ON THE SYNERGISTIC, INTERDEPENDENT RELATIONSHIP OF BUSINESS ETHICS AND LAW

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The relationship between ethics and law has drawn the attention of influential legal and philosophy scholars for many decades. (e.g., Atiyah, 1981; Coleman, 1988; Dworkin, 1978; Greenawalt, 1989; Hart, 1963; Posner, 1983). The focus of much of this writing has been on systemic and highly controversial issues (e.g. the scope and nature of obligations to obey the law; the relationship, if any, between law and morality; and constitutional dimensions of the abortion debates). Without question, this literature has influenced legislative and adjudicative processes. In turn, the evolution of legal principles has shaped philosophical thought.[1]

This important special issue of the *American Business Law Journal* is more narrowly focused on the relationship between law and ethics in the context of business-related law. Here in the trenches where commercial battles are fought for the advantage of law, economic, jurisprudential, and philosophical ideas smash together in a confluence of application. The specific outcomes of these tactical legal engagements shape the structure and content of law for business and create currents that influence the overall nature of legal systems.

In this brief epilogue, I will (1) trace the parameters and significance of the intersection between business law and ethics; (2) briefly identify how their junction is treated in textbooks and the research

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[1] This second claim is more controversial, but surely the enduring interest in and reference to law on the part of philosophers is evidence of considerable influence. Rawls (1971) appears to be a supporting example.

literature in business ethics and business law; (3) identify some intriguing open research issues, particularly where the ethics literature may have an impact on doctrinal analysis; and (4) close by suggesting some specific ways in which research in business law can contribute to business ethics scholarship.

The Intersection Of Business Law And Ethics

In the tactical academic field of commercial law, seemingly far removed from the strategic battles of Olympian philosophers and jurisprudential scholars debating the relationship between morality and law, the potential for a synergistic interaction between applied ethical concepts and doctrinal research is evident. This latent intersection is reflected in cross-coverage of the two topics in introductory business ethics and business law courses. Standard law texts typically include a chapter (or two) devoted to business ethics and related topics with specific applications found in many chapters or parts of the book. Perhaps more significantly, the major business ethics texts cover legal topics explicitly and sometimes excerpt law case opinions. A quick review of six prominent business ethics texts [Beauchamp & Bowie, 1993 (B&B); Boatright, 1993 (B); DeGeorge, 1988 (D); Donaldson & Werhane, 1993 (D&W); Hoffman & Frederick, 1995 (H&F); and Velasquez, 1992 (V)] reveals that they all explicitly cover common legal topics. All six texts cover legal aspects relating to stakeholder obligations and corporate governance, employee rights and the doctrine of employment-at-will, whistle-blowing, discrimination in the workplace, and deceptive or harmful advertising. At least four of the texts discuss OSHA or workplace safety issues, product liability and safety, privacy/drug-testing, and the Foreign Corrupt Practices Act. Four explicitly discuss the relationship between law and ethics in some detail, another (H&F) gives the topic at least cursory treatment, leaving D&W as the one text not dealing directly with the relationship. B&B provides a healthy number of law case opinion excerpts while several others (e.g., D) discuss or paraphrase cases at some length. Without a doubt, there is a lot of law being taught in business ethics courses, presumably even when the instructor is a philosopher.

The overall view of these texts concerning the relationship between the legal and moral domains is summarized in the following quotes:

> "Law is the public's agency for translating morality into explicit social guidelines and practices and for stipulating punishments for offenses." (Beauchamp & Bowie, p. 4.)
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> "Business is a social enterprise. Its mandate and limits are set by society. The limits are often moral, but they are also frequently written into law." (DeGeorge, p. 11.)
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> "Our moral standards are sometimes incorporated into the law when

> enough of us feel that a moral standard should be enforced by the pressures of a legal system; and laws, on the other hand, are sometimes criticized and eliminated when it becomes clear that they blatantly violate our moral standards." (Velasquez, p. 26.)

Paine (1994) has provided the most extensive analysis of the relationship between law and ethics in the business law literature. She provides a devastating critique of two mistaken but commonly held views found in court opinions and often among managers: (1) that law and ethics occupy entirely separate realms, not to be confused or intermingled; and (2) that there is a perfect congruence between law and ethics, so that if something is determined to be legal, it may be considered ethical. Building on Paine's critique and conclusion, I wish to advance the argument that the two domains are synergistically and intimately related. They are so much so, that neither can be fully meaningful or realized without the other. Law without reference to ethics and community moral values is in danger of becoming disconnected from the public will. In a democracy, strongly held moral attitudes and widely-recognized habits and practices must be considered in the interpretation and application of the law. This, among other things, is the way in which a sense of community is developed and community virtue nurtured. This is not to say that such attitudes and practices should always dominate other considerations, but only that they should be given due consideration.

