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FOREWORD

UNDERSTANDING THE INTERSECTION OF BUSINESS AND LEGAL ETHICS

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Media coverage in both the general media and legal publications has given dramatic attention to failures of corporate and legal ethics in the corporate scandals of the last several years. In the general media, all of us see regular updates on legal action regarding Enron, Adelphia, Credit Suisse First Boston, HealthSouth, Martha Stewart, Tyco, WorldCom, and others. In our professional literature, corporate lawyers closely follow both the ABA changes in Model Rules 1.6 (confidentiality) and 1.13 (organizational client), and the SEC regulations governing lawyer ethics mandated by Congress in the Sarbanes-Oxley Act because of a loss of public confidence in our profession's ability to regulate itself in the public interest.

While coverage of these issues has been substantial, little has been published that gives historical context and perspective on the lessons from these events for both the legal and business professions. Corporate wrongdoing necessarily implicates the ethics of both professions, and a cross-disciplinary perspective is particularly useful to help the two professions understand both what can be learned from each other, as well as how to proceed together to address these problems.

The University of St. Thomas Law Journal organized a March 6, 2004 symposium of seven national scholars to focus on understanding the intersection of business and legal ethics. This is an interdisciplinary field in its infancy, and Minnesota is a logical place for the two disciplines to explore common ground. Minnesota has a business ethics and corporate social responsibility tradition extending back over at least three generations that provides both national and international leadership. For example, the Five Percent Club (five percent of corporate pre-tax profits for charitable purposes) was founded here, and both the Minnesota Principles and the Caux Roundtable Global Principles of Business Ethics were developed here. The

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leadership of the bar in Minnesota for many years has strongly promoted the ideals and ethics of the legal profession.

University of St. Thomas business ethicist Ken Goodpaster suggested the overall framework for the symposium. As indicated below, the symposium panels addressed the intersection of business and legal ethics at several levels: (1) the arrangements and ideologies of entire social systems (moderated by Professor Goodpaster); (2) the policies and cultures of organizations (moderated by Ron James, President and CEO of the Center for Ethical Business Cultures); and (3) the choices and character of persons (moderated by me).

I. THE INTERSECTION OF BUSINESS AND LEGAL ETHICS IN THE CONTEXT OF IDEOLOGIES OF ENTIRE SYSTEMS

Michael Novak

Theologian Michael Novak's essay, "A Philosophy of Economics," looks at the ethical justification for capitalism and business as a system of economics. His thesis is that "[b]usiness is a noble Christian vocation, a work of social justice, and the greatest single institutional hope of the poor in the world, if the poor are to move up out of poverty."¹

The bulk of Novak's essay explores how a philosophy of economics supports this thesis, tracing how evidence over the course of the past thirty years eventually convinced him both that capitalism could transform economies from extreme poverty to development and that socialism had failed as an economic system to help the poor (emphasized particularly in 1989 with the fall of the Berlin Wall). The essay also explores the reasons for hostility to Novak's thesis from both the social democratic left and the traditionalist right.

Novak's essay notes that the success of democratic capitalism rests in significant measure on the culture and moral habits of the people. Democratic capitalism

heavily depends on work habits, family patterns, and metaphysical or religious energies of particular sorts. It will time and again fail to function in cultures that lack the necessary cultural habits just as it will fail time and again—in Latin America for instance—under moral systems of insufficient moral rigor. . . . Certain cultural and political preconditions must be met or else the whole system seems to go awry.²

In order to achieve the end that business be the most strategic vocation in the work of social justice, the professions, including business persons and lawyers, must foster the underlying culture and moral habits of the people

1. Michael Novak, *A Philosophy of Economics*, 1 U. St. Thomas L.J. 791, 791 (2004).

2. *Id.* at 800.

that make capitalism realize its potential for social justice. The natural entropy evident in capitalism makes this job challenging. The necessary moral capital of the people and culture must be renewed in each generation. Novak reminds us of two presently occurring debilitating features of democratic capitalism that were predicted by Tocqueville a century and a half ago: "the drift downwards toward materialism and mediocrity, on one hand, and on the other hand, the taste for surrendering liberty to the paternal state, in exchange for a reduction in uncertainties, in the name of equality."³

In any economic system, the human vice of greed is a catalyst for unlawful conduct and excess. The issue is always to what degree is greed restrained by the moral capital of business persons and those in the professions? In democratic capitalism, we have experienced since the founding of the Republic episodic waves of unlawful conduct and excess where greed is held less in check. Unchecked by sufficient moral capital, self-interest and greed will destroy democratic capitalism.

