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Asking the Right Question in Business Ethics

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Bon soir, mesdames et messieurs. And thank you, Your Excellency, for your very kind and generous introduction. On behalf of all the panelists here tonight I would also like to thank France–Amerique, the Commission franco-américaine, the France-Fulbright Association des Anciens, and the Université de Cergy-Pontoise for organizing this event. I am hopeful that our program this evening will produce an interesting conversation, both theoretical and practical, on the advertised theme, which is: Regards croises sur l’ethique des affaires, or “revisiting business ethics.”

I probably should make my own particular orientation to tonight’s topic as clear as possible at the outset. It has been nearly a quarter century since I gave any real legal advice to real business clients. In those days I thought of business and business litigation as a kind of war, and I was generally inclined to take no prisoners in the battles that I fought. Time and reflection have mellowed me since the fierce days of my youth, however, and now my own thoughts on the relationship between ethics and business tend to be more philosophical than pragmatic. Nevertheless, I believe with all my heart that the problem of how we human beings ought to treat one another is or should be the central issue confronting each one of us during our brief journey together on this planet. Seen from this point of view, ethics truly is “first philosophy,” as Emmanuel Levinas puts it.¹ And I, for one, think that the problem of ethics in the business

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context is as confused and confusing as it is profound, and that it could do with a great deal of serious meditation and clarification on the part of anyone who cares deeply about it.

So I hope you will forgive me if my remarks are placed at a different level than one might expect to find in a typical “how-to” seminar on business ethics. By this I mean the kind of self-improvement seminar that people sometimes attend (and even pay to attend) in order to learn how to make as much money as possible without getting into too much legal and ethical difficulty. I say that I will speak at a different level, not necessarily a “higher” one, for in the matter of how we human beings behave in the economic sphere far too much is at stake – far too much avoidable human suffering – to pontificate at the beginning of a conversation about whose perspective promises to be more important or noble.

II

I have been asked by the organizers of these proceedings to begin the discussion by focusing on a particular question pertaining to business ethics. That question is: “Peut-on harmoniser les questions éthiques?,” or “Can we harmonize ethical questions?” My esteemed colleagues from the business world, on the other hand, have been asked to focus on a slightly different question: “Peut-on harmoniser les pratiques éthiques?,” or “Can we harmonize ethical practices?”

In English, as in French, the word “harmonize” comes from the Greek term *harmonia*. In ancient Greece, the noun *harmos* had an anatomical connotation: it meant “joint” or “shoulder.” When translated literally, *harmonia* thus denotes a “means of joining together,” on analogy to the way that the muscles and tendons in a person’s shoulder join his arm to his body. Of course, this literal signification of the word has long since given way to the notion we have today that harmony is an agreement or concord of sounds. But I cannot help hearing an echo of the old meaning of *harmonia* in the way tonight’s questions are formulated. I could be mistaken, but I detect a kind of yearning standing behind these two questions. I sense the presence of a fervent desire or hope that somehow human beings might be able to join together what is different in the ethical sphere into what is the same. The image of this larger sameness seems to be one in which human beings achieve a consensus in word and deed that allows them to strive together – as integral members of the social body, so to speak – for the promotion of something called “the ethical conduct of business” in a manner that will be as effective and efficient as the way healthy individuals are able to move their arms in their shoulder joints. For reasons that I will soon explain, I am somewhat troubled by this hope – or rather, I should say that I think it would be
dangerously premature to yearn for harmony in the matter of ethical questions and ethical practices before investigating what kind of question we should be asking in the first place.

As someone who attempts to think as deeply as I can about the relationship between law and ethics, I was immediately struck by the fact that a third question is missing from these other two, namely, “Peut-on harmoniser les réponses éthiques?,” or “Can we harmonize ethical answers?” I do not regard this omission as a mistake. On the contrary, I think that the organizers’ decision not to obsess over the task of getting immediate answers to ethical questions not only was wise, but also is an absolute precondition for gaining a proper understanding of what is at stake in the matter of “business ethics.”