Authoritarian dismissal of all ethical sentiments is not only inconsistent with fundamental liberty and quintessentially undemocratic, but it is also inefficient. Legal interpretations at odds with strongly held community attitudes and values make enforcement problematic and may even weaken the institution of the law itself. In addition, as Orts (1995a, 1995b) claims, a synergistic relationship between law and community values may be a more efficient approach to difficult social problems such as environmental regulation than the two main alternatives—the purely legalistic command and control approach or, the other extreme, a purely market-based system. Finally, formal ethical analysis, regardless of whether it is reflected in community attitudes and values, may provide important, useful insights into the nature of alternative legal rules and procedures.

Ethical theories and community moral values may affect the law in at least three basic ways: (1) by influencing legislation, as may be the case of the Foreign Corrupt Practices Act and anti- scalping laws; (2) in the judicial interpretation and/or application of legislation; and (3) in the development of common law doctrines. Examples abound. Shell (1988) identifies doctrinal areas in which the "courts have increasingly relied on generalized, ethical standards to decide

disputes between business" (p. 1198). He highlights his analysis by focusing on the interpretation of so-called state little FTC acts, which tend to use language such as "unfair," "good faith," "bad faith," "deceptive," and " unconscionable." Reference to ethical standards can help the fact finder determine whether a particular legal standard has been met. For example, the literature on corporate social responsibility and risk management may help a jury determine whether a defendant has acted with "reckless indifference" sufficient to sustain a conviction of manslaughter in the context of an amusement park fire.[2] Similarly, ethical analysis concerning the relevancy of corporate personhood may assist a court in legislative interpretation essential for determining whether a corporation should be held criminally liable.[3] In civil suits, evidence concerning ethical attitudes should help inform fact finders required to determine whether a requisite standard of outrageous conduct has been met in order to justify imposition of punitive damages.

As the business ethics textbook authors suggest, the legal system is sometimes required to nurture or to implement the moral preferences of society, particularly with reference to universal moral prohibitions against physical harm. Where moral views have not yet converged toward a sufficiently broad consensus, the law may help to bring about a change of attitudes. Examples include the role of law in the 1950s and 1960s to change attitudes concerning racial discrimination and segregation, and the view of some that one of the purposes of the Federal Corporate Sentencing Guidelines is to bring about a change in compliance-related ethical attitudes and behavior on the part of the subject corporations (Nagel and Swenson, 1993). As Paine (1994) demonstrates by using the E.F. Hutton check kiting case and the Salomon Brothers U.S. Treasury auction bidding scandal, actions producing intense moral condemnation may be determined illegal even though the issue of legality was in doubt at the time that the action occurred.

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[2] For example, The Great Adventure case where the operator of an amusement park was tried for reckless manslaughter as a result of a fire causing loss of life in a Haunted Castle attraction. See Caiazza v. Bally Mfg. Inc., 509 A.2d 187 (N.J. App. Div., 1986), a subsequent civil action, for a brief summary. See also, " 'Wrong People Were on Trial.' Says Haunted Castle Juror," *Philadelphia Inquirer*, July 22, 1985, pp. 1-A, 6-A, in which the forewoman of the jury is quoted as saying that testimony about whether the defendants' actions were in line with accepted standards of corporate ethics "did help in narrowing [the jurors'] doubts" about whether to vote for acquittal.

[3] State v. Richard Knutson, Inc., 537 N.W.2d 420 (Wisc. App. 1993), relying on Walt & Laufer (1991). *See also* Laufer (1994).

