Chapter 1
Fair Markets Revisited

It is not uncommon to have businesspersons appeal to the principle, "If it is not illegal, it's ethical". The strategy behind the appeal is to limit the moral responsibilities of management. The *only* moral obligation of management is to obey the law. I shall refer to this position as the minimalist position regarding business ethics.

Criticisms of this principle are fairly common. Some have provided examples of corporate activities which, although legal, are allegedly immoral, e.g. firing a person employed at will for no reason. Many of the activities during the 2008–2009 financial crises were of this type. See the Academy Award winning documentary, *Inside Job*, for a vivid set of examples. In addition, still others, e.g., Christopher Stone, have argued that the law simply cannot constrain certain harmful corporate activities.[1] For example, if corporation X does something immoral which is later made illegal because the act was immoral, the law is powerless to punish X for that act.

I will not elaborate upon these well-known arguments. Rather I will argue that the sentence, "If it's not illegal, it's ethical" is hardly a minimalist strategy at all. The premises of my argument are as follows:

1. The law, as embodied in statutes, the common law tradition, and the judgments of juries, appeals to fundamental ethical notions.
2. These ethical notions are not given precise legal definition and, hence, cannot be reduced to legal terms.
3. Therefore, the law frequently requires corporate conduct to adhere to broad open-ended standard of morality.

If these premises are true, it means that business activity, in being held accountable to the law, will be held accountable to morality as well. If the obligation of business is to follow the law and if the law demands adherence to morality-where

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This chapter is an updated version of Sections I–V of my "Fair Markets" in *Journal of Business Ethics* 7 (1988) 89–97. This chapter contains a number of new arguments for the position argued in that paper. Material from the original article is reprinted by permission of Springer.

[1] Stone, Christopher D. (1973). *Where the Law Ends.* New York: Harper & Row Publishers.

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what is moral is not reducible to what is legal-then the injunction that all business should do is obey the law is likely to be badly misunderstood. The reason is that that injunction neither substantially limits the moral obligations of business nor provides much guidance to the manager who is trying to determine what her company should or should not do.

Of course, this point would be of limited interest if there were a consensus in both the business community and in the law as to what the legal demands of morality are. But there is no consensus. Moreover, to make matters worse from the standpoint of the manager, the classical account of the function of the corporation (maximize shareholder wealth) will often not provide an acceptable moral defense in the courts. In other words, although there is no consensus on what the legal requirements of morality are, there is a growing consensus that the traditional business views are inadequate. When I wrote this last sentence in 1988, my point was mostly directed at the fact that the business schools were finding room for business ethics and the resulting critique of profit maximization as the sole purpose of business. As I write the revised version of this essay in 2011, the skepticism about the ethical views of business is directed by the public with special emphasis on the large banks and other financial institutions that the public holds responsible for the 2008–2009 financial crisis. Although the courts are more conservative now, I still believe it is the case that the manager of a corporation faces the disconcerting possibility of appearing before a court, when neither she nor her company had done anything previously illegal nor contrary to stockholder interest, to be found morally and hence legally blameworthy. I am speaking here of civil cases.

In the remainder of this chapter, I will provide evidence and argument for the thesis outlined above. I will focus on the notion of fairness to make my points. Other ethical concepts could be used as well. Finally since a complete analysis of fairness is not found either in the legal literature or in society as a whole, I will try to show that it is a presumption in the law that unfair transactions are either coercive or involve inequality of bargaining power. If this analysis of fairness is adopted the moral and thus the legal obligations of business will be expanded.

Morality as a Ground of Legal Decisions

The first claim to be established is that the law as embodied in statute, the common law, and jury judgments uses fundamental ethical notions.

At the most general level, the Uniform Commercial Code which has been adopted in every state provides that good faith is assumed in every transaction governed by the code.[2] The requirements of good faith cannot even be waived by a voluntary agreement among the parties.

[2] Quoted from *Business and Its Legal Environment*, Thomas W. Dunfee, Janice R. Bellace, and Arnold Rosoff (eds.), 1983. Englewood Cliffs: Prentice-Hall, 209.