Halina Ward

Halina Ward, director of the Programme on Corporate Responsibility for Environment and Development at the London Institute for Environment and Development, in her article, "Globalisation, Corporate Responsibility, and Legal Ethics," addresses legal ethics through the lens of both globalization and corporate social responsibility (CSR). The article maps out links both between globalization and legal ethics and CSR and legal ethics.

She defines the key components of globalization as (1) trade and investment liberalization and (2) the technological advances that transform communication. She notes that while there is no consensus on the meaning of CSR, the core of all definitions rests on an understanding of the role of business as part of society—rather than somehow separate from it. The overall goal is both to maximize the positive contributions that business can make to societal goals such as social justice, environmental protection, or human rights, and to minimize the negatives of business activity.

Ward points out that "[l]aw firms, and the legal profession, are also actors in the process of economic globalisation. Business lawyers help generate the laws, the legally binding obligations, and the institutional architecture that underpin trade and investment liberalisation and privatisation."⁴ While the legal profession's role in economic globalization is substantial, Ward notes that scholarly attention to legal ethics in this context has been very modest.⁵

3. *Id.* at 799.

4. Halina Ward, *Globalisation, Corporate Responsibility, and Legal Ethics*, 1 U. St. Thomas L.J. 813, 817 (2004).

5. *Id.* at 828.

The consequences of CSR for legal ethics, Ward observes, have received almost no attention. Ward argues that (1) the current CSR agenda relies on voluntary compliance by corporations, (2) law has a more expansive role than the “voluntary only” definition that CSR allows, and (3) once the law’s more expansive role in CSR is apparent, the legal profession’s important role in CSR is also apparent. She notes: “Lawyers and the legal profession remain key guardians at the gateway to justice through the law. It is lawyers who remain principally responsible as agents for upholding the rights of citizens in the face of business transgressions, or for enforcing minimum baseline requirements of acceptable business behavior from a legal perspective. The legal profession is the linchpin of the foundations of CSR.”⁶

Ward supplies nine persuasive reasons that support her second argument above that law has a more expansive role than the “voluntary only” definition of CSR allows.⁷ Although not cited, ABA Model Rule 2.1, providing that “[a] lawyer shall exercise independent professional judgment and render candid advice” including advice on moral, economic, social and political factors, gives Ward’s argument further support.⁸

She urges business lawyers to become knowledgeable about the “voluntary” tools of CSR for their work, and to counsel their clients on both the legal position and the CSR considerations in play with respect to corporate decisions. Both the preventive law and the legal risk management literature provide additional support for this type of proactive approach to counseling the business client.

In an extremely creative analysis, Ward writes that CSR also applies to law firms themselves as businesses. There is again almost no scholarship on the application of business ethics and CSR to law firms. Appealing to the legal profession’s tradition as a calling where self-interest is restrained to some degree in service of the public interest in the profession’s transcendental purpose—justice—Ward concludes that law firms should consider the impact of their core business activities on sustainable development. For example, she notes the situation in South Africa in which a number of South African commercial law firms played a significant role in furthering the black economic empowerment agenda. She also argues that law firms should both donate a percentage of pre-tax profits to charitable projects in the communities they serve and take part in CSR law reform efforts.

Susan Pace Hamill

Professor Susan Pace Hamill’s article, “A Moral Perspective on ‘Big Business’ Fair Share of America’s Tax Burden,” addresses one of the major

6. *Id.* at 822-3.

7. *Id.* at 821-22.

8. Model R. Prof. Conduct 2.1 (ABA 2002).

current policy issues for both clients (individuals and organizations) and lawyers—the progressivity of the tax system. What is a fair tax given large differences in ability to pay? Hamill provides a framework of economic and ethical analysis for business and law professionals (both in their counseling role with clients and in their role as individual citizens) to address this critical question.