The (Almost) Separate Domains Of Research In Business Law and Ethics

In spite of these substantial conceptual interconnections between business law and business ethics, there has been only limited cross-referencing between the two in recent research. A scanning of the post-1990 articles[4] in the *Business Ethics Quarterly* and the *American Business Law Journal* sought to identify articles in the *ABLJ* that made specific, detailed reference to ethical theory or applied an ethical framework, and articles in the *BEQ* that discussed specific legal implications, either for adjudication or the legislative process.[5] Other than in a special issue on the topic (Vol 2, No. 4) , only *BEQ* articles by Walton (1991), Salbu (1995), and Orts (1995b) have a significant legal dimension. In the legal dominion of the *ABLJ*, articles by Beck-Dudley & Conry (1995), Beck- Dudley & Macdonald (1995), Nesteruk (1991), and Phillips (1992) are the only ones that formally consider ethical theory and the literature in business ethics. As Phillips notes in the context of the doctrine of employment-at-will, "[g]enerally speaking, neither set of writers fully considers the other's arguments. The result is a polarized 'dialogue' (p.443)." Consider, for example, the lack of connection between the two literature streams in the four articles on employment-at-will published in the *ABLJ* during this time period (Ballam, 1995; Callahan, 1991; Phillips, 1992; Vickory, 1992).[6] Only one, Phillips (1992), specifically relies upon the literature in business ethics and cites Werhane (1983, 1995, and much in between), the ethicist who is the most prolific scholar on that topic. Werhane stresses that the conceptual schemes and language we use greatly influence the direction of public policy. The relative weights we give to individual rights to notice or due process, versus efficiency or property interests, will have a great influence on the precise parameters of the employment-at-will doctrine. The ethics literature provides well reasoned arguments on this and many other subjects that should be used to strengthen doctrinal analysis so that it may ultimately influence legal decision makers.

In an earlier work, Callahan (1990) incorporated surveys of ethical attitudes and noted the tendency of the courts to be more likely to apply the public policy exception to employment-at-will when a legal,

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[4] The survey extended through Vol. 33 (2) of the *ABLJ* and Vol. 6 (2) of the *BEQ*.

[5] The *BEQ* published a special issue, jointly with the ALSB, which focused on the relationship of business law and ethics, Vol. 2, No. 4, 1992. This issue of the *ABLJ* is the reciprocal. Both are ignored for the purpose of this analysis.

[6] This special issue responds to this shortcoming by publishing the article by Radin and Werhane with a response by Bill Shaw.

as opposed to an ethical, violation exists. Such an orientation carries overtones of the separate realms view of ethics and law, and would seem to discount the arguments put forth in support of a synergistic relationship between the two. But this conclusion may not be warranted. In fact, what may be happening is that courts, perceiving strong ethical attitudes and practices in support of a given legal interpretation of the public policy exception, may simply transform what was originally an "ethical" wrong into a "legal" wrong. The separation between law and ethics is not nearly so clear when one looks at the underlying dynamics.

Connecting The Domains

The list of legal topics covered in ethics classes provides a strong clue concerning fruitful areas in which both theoretical and empirical research in business ethics may be relevant to current doctrinal analysis in law across a wide range of fields. The topics covered in this special issue, corporate accountability, employment at will, corporate governance, attorney professional conduct, and the role of trust are all rich examples of the interconnectedness of the two domains. Similarly, much of the research in business ethics relates to legal principles. In order to overcome criticisms that business ethics research is irrelevant and impractical (Stark, 1993), it must accurately incorporate related legal doctrines. Further, business ethicists can learn a great deal from the extensive experience of the law concerning effective techniques for the modification of human behavior. In the context of this epilogue, space permits only a few examples of how additional cross-fertilization might occur, but one hopes they will convey the potential for work in this area.

How Ethics May Inform The Law

There are many legal doctrines that make reference to or should be open to a consideration of ethical theory and empirical evidence concerning ethical attitudes and behavior. The brief discussion above concerning the relevancy of business ethics literature pertaining to employee rights in interpretation of the public policy exception to the doctrine of employment-at-will is a prime example. There are other aspects in which the insights from the ethics literature may be relevant. The public policy exception is typically invoked in the context of whistle-blowing. The substantial business ethics literature on the topic provides useful insights concerning issues of intent, confidentiality, and loyalty obligations. These may be relevant in ascertaining which types of whistle- blowing are deserving of legal protection. This issue can also be connected with legal ethics, as in

the case of whistle-blowing by corporate attorneys (Dunfee & Maurer, 1992).

Similarly, legal analysis of the proper scope of suits based upon fraud and misrepresentation may be informed by ethicists' analysis of the nature of deception. For example, Strudler (1995), [who, along with John Hasnas (Georgetown), Lynn Paine (Harvard), Rob Prevost (Winthrop), and Steve Walt (Virginia Law) is trained in both disciplines], has argued that a proper understanding of deception requires consideration of its conventional role in facilitating transactions among sophisticated business persons. Strudler's conclusion that "some deception in negotiation," (which does not put one's bargaining opponent at an unfair disadvantage) "may be morally acceptable" (p.805) holds relevance for doctrinal analysis of fraud.