I admit that, at first glance, what I have just said seems to be untrue. According to common sense, the right questions are supposed to lead to the right answers, and these in turn are supposed to lead to the right behavior. An ethical practice, on this view, consists in permanently linking four terms in such a way that the behavior governed by that practice becomes lawful in the Kantian sense of being rule-governed. Ever since Kant’s day, many if not most of us have come to believe that the only plausible ethical equation reads as follows: right practice = right question → right answer → right norm → right behavior.

It seems, therefore, that there must be some sort of mistake in the way tonight’s questions are formulated, since they talk about questions and practices but not about answers. In general, it has been my experience that businesspeople and their lawyers want as clear an answer as possible to the question of what limits there are, both legal and ethical, on their pursuit of gain for themselves and their employers. They want to understand in advance the rules of the game they are playing, just like players in a game of Monopoly want to know exactly what is supposed to happen when someone passes “Go” or lands on the square marked “Go to Jail.” People want to know the answers, or at least the rules that will give them the answers, because they are rewarded in their business and in their profession – and most especially in that precious currency called self-respect that we pay to ourselves – by how competently they perform their jobs and how well they play the roles that are allotted to them by their chosen careers.

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2 Immanuel Kant, “Metaphysical Foundations of Morals,” in Carl Friedrich, ed., *The Philosophy of Kant* (New York: Modern Library, 1993), 154-229, at 162 (“an action done from duty derives its moral worth, not from the purpose which is to be attained by it, but from the maxim by which it is determined”).
Consider the ethical rules of lawyers, for example. In my country, like many other places in the world, lawyers are required by the rules and principles of legal ethics to zealously represent the interests of their clients within the bounds of the law. “Zealously” is the very word that the American Bar Association uses to express this idea. You will immediately notice that ethics in this context frequently means being zealous on behalf of a client’s interests as opposed to (if not against) someone else’s interests. Thus, if any other ethical limits inhibit this ethical duty of zeal in pursuing a client’s interests – as indeed there are and should be – then lawyers want to know what these limits are. This helps explain why a course called “Professional Responsibility” is taught in just about every American law school, and why State Bar Examiners routinely administer multiple choice examinations on the subject which presuppose that the rules can be made to yield a correct answer to every ethical situation a lawyer is likely to confront.

The same sort of burning desire to know all the relevant limits and boundaries holds true in the case of the business executive whose compensation and career advancement depend on how zealously she pursues the ends of the firm that she represents. She wants to be given immediately useful answers to ethical questions so that she can get on with playing the money-and-career game all the more effectively. For I have observed that there is something to C. Wright Mills’s famous observation that in the developed world today a “panic for status replaces the proddings of poverty” in the motivational apparatus of the business and cultural elite. And of course, we all know from personal experience that the panicked yearn most of all for the comfort of a predictable order that would allow them to pursue their objectives all the more effectively.

I believe that I understand, and I know that I sympathize with, those whose primary motivation is practical in the way I have just described. Although it has become somewhat of a cliché, it is nonetheless true that we are living during a time of intense global competition amongst voracious international firms that interpret the entire world as a vast warehouse full of exploitable resources and an enormous bazaar for buying and selling things. Martin Heidegger

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3 See ABA Model Rules of Professional Conduct, Preamble (2007) (“the basic principle underlying the Rules ... include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law”).

characterized the world we have made in this image as *Das Bestand*, or “standing reserve,”⁵ while C. Wright Mills called it, rather more provocatively, “society as a salesroom.”⁶ While I may be wrong once again, I fear that many (if not most) executives experience their careers in business as a kind of rat race, as we used to say in the 1960s. In this race the best and biggest cheese goes to those rats best able to navigate the complex maze of formal and informal constraints that society tries to put between them and *le fromage*.

Nevertheless, tonight I would like us to consider the possibility that it can be morally disastrous to yearn for answers to ethical questions without first investigating what the right question is, and that this risk is particularly great in the field of business ethics. To legalize ethics is to make ethical rules enforceable, like law is, through penalties the cost of which can be calculated in advance. The businessperson who *only* cares about what limits others will impose on her self-interested behavior conceives of ethics as an “external” constraint, like the threat of a legal sanction. Metaphorically speaking, she wants to know how to skate as closely as possible to the thin ice in the pond so as to achieve all the more effectively her primary goal, which is to make a profit and advance her career without falling into the freezing water.