A number of business relationships are fiduciary in nature. Any business person takes on a fiduciary duty to her principal (e.g. employer) when she acts on the principal's behalf with regard to third parties. Corporate directors and officers have a fiduciary relationship with the stockholders. And what are the moral requirements of that relationship. Hear Justice Cardozo.[3]

> Joint adventurers, like carpenters, owe to one another, while the enterprise continues the duty of the finest loyalty. …A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor, the most sensitive, is then the standard of behavior.

As for labor law, Section 7 of the Wagner Act (National Labor Relations Act) specifically forbids an unfair labor practice. One of the unfair labor practices outlawed by the act is "…to refuse to bargain collectively with the representatives of his employees."[4] But what counts as refusal to bargain. In 1947 Congress enacted Section 8d which appealed to explicitly moral concepts. "For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representatives of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[5]

At this point, those who argue that if it's legal, it's OK (morally permissible) might agree that statutes make use of moral concepts. Legislatures create laws that make moral obligations legal obligations as in the examples above. However, until the statute is duly passed, business has no legal obligation and thus also no moral obligation with respect to the issue at hand.

But that is not strictly true. Often a law is written that requires a legal obligation to play fair but leaves to the courts or future legislative action what is to count as fair. A manager facing this kind of statute needs to act before what counts as legally fair is determined. It seems to me that the most prudent business decision is to act from the public understanding of what constitutes fairness because it is that standard to which future legislators and future court decisions will appeal. In other words the business person cannot wait for the law; the good business decision is to assume that the law will ultimately embrace common morality standards of what constitutes fairness. Thus, even in the cases cited above, the strategy of "If it's legal, it is OK" (morally permissible) won't work. The law requires adherence to fairness but most likely relies on common morality standards of fairness to tell the business person what to do. I will have more to say about this issue after providing some cases in common law that are decided on ethical grounds.

If one moves from statutes to the common law, the requirement that the law requires the ethical is seen in a number of classic cases. Consider the evolution of laws protecting the consumer. In traditional tort law a claim against another was based on "privity." To sue someone for damages you had to be in a direct relation

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[3] *Mienhard v. Salmon* (1928) 164 N.E. 545 at 223.

[4] http://www.nolo.com/legal-encyclopedia/content/nlra-act.html, Downloaded September 18, 2012.

[5] Ibid.

with the party you are suing. Consider the automobile manufacturer who uses dealers to distribute the product. If privity were strictly enforced, you could only sue the dealer, not the manufacturer.

In a classic case a Mr. Henningsen purchased a Plymouth from Bloomfield Motors. Later Mrs. Henningsen was injured when the car suddenly ran off the road, presumably as a result of a defective steering mechanism. The defendants, Chrysler Corporation and Bloomfield Motors, denied responsibility under privity. Chrysler had not sold Mr. Henningsen the car and neither Chrysler nor Bloomfield Motors had sold the car to Mrs. Henningsen. In *Henningsen v. Bloomfield Motors Inc.*,[6] the New Jersey Supreme Court disagreed that privity protected Chrysler and Bloomfield motors and they based their decision on grounds of morality.

> The Defense of Lack of Privity Against Mrs Henningsen
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> Both defendants contend that since there was no privity of contract between them and Mrs Henningsen, she cannot recover for breach of any warranty made by either of them. On the facts, as they were developed, we agree that she was not a party to the purchase agreement. Her right to maintain the action, therefore, depends upon whether she occupies such legal status thereunder as to permit her to take advantage of a breach of defendant's implied warranties… We are convinced that the cause of justice, in this area of the law can be served only by recognizing that she is such a person who, in the reasonable contemplation of the parties to the warranty, might be expected to become a user of the automobile.[7]

Manufacturers have also used warranties in the effort to limit legal liability. In the same Henningsen case, the defendants tried to argue that there were no warranties expressed or implied other than the one providing for the replacement of defective parts. Again the court appeals to canons of justice in deciding for the plaintiffs.