There are similar issues in the area of corporate governance. As Orts (1992) has detailed, the interpretation (and possible revision) of corporate constituency statutes connects in a direct way with the large business ethics literature on stakeholder obligations. Citizen expectations for corporate responsibility are surely relevant considerations for legislators and, when the language of a constituency statute permits, judicial consideration of community standards.

Creative scholars may find room for incorporating ethical analysis in supportive broad statements about ethics and morality in court opinions. Although general and sometimes purely dicta, such statements may provide an opening for explicit reliance on the business ethics literature in doctrinal analysis. For example, an oft-quoted statement by the United States Supreme Court concerning the federal securities laws asserts, "A fundamental purpose, common to these statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry."[7] Analysis of both conflict of interest and a duty to inform as developed in the ethics literature may be relevant in the context of issues such as the application of the securities laws to mutual fund managers trading for their own accounts, or selling short, or personally purchasing initial public offerings.

Certain common law doctrines have been framed with explicit reference to business ethics. "The rationale underlying the principle of economic duress is the imposition of certain minimal standards of business ethics in the market place."[8] The *Centric* court noted that

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[7] SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963). The language pertaining to achieving a high standard of business ethics has been quoted in 29 subsequent court opinions.

[8] Centric Corp. V. Morrison-Knudsen Co., 731 P. 2d 411, 413 (Okla. 1986).

the wrongfulness sufficient to sustain the rescission of a contract is not synonymous with illegality. This controversial doctrine is open to consideration of standards of marketplace morality. Ethics scholars should be able to contribute to the debate of the proper scope of the legal doctrine of economic duress, which includes whether or not it should be recognized as a tort claim.

A similar doctrine is tortious interference with contractual relations. The New Jersey Superior Court has stated, "The right to pursue one's business without such undue interference, and the correlative duty, are fundamentals of a well-ordered society. They inhere basically in the relations of those bound by the social compact. They have their roots in natural justice."[9] In *Avtec Industries v. Sony*,[10] the jury had found in response to a special interrogatory in an employee piracy case that "Sony had violated generally accepted standards of morality."[11] The Superior Court upheld a judgment NOV for Sony on grounds that there was no finding that Sony had acted with deceit or intention to harm the plaintiff. How and when general standards of morality constitute feasible and appropriate legal standards is an open issue holding great research potential. At a more fundamental level, legal doctrines open to consideration of ethical and moral standards have often been criticized for being overly broad and indefinite. Empirical and theoretical research providing greater precision for ascertaining the boundaries of ethical behavior would help legal decision makers properly connect law and ethics.

There are many additional examples of ways in which ethics research might relate to legal doctrine. In intellectual property law, for example, should varying national attitudes concerning community interests in intellectual property make a difference, particularly with regard to extra- territorial application of copyright or trade secret laws?[12] A most interesting issue of cultural diversity is posed by *United States v. Yu*.[13] In that case Yu claimed that a judge sentencing him on a guilty plea to bribing a public official should consider the fact that on the basis of his Korean background he considered the payment to an IRS agent an "honorarium" and not a bribe. In what legal circumstances should cultural diversity be recognized? The substantial writings in the ethics literature on the phenomenon of sexual harassment may provide insights concerning appropriate legal tests, for example, whether reference should be made to a reasonable

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[9] Wear-Ever Aluminum, Inc. V. Townecraft Industries Inc., 182 A.2d 387, 390 (1962).
[10] 500 A.2d 712 (N.J. Sup. Ct. Essex Co., 1985).
[11] *Id.* at 716.
[12] *See* Swinyard, Rinne & Kau, 1990.
[13] 954 F.2d 951 (3d Cir. 1992).

woman as opposed to a reasonable person. Finally, the extensive analysis of corporate moral accountability in the ethics literature connects directly with the scope and nature of corporate criminal liability (Laufer, 1994; Walt & Laufer, 1991).

How Law May Inform Ethics Research

Law scholars can identify legal issues open to ethical analysis. In this way they will encourage creative research from two different groups of scholars. Ethical theorists may advance reasoned arguments concerning the direction the law should take. Those doing empirical research in ethics might seek to structure research projects that can be used in support of adjudication and in the legislative process. Second, law scholars can publish expository articles describing current developments in relevant areas of law in a manner that is user friendly for ethics scholars. Good examples of this are articles in which Orts summarized his research on reflexive environmental law (1995a) in the *BEQ* (1995b) and Shell described his research concerning legal standards for deception in pre-contractual negotiations (1991a) in the *Sloan Management Review* (1991b).

Third, law scholars can conduct joint research with philosophers. I can attest that the joining of two very different research methodologies and data bases can enrich the scholarly experience and lead to novel insights.

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