If, in any given case, such a person behaves the way other people would call “ethical,” she does so *in conformity* with ethical rules and expectations, but not *because of* ethics. In other words, she does not act ethically because being an ethical person constitutes the ultimate ground of her behavior, but because she feels that she is compelled to do so. Ethics for her is a means to a non-ethical end; it is not an end in itself. Her definition of unethical behavior might be expressed this way: “Unethical behavior means doing something that other people will disapprove of in a way that will harm my interests if they find out about it.” I am reminded in this connection of the ancient fable of the Ring of Gyges. This magical ring allowed its wearer to become invisible at will, and I wonder, as Plato did more than two millennia ago,⁷ whether someone who could put it on would behave the same way if she knew that she never had to fear the personal consequences of her actions.

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⁷ *The Republic* (2.359a – 360d).
III

At this point I would like to introduce two of the most important concepts in the theory of corporate ethics: the distinction between a standard of conduct and a standard of review. A standard of review adopts the perspective of an outsider – a referee – to a decision that someone else has already made. In the American law of corporate governance, for example, we know that if shareholders legally challenge a business decision made by management, the judge will usually employ a standard of review that gives extremely broad deference to management’s expertise and exercise of discretion. We lawyers call this the “business judgment rule,” and virtually all theorists of corporate governance agree that the rule permits (but does not require) management to make decisions which seem to be altruistic or socially responsible, but only on the condition that their so-called “ethical” decisions serve the long-term best interests of the corporation and its shareholders.

People sometimes refer to this attitude towards ethical business practices as “enlightened self-interest,” or “doing well by doing good.” Forgive me for saying so out loud, but I cannot help finding this view of corporate ethics to be similar to the point of view held by certain sociopathic personalities. By definition, a sociopath is someone who is unable actually to experience empathy; but if he is smart he can learn to pretend to empathize with others in order to achieve his goals, whatever they may be. As ugly as this comparison might seem, it does have the virtue of showing that the business judgment rule is a standard of external review, not a standard of conduct. Before they actually make corporate decisions, executives no more employ the business judgment rule as the reason for their business judgments than judges employ a prediction of how they might decide a case as the reason for why they decide it the way they do.

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10 *Id.* at 274, 280. As an example of the business advice to do well by doing good, consider a 1995 report by the National Association of Corporate Directors, which stated: “The primary objective of the corporation is to conduct business activities with a view to enhancing corporate profit and shareholder gain,” albeit subject to the qualification that the “fair treatment” of non-shareholder constituencies might be required if it results in “long-term shareholder gain.” National Association of Corporate Directors, “Report of the NACD Blue Ribbon Commission on Director Compensation: Purposes, Principles, and Best Practices (1995), 1.
This is not to deny that businesspeople and their lawyers will (sometimes) take the business judgment rule into account when making assessments about the various narrowly legal risks of pursuing a proposed course of action. Rather, I simply want to make the logical point that a business judgment is one sort of thing and the evaluation of a business judgment is another.

Thus, a standard of conduct is logically different than a standard of review. A standard of conduct is the criterion that a decision maker consults explicitly, or is guided by implicitly, before she makes a decision. This standard determines or helps determine her real subjective motive for acting before the fact. In ethics, a standard of conduct is what is seen or experienced from the inside rather than from the outside. Seen from the outside by a referee, a decision maker is a “what.” She is interpreted as an Other: a mere person conceived of as an entity to be judged and then praised or condemned for what she has done. Seen from the inside, however, a decision maker is a “who.” She is a self, not some indifferent person or other: she is a Me who inevitably must keep on answering by her decisions and her conduct that most fundamental of all ethical questions: Who am I? For in the matter of how we choose to treat other people, we do not experience ourselves as machines that are merely the sum of their past determinations and inputs. Instead, each one of us is always a Me Myself confronting a future that is, ethically speaking, a tabula rasa that we are always just on the verge of filling up with the scribble of our deeds.