> The Effects of the Disclaimer and Limitation of Liability Clauses on the Implied Warranty of Merchantability
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> …[W]hat effect should be given to the express warranty in question which seeks to limit the manufacturer's liability to replacement of defective parts, and which disclaims all other warranties, express or implied?…
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> The warranty before us is a standardized form designed for mass use. He [the buyer] takes it or leaves it and he must take it to buy an automobile. No bargaining is engaged in with respect to it. In fact, the dealer through whom it comes to the buyer is without authority to alter it; his function is ministerial-simply to deliver it.
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> The gross inequality of bargaining position occupied by the consumer in the automobile industry is thus apparent. There is no competition among the car makers in the area of express warranty….
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> …*In the context* of this warranty, only the abandonment of all sense of justice would permit us to hold that as a matter of law, the phrase, "its obligations under this warranty being limited to making good at its factory any part or parts thereof" signifies to an ordinary reasonable person that he is relinquishing any personal injury claim that might flow from the use of a defective automobile.
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> …The verdict in favor of the plaintiffs and against Chrysler Corporation establishes that the jury found the disclaimer was not fairly obtained….[8]

[6] *Henningsen v Bloomfield Motors* (1960) Supreme Court of New Jersey 161 A2d 61.

[7] Ibid.

[8] Ibid.

The impact of this case was to bring consumer protection law closer to the public's understanding of what fairness and justice require. Indeed at this point in the twenty-first century the arguments of the Chrysler Corporation and Bloomfield Motors seem outrageous.

Still another court decision that supports my point is in the area of patent infringement. In Beaumont, Texas, the DuPont Company was constructing a new plant for making methanol. An unknown third party hired the defendants Rolfe and Gary Christopher to fly over the facility and take photographs. This flyover was discovered and DuPont sued. In response the Christophers said they had done nothing legally wrong (The "if it is legal, it is morally ok." Defense).

In delivering his decision, Judge Goldberg admitted that the Christophers had neither trespassed, breached a confidential relationship, nor engaged in other illegal conduct. Judge Goldberg then invoked the rule from the Restatement of Torts which provides, "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means."[9]

Judge Goldberg continued

> The question remaining, therefore, is whether aerial photography of plant construction is an improper means of obtaining another's trade secret. We conclude that it is and that the Texas courts would so hold. The Supreme Court of that state has declared that "the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world."

A standard defense in a violation of trade secrets case is to show that the defendant did not protect the trade secret in question. Justice Goldberg used moral concepts to totally reject that defense.

> To require DuPont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy's trick. We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy. The market place must not deviate far from our mores. We should not require a person or corporation to take unreasonable precautions to prevent another from doing that which he ought not do in the first place. Reasonable precautions against predatory eyes we may require but an impenetrable fortress is an unreasonable requirement and we are not disposed to burden industrial inventors with such a duty in order to protect the fruits of their efforts. "Improper" will always be a word of many nuances, determined by time, place, and circumstances. We therefore need not proclaim a catalogue of commercial improprieties. Clearly, however, one of the commandments does say, "Thou shall not appropriate a trade secret deviously under circumstances in which countervailing defenses are not reasonable available."

Several observations can be made from Judge Goldberg's decision. First he admitted that the Christophers had broken no specific law. He then appealed to a general law against the improper securing of trade secrets. He then appealed to ordinary standards of morality to show that the flyover was improper. Again what drove the legal decision was the mores of ordinary morality.

One more piece of evidence comes from the highly controversial Delaware decision regarding defenses again hostile takeovers.[10]

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[9] *E.I DuPont de Nemours & Co. Inc*., *v Christopher* (1970) Justice Goldberg 431 F2d 1012.

[10] *Unocal v Mesa Petroleum Co.*

Unocal Corporation fought off a bid by T Boone Pickens' Mesa Petroleum Company by offering to buy shares of all stockholders except those held by Mesa. In other words, the Board of Directors created two distinct classes of Unocal stockholders and treated them differently. In point of law such disparate treatment is only permitted for a valid corporate purpose; it cannot be used by the directors to keep themselves in power. Moreover, the moral principle of "treat equals equally" would *prima facie* condemn such a two-tier classification of stockholders.

Much to the dismay of many in the business and financial community at that time, the Delaware Supreme Court supported Unocal. And it did so on the ground that Unocal's defense was legitimate and proper given the nature of the Mesa threat. In other words Mesa's behavior was sufficiently questionable on grounds of fairness that this extraordinary defense passed legal muster.