Addressing whether a progressive or flatter tax structure is more fair, Hamill first outlines the moderately progressive income tax system currently in existence, followed by a critique of the economic theory of marginal utility most commonly used to justify a progressive tax system. The article's second section examines the impact of the major current proposal for a flatter tax structure followed by a critique of the economic incentive theory used to justify a flatter tax structure.

Hamill ultimately concludes that “all questions of tax policy ultimately must be decided on moral grounds.”⁹ The article then applies the three most common secular-based moral “frameworks”—(1) utilitarianism, (2) ethical egoism, and (3) the virtue of justice—to the debate concerning progressive versus flatter tax structures. She finds that (1) utilitarianism offers no guidance on the question, (2) ethical egoism supports flatter tax structures, and (3) an ethical model based on the virtue of justice “solidly opposes flatter tax proposals and provides strong moral arguments supporting a moderately progressive tax structure.”¹⁰

II. THE INTERSECTION OF BUSINESS AND LEGAL ETHICS IN THE CONTEXT OF POLICIES AND CULTURES OF ORGANIZATIONS

Over recent years, a number of legal scholars have commented that lawyers formerly occupied a more central role as counselors in shaping both the legal and ethical cultures of business enterprises. For example, former Yale Law School Dean Anthony Kronman in *The Lost Lawyer* argued that the lawyer-statesman—the counselor who served the client by exercising independent judgment—was the model for the corporate lawyer in previous generations of lawyers.¹¹ In response to these scholars, Dorsey & Whitney LLP lawyer Bill Wernz has repeatedly cautioned that there was no Golden Age of ethical lawyering—there have always been scoundrels in the profession.¹²

It really does not matter whether the moral capital of the business and legal professions was higher twenty or forty years ago. What matters is

9. Susan Pace Hamill, *A Moral Perspective on “Big Business’” Fair Share of America’s Tax Burden*, 1 U. St. Thomas L.J. 857, 863 (2004).

10. *Id.* at 864.

11. Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard U. Press 1993).

12. Bill Wernz, *Professionalism Lite: Aspiring to Civility, Idealizing the Past*, Bench & Bar of Minnesota (Apr. 2001).

whether both professions can do better at developing the moral capital necessary to check the natural tendency of democratic capitalism toward materialism and greed.

Stephen Bainbridge

Professor Stephen Bainbridge's article, "The Tournament at the Intersection of Business and Legal Ethics," is not sanguine about the prospects. Bainbridge argues that tournament theory is useful in analyzing the incentives of lawyers in large firms. Promotion-to-partner tournaments are a mechanism to reduce agency costs by providing incentives through comparative performance evaluation. In a promotion tournament, the principal ranks its agents by their performance relative to one another. The best performing agents are promoted to positions with higher pay and/or status. As applied to lawyers, law firms supposedly rank associates and then promote the best performing associates to partner at the end of the evaluation period.

Bainbridge continues,

[w]hat skills and attitudes contribute to success in the promotion-to-partner tournament? Survey data demonstrate that the ability to develop 'good working relationships with clients and peers' is a highly ranked consideration in the promotion to partnership decision. Also highly ranked were a willingness to pursue the interests of clients aggressively and the potential for bringing in new business to the firm.¹³

Winning the tournament, Bainbridge argues, requires developing a set of skills and attitudes aimed squarely at keeping clients happy. The tournament thus develops lawyers with strong incentives both to align themselves with the managers who hire the corporate lawyers (not with directors and shareholders) and to overlook management wrongdoing. Bainbridge argues further that Sarbanes-Oxley and the SEC regulations requiring "up-the-ladder" reporting of management wrongdoing will not change this underlying reality. Under the SEC regulations, Bainbridge noted that an attorney is only responsible for material violations of which the attorney becomes aware. Bainbridge predicts this will result in more studied ignorance by corporate lawyers.

Bainbridge concludes that the problem the legal profession faces is not really a "rules" problem. Neither the SEC regulations nor the new ABA Rules of Professional Conduct will lead to more lawyer effort to improve ethical business conduct. The problem is the "structure of modern big firm legal practice and the resulting economic incentives for lawyers,"¹⁴ not the need for more rules.