IV

In theory, at least, the standard of conduct of a corporate executive is in part derived from the law of corporate governance. This is because it is conventionally believed that businesspeople, just like everyone else, ought to comply with the law, even if it is not always clear to people whether that duty is legal, moral, or both. In America and many other places the law says that directors owe a special, fiduciary duty to the shareholders. This has been interpreted by most (though not all) lawyers and businesspeople to mean that the primary if not sole end of the

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12 For more on the distinction between “what” and “who,” see Martin Heidegger, *Logic as the Question Concerning the Essence of Language*, trs Wanda Torres Gregory and Yvonne Unna (Albany: SUNY Press, 2009), 32-36.

corporation is to maximize shareholder wealth. If this is how the law is received, then it follows that what is called “corporate ethics” and “corporate social responsibility” are reduced to the status of means to an end that is other than them. If, as Milton Friedman once declared, “the social responsibility of business is to increase its profits,” then acting to benefit non-shareholder interests (including the interests of what people sometimes casually call “society”) becomes a mere option that corporate managers can and should pursue if and only if it can be made to pay more than acting contrary to those interests will pay.

On this view, a corporate executive’s standard of conduct requires her to calculate the overall net present economic value for shareholders of every decision she makes. Since politicians, regulators and prospective customers can, and often do, make moral judgments about those with whom they deal, it follows that seeming to be a good corporate citizen can produce considerable cash value in the marketplace. This means that “doing good” can sometimes make more money for the shareholders in the long run than “doing bad.” But of course this is not necessarily so. It is also possible that acting lawfully in a way that most people would call “doing bad” will make more money in the long run. And if that happens to be the case, then management will be forced to choose between alternatives that present what most people would call an ethical dilemma.

The dilemma is easily expressed, but not so easily resolved. On the one hand, a manager’s fiduciary duty to the company and the shareholders implies its own kind of morality – the kind that says you should not betray a trust which you have voluntarily undertaken to honor. Diverting money from your employer to benefit yourself personally and diverting money from your employer to benefit needy others seem disturbingly similar from this point of view. But on the other hand, the executive’s own sense of self-respect as an ethical person implies that she should not engage in behavior that she regards as immoral. Making money is like making omelets: somewhere, somehow, the chef has to break some eggs. Or, as the poet William Matthews puts it, “there’s someone’s misery in all we earn.” And I, for one, am glad to observe

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14 A highly influential Delaware court has declared, for example, that it “is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation’s stockholders.” Katz v. Oak Industries, Inc., 508 A.2d 873, 879 (Del.Ch. 1986).


that not everyone involved in business affairs today has the stomach for breaking any and every egg in the world if doing so would turn a profit. Indeed, in her recent book, evocatively titled *The Moral Underground: How Ordinary Americans Subvert an Unfair Economy*, Lisa Dodson shows that there exists in the business world today a powerful human aversion to relentlessly performing the unceasing task of egg-breaking for profit that may in fact run much deeper than many have supposed.17

In my classes on corporate governance, I sometimes offer the hypothetical example of a company’s pending decision whether or not profitably (and lawfully) to sell weapons to warring factions within some faraway third world country. What if, all things considered, the conscientious executive actually concludes that the shareholders and the company will do much better in the long run if the firm goes ahead and sells the weapons, even though she knows that the weapons will be used to perpetrate morally abhorrent acts? Should she refuse to sell the weapons even though she thinks that shareholders will be hurt in their pocketbooks by her decision? And if she does this, how is she supposed to explain herself to them and to her colleagues? Should she be honest and say to them that she made the decision she did because she thought a contrary decision would be immoral by her own personal standards of morality, despite the fact that it would produce more shareholder wealth? Or should she lie to them and say that she believed her decision actually maximized shareholder value by improving (or not tarnishing) the company’s “image,” even though she actually believes that any long term threat to the corporation’s public image would be more than offset by the rather attractive short term gain from making the sale? The latter course – lying about her actual motives, her actual standard of conduct – might insulate her decision from legal attack under the business judgment rule.18 But would it be ethical to lie to shareholders and colleagues in this way? Indeed, would it be ethical not to lie in this situation, given the lives that are at stake?


18 Cf. Marens & Wicks, supra note 9, at 281:

No competent attorney would allow her client to argue in court that their corporation made a decision because it “was the right thing to do” in the face of evidence that management knew of legal alternatives whose impact on the bottom line, short term and long term, were indisputably superior. It may smack of moral cowardice, but given the uncertainty of what sustains and makes a business profitable over a period of years, virtually any act that does not financially threaten the survival of the business could be construed as in the long-term best interest of shareholders.
Perhaps you can now understand why I said earlier that in ethics asking the right question is more important than rushing to get answers to questions that have not been thought about clearly and deeply enough.