That the offer was unfair has to be extracted from the Court's comments on the case. Central to the issue of fairness was Mesa's two tiered stock offer. For the first 64 million shares of Unocal stock, Mesa offered $54 a share. For the remaining shares Mesa would offer securities that were allegedly worth $54 a share. In fact, the backing on the remaining shares was such that both the market and the court termed the securities "junk bonds."

In passing moral judgment the court said.

> It is now well recognized that such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate out of fear of what they will receive at the back end of the transaction.[11]

Given the nature of the threat, the Unocal response was legitimate. "Thus, while the exchange offer is a form of selective treatment, given the nature of the threat posed here, the response is neither unlawful nor unreasonable."[12]

An interesting sidelight is the fact that the court used a standard technique in ethical reasoning to further condemn Pickens' takeover attempt. Mesa had sued on the grounds of a discriminatory exchange. Yet the court noted that Mesa had a history-"a national reputation" as a greenmailer and since greenmail itself was a discriminatory exchange, the court found Mera's allegation of discriminatory exchange to be "ironic." Philosophers would use such terms as "inconsistent" or "in violation of the ethical principle of universality." Immanuel Kant would have been proud of the court.

A Rejoinder and Reply

Some may accept the conclusion that the law embodies moral terms such as "improper," "coercive," and "good faith." They would also concede that in the first instance these terms have not been legally defined and that when the first decision comes down the appeal is often made to common morality or the morality of the "reasonable person." However, once the legal system has adopted a definition of these moral terms, we then

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[11] *Unocal v Mesa Petroleum Co*. (1985) 493 A2d at 956.

[12] Ibid.

have a legal definition of the moral terms. So Bowie's point is well taken at the beginning but really isn't all that important in the long run.

I reject that move. First, any business person who confronts a law that says it should not behave in a coercive manner and that it should act in good faith needs to know what those terms mean. In the absence of a legal decision, the prudent advice is to follow common morality or the morality of the reasonable person. In those cases where there is no legal option the prudent strategy is to do what morality requires.

Once a business person or firm has a set of legal decisions, the firm does have some guidance as to what the law requires about issues of morality. Is it a wise business strategy in those cases for the firm simply to consult the lawyers? I argue that it is not because in most instances the definitions of terms like "good faith" and "improper" are evolving as societal attitudes change.

Moreover, nearly all the decisions discussed in Section 1 appeal to a broad theory of morality to justify the decision. In Henningsen the warranty is rejected as unjust In Unocal, the court admitted that it might seem that Unocal's refusal to accept Mesa's offer was a violation of Unocal's fiduciary obligation to stockholders and a violation of the principle that all stockholders should be treated equally. But in these particular circumstances the court argued that the defensive strategies were fair.

What is significant about Du Pont v Christopher is that the court used philosophical views about ethics to expand the nature of law. The notion of "improper" is in part defined by the moral principle, "Thou shall not appropriate a trade secret deviously under circumstances in which countervailing defenses are not available."

Even where an attempt to provide a legal definition is given, that is hardly the end of the matter. Consider the Wagner Act which attempts to define an unfair labor practice not to bargain in good faith. What does "bargain in good faith" mean? One of the more frustrating aspects of collective bargaining is the fact that each side initially makes demands that it knows the other side will not accept. There is then a long process of give-and-take which, after much posturing, results in a compromise reasonably close to what both sides would have anticipated. I speak as a former union president here.

In the 1960s General Electric decided that the whole process was time-consuming and inefficient. General Electric then did a study and prepared a contract offer which it believed was fair. In public announcements General Electric said it intended to do right voluntarily. However, the position was to be firm-basically take it or leave it.

In a celebrated U.S. Court of Appeals Second Circuit case, National Labor Relations Board v General Electric Company,[13] GE was found guilty of bargaining in bad faith, first, because its take-it or leave-it strategy made the union powerless and useless, and second because management argued that it was the defender of the employee's interest. The GE strategy was a violation of the process, even if the specific contract being offered was fair. In this case the Court decided what was fair in this context. The actions of GE unfairly compromised the position of the union as a bargaining agent. The GE strategy was to try to eliminate the possibility of bargaining at all. As an aside, Kant would approve of the Court's decision, because

[13] *National Labor Relations Board v General Electric Company* (1969) Judge Irving Kauffman, 418 F2d 736.

if GE's tactic were to be universalized, there would be no point to having a union whose chief task was to collectively bargain.