13. Stephen Bainbridge, *The Tournament at the Intersection of Business and Legal Ethics*, 1 U. St. Thomas L.J. 909, 918 (2004).

14. *Id.* at 910.

John Stout

Corporate practitioner John Stout's article, "Corporate Governance and Organizational Integrity," points to two recent corporate governance initiatives that give reason for optimism that boards of directors will take greater responsibility for organizational integrity. First, the emergence from a wide number of sources of a recognized body of "best practices" in corporate governance is leading boards to assume more responsibility for legal compliance and business ethics. Second, corporate boards are becoming more proactive in taking responsibility for the organization's integrity. This includes monitoring by the board as to whether the lawyers and law firms engaged by the corporation in fact conduct themselves to assure the corporation's integrity.

In support of his position, Stout cites to the pressure placed on boards starting with the Federal Sentencing Guidelines, and continuing through Sarbanes-Oxley, the consequent SEC regulations, current litigation involving board misconduct, and a recent Delaware decision articulating the proposition that boards must act proactively, both to put systems and processes in place to prevent misconduct and to engage in active monitoring of the systems. These changes in corporate governance should create increased opportunities for the lawyer who goes beyond service as a legal technician providing simply what management wants to providing stronger preventive law/corporate compliance/business ethics counsel and support.

III. THE INTERSECTION OF BUSINESS AND LEGAL ETHICS IN THE CONTEXT OF THE CHOICES AND CHARACTERS OF INDIVIDUAL PROFESSIONALS

Rob Atkinson

Professor Rob Atkinson's article, "Growing Greener Grass: Looking from Legal Ethics to Business Ethics and Back," compares education in business ethics to education in legal ethics and concludes that the grass is greener in business ethics education. Business ethics education actually examines ethics broadly. It is, in significant ways, much more richly interdisciplinary. Legal ethics education has become "the law of lawyering," focusing narrowly on the maximum requirements of a set of legal rules defining the lowest level of acceptable conduct. For lawyers, moral ideals collapse into the floor of the Rules of Professional Conduct. Some lawyers, seeking to lower the floor even further, use their legal skills to game the ethics rules themselves. Professor Atkinson recommends that ethical education for both law students and lawyers borrow from business ethics education where much richer interdisciplinary materials from comparative economic systems, philosophy, ethics, sociology, and literature are available.

Professor Atkinson ends his article with two well-argued pleas. First, he urges the legal academy to fortify professional ethics by adopting a Brandeisian approach to professionalism in contrast to Roscoe Pound's approach to the same topic. Brandeis embraced the reality that lawyers must make a living by advocating vigorously for clients, but are constrained by attentiveness to the wider public interest and justice. Pound articulated an ideal of the professional life as the pursuit of "a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood."¹⁵

In Pound's definition of professionalism, the business aspects of professional life are an embarrassment, not to be acknowledged, whereas for Brandeis, the making of a living in a market economy is salutary, and all professions, including business, offer the opportunity to do so while living the virtues, including a commitment to the common good. Atkinson argues that Brandeis offers a far more solid basis for including grounding in higher ethical analysis in professional education.¹⁶

Second, Atkinson, citing both Brandeis and John Henry Cardinal Newman, pleads for both business and legal education to attend to the importance of a strong liberal education as the foundation on which professional education builds. The classics, including the writings of the great religious thinkers, are the wellspring for healthy professional and civic cultures.

Marianne Jennings

Business ethics professor and lawyer Marianne Jennings' article, "The Disconnect between and among Legal Ethics, Business Ethics, Law and Virtue," addresses the disjunction between and among legal ethics, business ethics, law, and virtue. She asks the question, where were the professionals in the continuing series of corporate scandals dating back to the Savings and Loan crisis in the 1980s? Why didn't any of them speak up or disassociate themselves from the transactions? Are the lawyers complicit with their clients in gaming the law, seeking to find an outer edge of interpretation that completely ignores the law's spirit and intent?