In Alexandre Dumas’s great novel, *The Count of Monte Cristo*, the protagonist remarks that “[a] careworn capitalist is like a comet, he presages some great misfortune to the world.”¹⁹ Those who oppose the so-called “corporate social responsibility” (CSR) movement believe that a careworn corporate manager whose tender heart bleeds for non-shareholder interests portends great misfortune to the world because she harbors *too much* (allegedly irrelevant) ethical concern rather than too little. This does not imply that such persons think of themselves as ethical monsters. It would be kinder and more accurate to say that the index of ethics that they employ lies on a different scale than the index that many other people employ.

Philosophers sometimes express this sort of difference by distinguishing between teleological and deontological ethical systems: utilitarianism’s idea of the greatest good for the greatest number, for example, *versus* Kant’s principle of always following the moral law regardless of the consequences. But for present purposes it will be enough to say that the opponents of CSR tend to *define* ethics as increasing net overall social welfare by letting the invisible hand of the market work its magic rather than by trying to plan bureaucratically for the doing of good on a case-by-case basis. I take it that this is what Gordon Gecko, a character in the movie *Wall Street*, meant when he uttered the famous line, “Greed is good.” It is certainly what the influential libertarian writer Ayn Rand meant when she praised the virtues of a “utopia of greed.”²⁰

For people who subscribe to Gecko’s and Rand’s view of corporate ethics, the laws of corporate governance can be interpreted as a contract in which the shareholder wealth-maximization norm is “a bargained-for term of the board-shareholder contract by which the directors agree not to make Kaldor-Hicks efficient decisions that leave shareholders worse off.”²¹

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²¹ Bainbridge, *supra* note 8, at 424.
This is a dry and fancy way of saying something that the average person might have difficulty swallowing. It says that even if doing the right thing is socially “efficient” in the precise economic sense that it improves net social welfare as measured by people’s willingness to pay, corporate managers are duty-bound not to pursue that course of action if it will lose their shareholders even so much as a penny when compared to some other, less efficient and more ethically questionable, course of action.

When considered from a point of view which holds that pursuing the goal of corporate profit-seeking is good in the long run for everyone, there are two and only two ethical questions that a manager ought to ask herself in any given situation:

First, should I make this decision solely to further my own selfish financial and career interests rather than the interests of the shareholders and the company? And

Second, should I make a decision that others might praise as being “ethical” if, in my well-considered opinion, it will not ultimately maximize the long-term economic benefit of the shareholders and the company?

Thinkers who oppose the CSR movement tend to believe that the only rationally defensible answer to both of the foregoing questions is “No.” Stealing and other forms of self-dealing, they say, are “agency costs” that undermine confidence in the market and thus threaten to make everybody worse off. What is more, they also tend to believe that if a corporation cannot do well economically by doing good morally in any particular situation, then its managers not only have no legal or moral right to do something good for its own sake, they have a moral obligation not to do so. For what is supposed to count as “doing good morally” if the behavior

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23 See, e.g., Bainbridge, supra note 8, at 35-38.

24 Id. at 19-20, 423-24. See also the following stentorian warning against overdoing the current social movement for ‘corporate social responsibility’ (‘CSR’): “If companies need to be vigilant about the limits of CSR, the same applies even more to society as a whole. A dangerous myth is gaining ground: that unadorned capitalism fails to serve the public interest. Profits are not good, goes the logic of much CSR; hence the attraction of turning companies into instruments of social policy. In fact, the opposite is true. The main contribution of companies to society comes precisely from those profits (and the products, services, salaries and ideas that competitive capitalism creates). If the business of business stops being business, we all lose.” ‘Ethical capitalism: How good should your business be?’, The Economist, 19 Jan. 2008, 12-13.
in question does not also maximize the interests of those who own the company, and who is supposed to decide this question in cases where there is a disagreement?

