any incentive to do otherwise. Id. Hardin uses the example of a pasture open to all. Each farmer keeps adding more livestock to graze on the Commons because it costs him nothing to do so. Id. In a few years, the soil is depleted by overgrazing and the Commons becomes unusable. Id.

114. One example is the company Netafim.

change the law, but do not demonize me as being greedy because I disagree with you. This is a criticism of the way that business ethics seems to be practiced, by rights groups that are invariably "outraged" by their targets or by other third parties who have made a living out of second guessing others. Business ethics is a good business to be in. This objection assumes that there are few if any cases in which there is but a single incontestable decision, act or outcome that is moral. Further, it assumes that matters of ethics are usually fairly debatable, matters about which reasonable persons may honestly disagree. It also assumes the sort of belief that moves a judge to defer to matters of legislative judgment.¹¹⁶ Finally, it assumes that even in matters of ethics, people pursue their own self interest.

VIII. Conclusion

This Article has dealt with one category of business ethics problems, involving the management of an enterprise, and has tried to show that these problems can usually be resolved without recourse to ethical analysis. Either a proposed action conforms to law and makes economic sense, or it does not. If it does, then there is no need to dress it up in the language of values. If it does not, then the managers are on a frolic, pursuing their own peculiar sense of values with other people's money.

There is a second category of problems that have not been considered. These are the problems that concern the relationship of the individual worker to the enterprise, and involve question such as: "Is this job right for me?", "Should I blow the whistle?", "Should I go along to get along?" These questions concern the life of the individual and are fundamentally of a different sort than questions that concern the mission and operation of a for profit business enterprise in a market economy.

How do ethical considerations differ from business judgment? How does business ethics differ from the simple habit of taking a long view? How often does it happen that lawful action, keyed to long run profit maximization, will violate the prevailing ethical mindset? If good business is good ethics, and if practices undertaken with an eye towards long term profitability are probably good practices, then the current emphasis on business ethics is overdone. The field is in need of a narrowed focus. Since the emphasis should usually be on what is

best for the company, the teachers and writers of business ethics should be experienced managers. They should know how to run a business.

Even if there is no real domain for the business ethicists, is there any harm in pursuing the discipline, assuming that it is properly focused on matters that are not solved by law? The answer may depend on why companies talk about ethics, responsibility and values, as well as compliance with law. It may be that people just do not like lawyers and laws, thinking them to be too technical, too crabbed, and too unfair. It may be that they think a virtuous man to be better somehow than one who is merely law abiding, although presumably most people would be satisfied if the large public companies would follow the law and tell the truth, and if their officers would follow the law and not steal from the company. It may be that people find the law to be unclear and incomplete, but lawyers often know how to fill the gaps with legal reasoning. The tradition is richer than laypeople may understand. Perhaps it is just more fun to talk about values than law and economics, but as a teacher of law, the concern is that values talk may displace the richness of the legal system, based on centuries of real cases, with a fullness and detail of fact unmatched by theorists,\textsuperscript{117} and informed by the practical wisdom of those who have lived in the law.\textsuperscript{118}

\textsuperscript{117} Posner, \textit{supra} note 18, at 1699.
\textsuperscript{118} See generally Kronman, \textit{supra} note 115.