Jennings thinks that the solution to this disconnect and complicity in wrongdoing is not more law or regulation. She asserts

the role of lawyers and business people in preventing frauds begins at a much earlier stage than the laws, regulations, and codes contemplate. Nothing in the regulatory reform addresses those moments when the first steps are taken that will eventually begin a downward spiral from which there is no correction. At these initial stages, the codified ethical standards and legal prohibitions

15. Rob Atkinson, *Growing Greener Grass: Looking from Legal Ethics to Business Ethics and Back*, 1 U. St. Thomas L.J. 951, 982 (2004).

16. *Id.* at nn. 39-40.

are inapplicable. Virtue is required and courage of convictions is demanded.¹⁷

Jennings argues that ethics education in both professions should focus on virtue ethics and moral courage as simpler, cleaner guides and motivation for the conduct of professionals as they execute their roles of accountability and responsibility in corporate governance. Virtue ethics is one of three major current approaches to normative ethics. It emphasizes what makes a good person, namely the virtues, particularly moral character. In contrast, both Kantian (deontology) and utilitarian systems focus on actions. Each tries to provide guiding principles to inform a person's decision on how to act. Education in virtue ethics would look to both the Greek idea of the virtues, as well as the incorporation of Greek moral theory into Judeo-Christian moral theology.

Jennings concludes that "[u]ltimately, all systems and organizations that seek to inculcate absolutes are dependent upon the moral courage of those within their systems and organizations. Nurturing individual strength for that fortitude becomes a critical function."¹⁸

In a letter to the March 5, 2004 Rome Conference on "The Business Executive: Social Responsibility and Globalization," Pope John Paul II wrote,

[s]ince the pursuit of profit is not the sole end of [business] activity, the Gospel challenges business men and women to embody respect both for the dignity and creativity of their employees and customers and the demands of the common good. On a personal level, they are called to develop important virtues such as 'diligence, industriousness, prudence in undertaking reasonable risks, reliability and fidelity in interpersonal relationships, and courage in carrying out decisions which are difficult and painful.'¹⁹

Richard Zitrin and Carol Langford started their book, *The Moral Compass of the American Lawyer*, with a quotation from Robert F. Kennedy: "Courage is the most important attribute of a lawyer. It is more important than competence or vision. . . . It can never be delimited, dated, or outworn, and it should pervade the heart, the halls of justice, and chambers of the mind."²⁰

17. Marianne Jennings, *The Disconnect between and among Legal Ethics, Business Ethics, Law and Virtue: Learning Not to Make Ethics so Complex*, 1 U. St. Thomas L.J. 995, 998 (2004).

18. *Id.* at 1020.

19. Pope John Paul II, *Message of John Paul II to the Participants in the Conference on "The Business Executive: Social Responsibility and Globalization,"* http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/march/documents/hf_jp-ii_spe_20040305_martino_en.html (Mar. 3, 2004) (quoting John Paul II, *Centesimus Annus*, No. 32 (May 1, 1991) (available at http://www.vatican.va/edocs/ENG0214/_P6.HTM)).

20. Richard Zitrin & Carol M. Langford, *The Moral Compass of the American Lawyer: Truth, Justice, Power, and Greed* 1 (Ballantine Books 1999).

The day-to-day practice of law or business rarely requires heroic courage because of physical threat, rather it requires the day-to-day courage in relationships of being candid with clients and professional peers, including senior management, about improper conduct. It requires the day-to-day courage to restrain self-interest to some degree to serve the public interest in the profession's area of responsibility.

IV. CONCLUSION

The contributors all emphasize building moral capital in individual professional students and practitioners. None thinks more ethical rules will help.

It is clear that legal ethics education can learn something from business ethics education to expand beyond narrow rules-focused courses. In addition, ethics education in both disciplines has to develop more successful teaching strategies to foster the moral development of the student or practitioner. Even if the subject matter includes ethics more broadly defined, we know from the moral psychology literature that simply learning various schools of philosophy or ethics does not improve an individual's moral sensitivity, moral reasoning, moral motivation, or moral character and courage.

Education in this area must develop strategies that assist individual students and practitioners to engage in personal reflection and personal appropriation of the concepts. Student-centered moral discourse in smaller groups with substantial student reflective self-assessment and personalized feedback is the one known teaching method that fosters this type of engagement.²¹

21. Neil Hamilton, *Moral Psychology and the Education of Lawyers*, Minnesota Lawyer (Dec. 15, 2003).