The use of concepts of philosophical ethics to ground legal decisions comes as no surprise to philosophers working in fields such as jurisprudence. Ronald Dworkin has given the most explicit and detailed argument for putting morality as a basis for law.[14] What interests Dworkin is the "hard" cases in which statutes and precedents may be vague, unclear, or in apparent conflict. How are such hard cases to be decided? Dworkin points out that the judge must get behind the statutes and precedents to the principles and policies that underlie them. Any theory regarding the applicable principles and policies will depend on a proper understanding of our legal institutions. However, a proper understanding of our political institutions is ultimately rights based. I think you see this kind of reasoning in the GE case discussed above.

For Dworkin, it is this last step in the hierarchy that is peculiarly moral. Such a hierarchy is required if opinions in hard cases are to be justified and not simply amount to a matter of judicial discretion. Dworkin appeals to the actual practices of judges to support his claim.

Hence we can see that a court can use philosophical or broad societal moral notions to make a decision or even on occasion actually uses such notions to declare what was previously legal to be illegal. Those moral notions are taken over and applied by law but not defined by law.

What is the implication of all this for managers? It should be clear that the principle, "If it's legal, it's moral" cannot be used to limit what is morally required of a business. Given the analysis provided here, we see that what is legal is often a function of what is moral. This is particularly true in just the instances where management wants to use the "If it's legal, it's, moral" principle. After all what the manager wants to say when he or she is criticized for acting in an ethically controversial way is that he or she did nothing illegal. But what is determined to be legal in these cases is what morality would have required. In other words, a business must often show that it acted morally if it is to make its legal case, and it can often be found legally culpable if it did not act morally.

Advice for Managers

But how is a manager to know what business activities the courts will consider moral and which activities the courts will consider immoral? At this point the business ethicist might have a contribution to make. Let us return to the decisions and statutes discussed thus far. In summary fashion here are the results:

1. All business transactions must be made in good faith.
2. Corporate directors have a duty of loyalty to stockholders.
3. Management and labor are forbidden to engage in unfair labor practices.
4. The obligations of manufacturers rest upon the demands of social justice.

[14] Dworkin, Ronald. (1977). *Taking Rights Seriously.* Cambridge, MA: Harvard University Press.

5. Trade secrets may not be obtained in an improper manner.
6. Defense measures, including differential offers to stockholders, are legally appropriate responses to hostile takeovers when the takeover offer is based on a coercive two tiered buyout where those tendering their stock early get cash and those tendering later get junk bonds.

The key terms here are "good faith," "loyalty," "unfair," "justice," "proper," and "coercive." What do these terms mean?

Characteristics of Fairness

The business manager might look to society at large for the answer and sometimes the courts will invoke societal norms. But an appeal to societal norms is incomplete or inadequate when either there is no clear societal norm or when there is considerable disagreement as to what the norm is and should be. These kinds of disagreements are to be expected in a highly pluralistic society like our own. Indeed these conflicts over ethical norms help explain why even business firms that are recognized by the business community itself as ethical firms are nonetheless sometimes targets of ethical criticism. And of course the Christophers in the DuPont case and Boone Pickens in the Unocal case would not agree that they acted unfairly.

Perhaps we should return to the court decisions to see if there is one moral notion that captures the variety of decisions. The moral terms mentioned above could then be defined in terms of that notion. My suggestion is that the underlying concept is "fairness." Intuitively here are some of the considerations that lie behind that statement. What counts as an improper obtaining of trade secrets is attempts that are unfair. The law recognizes the competitive nature of enterprise but tries to set limits on what is acceptable competition and what isn't. If a corporation doesn't make a reasonable attempt to protect its trade secrets, then they cannot complain when their trade secrets are used by another. In building its plant, however, DuPont was defenseless since it could not protect its trade secrets from that kind of espionage. Just as there are rules which protect the punter, and now the quarterback, in football, so there are rules to protect companies when those companies cannot protect themselves. Hence the principle enunciated by the court in the DuPont case, "Thou shall not appropriate a trade secret deviously under circumstances in which countervailing defenses are not reasonably available," is really a principle of fairness.