For example, suppose director X thinks that using cheap child labor in the third world is morally bankrupt, whereas director Y thinks that doing so is morally justified because at least it gives poor children and their families some money that will help them survive the daily grind of their hardscrabble existence. If the law itself does not compel one result or the other – if, hypothetically, exploiting child labor in the third world is not exactly “illegal” – then whose particular moral compass determines what the ethical conduct of business looks like in this context? Is it simply a matter of counting heads, so that if six directors think that using child labor is morally justified and five do not, then we will say that it “is” morally justified, and vice versa if the vote goes the other way?

It seems to me that if the only two questions relevant to corporate ethics are expressed in the foregoing ways, then the answers can begin to appear both obvious and inescapable: you have an ethical obligation to steer the company towards doing what you personally think is good and moral if and only if you can make more money for the shareholders by doing so than by not doing so. I take it that something like this proposition stands behind the jaundiced sentiments expressed in the following paragraph from a recent article in The Economist magazine about the so-called “ethics oath” that was taken in June of 2009 by 400 students graduating from the Harvard Business School:

One of the main criticisms of the oath and of the whole idea of turning management into a profession, particularly in business-school faculties, is that it is either unnecessary or actively harmful. Crimes such as embezzlement are punishable by law. Shareholders who feel that managers have not acted in their best interests can sue them. Meanwhile, by promising to “safeguard the interests” of colleagues, customers, and society, are the future captains of industry simply shortchanging their shareholders?  

The question at the end of this passage is clearly rhetorical. It impliedly asserts that the exercise by corporate employees of individual moral autonomy in the making of what they personally regard as socially responsible business decisions on behalf of their firm can be a form of stealing.

25 “Foreswearing Greed,” The Economist (6 June 2009), 67-68, at 68.
It is important to understand that this critique of the Harvard Business School Oath\textsuperscript{26} is not really about what concrete actions or types of actions are ethical or unethical, right or wrong, in some transcendentally objective sense. It is about who should be allowed to say, authoritatively and definitively, what it means to act ethically in the corporate sphere.

\textit{VI}

During his trial in Jerusalem, the former SS officer Adolph Eichmann “declared with great emphasis that he had lived his whole life according to Kant’s moral precepts, and especially

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\textit{Preamble. As a manager, my purpose is to serve the greater good by bringing people and resources together to create value that no single individual can build alone. Therefore I will seek a course that enhances the value my enterprise can create for society over the long term. I recognize my decisions can have far-reaching consequences that affect the well-being of individuals inside and outside my enterprise, today and in the future. As I reconcile the interests of different constituencies, I will face difficult choices. Therefore, I promise: I will act with utmost integrity and pursue my work in an ethical manner. My personal behavior will be an example of integrity, consistent with the values I publicly espouse. I will safeguard the interests of my shareholders, co-workers, customers, and the society in which we operate. I will endeavor to protect the interests of those who may not have power, but whose well-being is contingent on my decisions. I will manage my enterprise in good faith, guarding against decisions and behavior that advance my own narrow ambitions but harm the enterprise and the people it serves. The pursuit of self-interest is the vital engine of a capitalist economy, but unbridled greed can be just as harmful. I will oppose corruption, unfair discrimination, and exploitation. I will understand and uphold, both in letter and in spirit, the laws and contracts governing my own conduct and that of my enterprise. If I find laws that are unjust, antiquated, or unhelpful I will not brazenly break, ignore or avoid them; I will seek civil and acceptable means of reforming them. I will take responsibility for my actions, and I will represent the performance and risks of my enterprise accurately and honestly. My aim will not be to distort the truth, but to transparently explain it and help people understand how decisions that affect them are made. I will develop both myself and other managers under my supervision so that the profession continues to grow and contribute to the well-being of society. I will consult colleagues and others who can help inform my judgment and will continually invest in staying abreast of the evolving knowledge in the field, always remaining open to innovation. I will mentor and look after the education of the next generation of leaders. I will strive to create sustainable economic, social, and environmental prosperity worldwide. Sustainable prosperity is created when the enterprise produces an output in the long run that is greater than the opportunity cost of all the inputs it consumes. I will be accountable to my peers and they will be accountable to me for living by this oath. I recognize that my stature and privileges as a professional stem from the respect and trust that the profession as a whole enjoys, and I accept my responsibility for embodying, protecting, and developing the standards of the management profession, so as to enhance that trust and respect. This oath I make freely, and upon my honor.”
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\url{http://mbaoath.org/about/the-mba-oath/}
according to the Kantian definition of duty.” In trying to make sense of this statement, which she called “outrageous on the face of it, since Kant’s moral philosophy is closely bound up with man’s faculty of judgment, which rules out blind obedience,” Hannah Arendt interpreted Eichmann’s enthusiastic and extraordinarily effective wartime efforts to help destroy the Jews of Europe as having been grounded in an unconscious distortion of Kant’s categorical imperative. As Kant had originally formulated it, the categorical imperative requires each individual to “act as if the maxim of your action were to become by your will a general law of nature.” But Eichmann seemed to interpret it to read, “Act in such a way the Führer, if he knew your action, would approve it.” Arendt continues:

Kant, to be sure, had never intended to say anything of the sort; on the contrary, to him every man was a legislator the moment he started to act: by using his “practical reason” man found the principles that could and should be the principles of law. But it is true that Eichmann’s unconscious distortion agrees with what he himself called the version of Kant “for the household use of the little man.” In this household use, all that is left of Kant’s spirit is the demand that a man do more than obey the law, that he go beyond the call of obedience and identify his own will with the principle behind the law—the source from which the law sprang. In Kant’s philosophy, that source was practical reason; in Eichmann’s household use of him, it was the will of the Führer. Much of the horrible painstaking thoroughness in the execution of the Final Solution … can be traced to the odd notion … that to be law-abiding means not merely to obey the laws but to act as though one were the legislator of the laws one obeys. Hence the conviction that nothing less than going beyond the call of duty will do.

I hasten to say that I do not intend to draw any sort of moral comparison between what Eichmann did and what today’s corporate managers are doing. That would be worse than a cheap shot – it would be an unconscionable affront to the memory of the millions who died by Eichmann’s hands. Nevertheless, it does seem to me that Arendt’s analysis of the way in which Eichmann pre-constructed the intellectual environment in which he made his moral choices sharpens to a fine point what has to be the one ethical question that by its very nature precedes all others: “Who will I let control my moral actions, me or someone else?”


28 Kant, *supra* note 2, at 187.


30 Id. at 136-37.
I recently ran a Google search on the term “corporate ethics codes,” and it produced nearly twenty-one million hits. The writing of corporate ethics codes has become a business in its own right, complete with elaborate advice on how the corporate elite can control their employees and satisfy their shareholders by laying down the law, so to speak, of permissible corporate tactics.31 According to every business executive with whom I have spoken on the subject, this “soft law” made up of internal corporate ethics codes enforced by “compliance officers” attempts to institutionalize certain ethical norms in order to defuse the widespread political demand for externally imposed corporate reforms in the wake of the corporate scandals and ethical lapses that have periodically shaken the modern business world to its foundations.

It seems to me that corporate ethics codes are offshoots of the command-and-control mechanisms of corporate governance generally. As Ronald Coase so famously maintained, the invention of the corporate form can be viewed as an appropriate response to the problem of transactions costs.32 Large firms have elaborate internal hierarchies mimicking the government bureaucracies of the welfare state because employing market solutions to each and every corporate decision would be far too costly when compared to the alternative of an enlightened, profit-seeking command-and-control system. While Coase’s theory of the firm is not the only one that exists, it does have the advantage of highlighting an important feature of our problem.

Just as routine economic decisions within the firm can be more efficiently managed by command-and-control principles than by costly case-by-case negotiations amongst individual market participants, so too ethical decisions would become very costly for the firm if each one had to be negotiated with an employee every time she felt a twinge of moral guilt on account of what her boss is telling her to do. From the standpoint of the firm and its shareholders, it must seem much more efficient to control ethical situations in advance by in-house corporate ethics codes that supplant the individual moral sensibilities of corporate employees than to allow employees the freedom to exercise autonomous moral judgment in each and every situation they confront during the workday. Unworldly and impractical philosophers like Kant might think that

31 See, for example, the high-end conference held on March 15-16, 2010, in New York City, advertised as: “Corporate Citizenship 2010: Doing Well by Doing Good.” Advertisement, The Economist (20 February 2010), at 66. Featuring speeches by former President Bill Clinton and various luminaries from the corporate world, the website for the conference establishes a fee of $1,750 for attendance (a bit less if you are an academic, and “only” $500 if you are a student). http://corpcitizen.economist.com.

individual moral autonomy is the *sine qua non* of ethics; but if I have understood the corporate mentality correctly, the average member of the business elite suspects that the suppression of a radically individual moral autonomy (read “moral anarchy”) in the boardroom and on the factory floor is the *sine qua non* of generating corporate profits.