Similarly, in the Henningsen case, both the warranty and the appeal to privity were seen as unfair. The customer's position was too vulnerable. All the advantages lay with the automobile manufacturer and distributer. So even though the court in Henningsen uses the term "justice" the underlying notion is "fairness"- a result that would not surprise John Rawls who defines "justice" as "fairness."

Although the General Electric labor relations case is based on a situation where the intent is very different, I submit that the judicial reasoning was based on similar considerations. To allow GE to dictate the terms eliminated the opportunity for a fair fight. And finally in the defense against a hostile takeover case, the defense was

fair because it was made in response to a coercive threat. A coercive threat is not fair. On the other hand, if the threat had not been coercive, the defense probably would not have passed legal muster because it would not have been fair.

However, critics might argue that I have simply pushed the issue out one more step. At this point I am telling the manager that he or she must behave fairly and that it is not enough to simply look to norms of fairness in common morality. So what is the manager to do? Let us return to some of the court decisions and consider some others as well in order to determine if we can detect some common essence to notions of fairness at least with the courts.

In Unocal v Mesa Petroleum, the issue is one of coercion. Coercion is unfair. There are other statutes and court cases that speak against the morality of coercion in the marketplace. For example, many states have followed New York in passing laws that permit a cooling off period for consumers who buy from door-to-door salespeople. These laws have been greatly expanded especially in the banking industry. All are based on the presumption that there is something coercive about offers that are made under very tight time pressures. By allowing consumers to void the contract within 24 h, the element of coercion is mitigated- at least for those who know the law.

In Henningsen, the issue is the inequality in bargaining power between the consumer and the seller. Again there are other statutes and court cases that speak against the morality of taking advantage of great inequalities in bargaining power. The Uniform Commercial Code invalidates unconscionable contracts or clauses. “If a court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract” [15] What makes a contract or clause within a contract unfair?

One of the more common judgments made on grounds of unconscionability is in the area of sales contracts. The case of Jones v. Starr Credit Corporation serves as a good example. The plaintiffs bought a freezer worth $300. They bought it on the installment plan whereby they paid $900 for the freezer and an additional $334.80 of financing charges. In finding for the plaintiffs, the court said:

> There was a time when the shield of caveat emptor would protect the most unscrupulous in the marketplace—a time when the law, in granting parties unbridled latitude to make their own contracts allowed exploitive and callous practices which shocked the conscience of the legislative bodies and the courts.
>
> The efforts to eliminate these practices has [sic] continued to pose a difficult problem. On the one hand it is necessary to recognize the importance of preserving the integrity of agreements and the fundamental right of parties to deal, trade, bargain and contract. On the other hand, there is concern for the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest member of the community.[16]

We see in this case that the court explicitly appealed to gross inequality of bargaining power as the basis for the decision. In the case, unlike the GE case discussed

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[15] http://www.law.cornell.edu/ucc/ucc.table.html, Downloaded September 18, 2012.

[16] *Jones v Star Credit Corporation*, 1969 Supreme Court of New York 298 NYS 2d 264.

earlier, the gross inequality of bargaining power in this case refers to inequality of knowledge rather that inequality of economic power.

By the way it is this inequality of knowledge that makes insider trading unfair. Hence there are laws against insider trading because insider trading is unfair, even though such laws are extraordinarily difficult to enforce and some have argued that insider trading is efficient on economic grounds. In *SEC v. Texas Gulf Sulphur*, the court explained its position on Rule 19b-5 of the Securities Exchange Act of 1934.

> …The core of Rule 10b-5 is the implementation of the Congressional purpose that all investors should have equal access to the rewards of participation in securities transactions. It was the intent of Congress that all members of the investing public should be subject to identical market risks. … The insiders here were not trading on equal footing with the outside investors. They alone were in a position to evaluate the probability and magnitude of what seemed from the outset to be a major strike; they alone could invest safely, secure in the expectation that the price of TGS stock would rise substantially in the event such a major strike should materialize, but would decline little, if at all, in the event of failure, for the public, ignorant at the outset of the favorable probabilities would likewise be unaware of the unproductive exploration, and the additional exploration costs would not significantly affect TGS market prices. Such inequities based upon unequal access to knowledge shouldn't be shrugged off as inevitable in our way of life, or in view of the Congressional concern in the area, remain uncorrected.[17]

Perhaps a transaction should be defined as unfair whenever it is coercive or when there is great inequality of bargaining power or great inequality of knowledge among the parties. If this line of thinking is correct, we have some specific advice for managers. If your action is likely to be considered coercive or if you are engaged in a business activity where there is great inequality of bargaining power, the courts may determine that you are behaving unfairly and because you are behaving unfairly you are behaving illegally.

This way of characterizing unfairness has some plausibility. There are some important parallels between labor law and product liability law. Until the 1930s, employment agreements were modeled on individual contracts that were the common feature of the marketplace. As the size of business enterprises expanded, the individualist model where each individual employee bargained with the individual employer was widely perceived to be irrelevant. Society believed the bargaining relationship between a large steel company and an individual steel worker was excessively unequal. The steel company had too much power. Hence the typical individual employer/employee labor contract was unfair. As a result Congress passed the Wagner Act that gave employees the right to bargain collectively. Presumably, collective bargaining equalized the equation. The power of the large individual corporation was pitted against the collective power of the labor union. During the 1940s some argued that the balance of power had swung too far in favor of labor. Both the Taft Hartley Act and the Landrum Griffin Act contained provisions designed to curb what was seen as the excessive power of unions. (Given this history, a story needs to be told as to how labor has lost power in the United States and how the United States has become the most anti-union country in the G-20.)

[17] *S.E.C. v Texas Gulf Sulphur Co.* (1968) United States Court of Appeals Second Circuit, 401 F2d, 833.

On the basis of this analysis, I can now give some general advice to managers.

1. American business activity is legally bound to compete fairly.
2. Three necessary conditions of fairness recognized by law are reasonable equality of bargaining power, reasonable equality of knowledge and non-coerciveness.

Managers cannot rely on the law alone to tell them what is right. They must ask whether their action violates morality by being coercive, an abuse of inequality of bargaining power or an abuse of inequality of knowledge (information asymmetry). Failure to consider morality in this way may leave the company open to charges of illegal activity because the action of the manager was unethical.

Objections and Replies

Since the earlier version of this paper was published in 1988 and my examples are mostly from the mid-twentieth century, perhaps my analysis is less persuasive now that the courts are more conservative. Specifically we have more judges who are strict constructionists about the law and thus these judges are less likely to appeal to moral notions in their decisions. What counts as fair is what the statute or precedent says is fair.

There are a number of possible responses to this objection. First, I must concede that it is partially true. I think there is less likelihood now that judges will decide legal cases on moral grounds. That does not mean that the issue of fairness-even for the most conservative judges has gone away. Let's take a look at some examples.

On October 18, The New York Times, reported that Supreme Court Justice Samuel Alito was troubled by a case where following the law would clearly be unfair.[18] Mr Cory R Maples was on death row in Alabama. The deadline for an appeal had past. The reason no appeal had been made was the result of a series of errors. The article describes those errors as follows:

> A court clerk in Alabama sent two copies of a crucial court order in his case to his lawyer in New York who had left the firm. The firm's mail room returned the envelopes unopened and marked "return to sender." The court clerk did nothing more, and the deadline for an appeal passed.

Now Justice Alito faced this case at least twice before and the tenor of the article is that Alito is trying to come up with principles that will enable him to balance his concern with justice with his concern that the courts would be overwhelmed with cases where error by courts or lawyers were alleged. In one 7–2 case involving Jose Padilla, a Honduran who had lived in the United States for 40 years, the court did decide on the basis of justice. Padilla was arrested for possession of more than a thousand pounds of marijuana. He lawyer told him that if he pleaded guilty and served his sentence, he would not be deported. That was false. In this case, the court found for Mr. Padilla.