**VII**

Officials of the old Soviet Union used to define individualism as egotism: the regime officially condemned “the man for whom his own well-being is more important than the group’s welfare.”33 I cannot help thinking that Soviet Communism’s attempt to subordinate individual selfishness (egotism) for the benefit of the group is similar to the attempt made by proponents of mainstream corporate governance principles to suppress employees’ individual moral autonomy (altruism), at least to the extent that it does not exclusively promote the economic interests of the corporate “shareholder collective.” It seems to me that suppressing individual self-seeking for the greater good of the proletariat and suppressing individual moral altruism for the greater good of the corporation are both forms of domination and control. Both attempt to use the individual as a means to an end that she would not necessarily choose herself. Indeed, in the final analysis both forms of domination seek to turn the individual into what C. Wright Mills called a “Cheerful Robot”34 – someone for whom the ends of the collective entity (whether it is the state or the corporation) routinely and automatically become the ends of the individual without the mediation of any autonomous moral reflection.

In light of what I have just said, I believe that there is something ethically significant – even monumental and potentially earth shattering – in the sheer social fact that 400 graduates of the Harvard Business School just took an oath promising to safeguard the interests of colleagues, customers and society in pursuing their future careers in business. The Harvard Business School professor Rakesh Khurana recently remarked that just telling his students to maximize shareholder value “does not satisfy them anymore.”35 My own experience in teaching the current generation of law students in America, and now in France, has been similar. Going by what they say they want from law school, most of my students long to hear about justice and not just about

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35 “Foreswearing Greed,” *supra* note 25, at 68.
legality; they want room to reflect on law from a moral point of view, and not just from the point of view of someone who, like Holmes’s famous “Bad Man,” cares only to know what the law will do to him if he is caught.\(^\text{36}\)

Of course, all of this could be a tragic illusion – a case of wishful thinking on my part. Perhaps *The Economist* article is right when it alleges that young people today, who face the worse job market in decades, have come to see non-profit and government jobs as their best bet for getting any job at all, and therefore that they have made the cold calculation that appearing to embrace the “values agenda” will be useful to them.\(^\text{37}\)

That said, however, I believe that the millennium generation’s apparent “ethical turn” represents something that cannot be so easily dismissed by those who think, however sincerely, that the only proper business of business is, well, *business*. Today’s business students and law students may very well be displaying “naivety,” as *The Economist* article says,\(^\text{38}\) but so what? Given the right circumstances, today’s naivety can become tomorrow’s consensus. Whether a given consensus is actually good for humanity and all of the individuals that comprise it is another matter, of course, and ultimately depends on how one evaluates the real, living world that it constructs. To be honest, I cannot say whether the universal adoption by businesspeople of the Harvard Ethics Oath would make for a better world – for me there is too much uncertainty in how it would be actually applied to allow for a reasonable prejudgment on the question.

I do know one thing for sure, however. Properly understood, being ethical must transcend the project of acting in conformity with externally imposed rules and customs, for we who are alive in the twenty-first century bear (or should bear) tragic witness to the fact that following like sheep the rules and customs laid down by others has all too often led human beings to do terrible things to one another. Of course, it is empirically true that we can always choose to delegate to others the power to construct the norms of our conduct. But if Kant was right, then the ultimate ethical *responsibility* of the individual for what he actually does in the world can never be delegated in this way.


\(^{37}\) “Foreswearing Greed,” supra note 25, at 68.

\(^{38}\) Id. at 68.
It seems to me that being ethical amounts to much more than paying hypocritical lip service to the question, “Who am I?” If the latter question is not taken as the genuine question lying at the very core of what is called “business ethics,” then I, for one, want no part of it.