[18] Liptak, Adam. (2011). "When Fairness and the Law Collide, One Jurist is Troubled," *The New York Times National*, October 18, A 18.

I am not claiming that Justice Alito, a conservative justice, will always try to correct injustices. But I find it interesting that he is trying to come up with principles that will guide justices when they want to see justice done. Then on January 18, 2012, the United States Supreme Court ruled 7–2 in favor of Maples. Justice Alito was included in the majority. In writing for the majority, Justice Ruth Bader Ginsburg wrote, "In these circumstances, no just system would lay the default at Maples's death-cell door."[19]

Since the publication of the original version of this paper, a number of companies have been sued under the Alien Tort Act for violations of human rights. These cases again introduce ethics into the law. In one case, Sosa v. Alvarez-Marchain, the United States had arranged for the abduction of a Mexican national suspected of murdering a Drug Enforcement Officer in Mexico. The Supreme Court (2004) determined that the United States government could not be sued for criminal action but it held open the possibility that Alvarez-Marchain could use international norms of ethics for a civil suit. That still leaves open questions regarding the legal liability of corporations. The Supreme Court had agreed to hear Kiobel v Royal Dutch Petroleum during the 2011–2012 term as to whether corporations could be sued under the act for violations of human rights. Individuals had successfully sued corporations but the United States Court of Appeals for the Second Circuit in New York had ruled that corporations could not be sued under the Act. A similar decision was reached by the United States Court of Appeals for the District of Columbia circuit. On March 5, 2012 the Court ruled for reargument. Reargument is set for October 1, 2012. Should the Supreme Court reverse these decisions, American corporations would be subject in certain circumstances to be sued for violations of human rights. If so courts will be appealing to international moral norms as a basis for their decisions.[20] Here may be another way for what is ethical to determine the legal.

Conclusion

Managers need to manage ethics for prudential reasons as well as moral ones. In this chapter, I have looked at the principle, "If it's legal, it's moral." By looking at statutes, court cases, and reports of the deliberations of justices, I have shown that managers cannot adopt the, "If it's legal, it's moral" principle. Often it is the moral that determines what is legal-the very opposite of the proposed principle.

For managers who are convinced by my arguments, I have tried to provide some practical guidance. I have argued that when the law takes morality into account, the special concern seems to be with fairness in commercial activity. Upon further analysis I have argued that there seem to be three features of unfairness that attract the attention of the law-coercion, gross inequality of bargaining power, and information asymmetry.

[19] Quoted in Liptak, Adam. (2012). "Justices Rule for Inmate After Mailroom Mix-Up," *The New York Times*, January 19, A 11.

[20] http://www.jdsupra.com/legalnews/the-alien-tort-statute-at-a-crossroads-27623/, Downloaded September 29, 2012.

Some managers may argue that this advice is not sufficient. What counts as coercion, gross inequality of bargaining power, or abuse of information asymmetry? I admit that these are legitimate questions. To some extent managers could look to societal norms to answer these questions. In the earlier version of this paper, I accepted a definition of coercion by Gregory Dees.[21] However, I also argued that if Dees' definition were accepted the ethical responsibilities of business would expand greatly. Philosophical discussions of the definition of coercion have grown more complex over the past 25 years and this is not the place to argue for one of the competing definitions in the philosophical literature.

As a practical matter, what my analysis shows is that the manager cannot simply send ethical issues to the legal department. If a manager can be held legally responsible for unethical decisions, then the manager needs to approach issues where unfairness especially in terms of coercion, gross inequality of bargaining power , or information asymmetry are present with caution. Consider again GE's take it or leave it offer. Since GE might have thought that the offer was a fair one in substance, they neglected to consider the fairness of the process of collective bargaining. What this chapter does is argue that managers cannot avoid the hard task of ethical analysis. Pushing ethical questions to the legal department is a bad business strategy. My new proposed principle is "If it's unethical, it may not be legal." Thus the manager must try to figure out what is unethical.

[21] Dees, Gregory. (1986). "The Ethics of Greenmail" in James E Post (ed.), *Research in Corporate Social Performance and Policy,* Vol. 8. Greenwich: JAI Press, Inc., 165.