

Unethical Compliance and the Non Sequitur of Academic Business Ethics

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I. Introduction

We live in a post-Enron world. The corporate scandals that rocked American business over the past four years have brought renewed attention to the importance of ingraining the principles of business ethics into the corporate environment.

There. I love beginning an article with a vacuous bromide. And in doing so, I act in keeping with the vast majority of post-Enron business ethics articles which invariably begin with such a proclamation and then advance various reforms to corporate governance intended to prevent the next Enron. Thus, we hear proposals to encourage whistle blowing by promising confidentiality and setting up ombudsmen or ethics officers to whom employees can anonymously report their suspicions; to institute programs of organizational justice designed to raise the level of trust between employees and management; to provide junior employees led into wrongdoing by corrupt senior corporate officials with ethical mentors who can help them get back on the right path, and to undertake rigorous programs of ethical self-assessment to detect and rectify any potential unethical or illegal conduct within the firm. Adherence to such reforms is being urged upon incipient MBAs in business schools throughout the nation as effective means for keeping their future firms free of legal entanglements. The problem is that if our novitiate MBAs take these calls for reform to heart and actually put them into effect, they will not only increase the

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chances of their firms being indicted, which in itself can be a corporate death sentence, but also greatly magnify the financial penalty the firm may incur should it be convicted of a criminal offense. Rather than prevent one's firm from becoming the next Enron, these proposals make it more likely that it will become the next Arthur Andersen.

In this article, I do not intend to evaluate the ethical quality of the proposed reforms. In the abstract, they may indeed represent correct ethical behavior. However, because they take no account of the incentives built into federal white collar criminal law, they are not relevant to the real world environment in which contemporary businesses must function. Rather, in what follows, I will describe these incentives and show how they frequently place conscientious business people in the position of having to choose between protecting their firm and meeting their ethical obligations. In such cases, business people face poignantly difficult ethical decisions; decisions for which they receive no useful guidance from the abstract principles typically discussed by business ethicists. This problem, the problem of unethical compliance, is left entirely unaddressed by contemporary academic business ethics.

II. The Nature of White Collar Crime

To begin with, it is important to appreciate that white collar crime is not crime as that term is traditionally understood. Criminal activity is usually thought to consist in actions that either directly harm or violate the rights of others—e.g., murder, rape, kidnapping, or theft—or that constitute inherently immoral activity—e.g., prostitution or the use of narcotics. White collar criminal law, in contrast, is that portion of federal criminal law designed to police the behavior of business people for honest dealing and compliance with regulatory requirements.

The difference between traditional criminal law and white collar criminal law can be

illustrated by what constitutes fraudulent behavior under each. Under the traditional criminal law, fraud consists in obtaining the property of another on the basis of an intentional misrepresentation of a material fact upon which the victim relied. This requires proof that 1) the defendant obtained the property of another, 2) the defendant knowingly made a false representation of fact, 3) the fact was material, and 4) the victim relied on the false representation in transferring the property. In contrast, under the federal fraud statutes, which are the paradigmatic white collar offenses, fraud consists in any scheme or artifice to defraud. This requires proof only of a “deliberate plan of action or course of conduct by which someone intends to deceive or to cheat another.”¹ There need be no proof that there was a misrepresentation of fact since “it is just as unlawful to speak ‘half truths’ or to omit to state facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;”² that the victim suffered any loss or actually relied on any representation of the defendant since the scheme alone constitutes the offense; or even that the scheme was designed to obtain property since the offense may consist in the attempt to “deprive another of the intangible right of honest services.”³ Thus, the federal government has criminalized virtually any kind of dishonest or deceptive behavior, even when no other party has suffered any harm.

The federal fraud statutes are typical of the white collar criminal law in that they empower the federal government to police dishonest conduct that is otherwise beyond the scope of the

¹KEVIN F. O’MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 47.13 (5th ed. 2000).

²United States v. Townley, 665 F.2d 579, 585 (1982).

³18 U.S.C. §1346.

traditional criminal law. Other offenses that share this feature and thus fall within the ambit of white collar crime include RICO violations, money laundering, making false statements to federal investigators, obstruction of justice, and the violation of federal regulations.

III. The Impossibility of Liberal Enforcement

Anglo-American criminal law evolved over the course of centuries in the crucible of the conflict between Parliament and the Crown for power and the struggle to preserve the “rights of Englishmen” against the prerogatives of the King. This is not the place to retell this tale other than to observe that by the beginning of the twentieth century, this evolutionary process had produced a body of criminal law that contained many civil libertarian features. Prominent among these were the *mens rea* requirement that limited punishment to those who act intentionally or recklessly, the ban on vicarious criminal liability that prohibits punishing one person for the actions of others, the presumption of innocence that requires the state to bear the burden of introducing evidence sufficient to establish every element of a criminal offense, the standard of proof beyond reasonable doubt that sets the bar the state must surmount to establish these elements exceedingly high, the principle of legality that requires a criminal offense to be sufficiently clearly defined to give citizens adequate notice of what conduct is prohibited and to establish clear guidelines governing law enforcement, the attorney-client privilege that creates a zone of privacy within which citizens may communicate with legal counsel without thereby manufacturing evidence against themselves, and the Fifth Amendment right not to be compelled to be a witness against oneself that prohibits the state “from easing its burden of proof by simply calling the defendant as its witness and forcing him to make the prosecution’s case.”⁴

⁴JEROLD H. ISRAEL & WAYNE R. LAFAVE, CRIMINAL PROCEDURE 26 (1985).

These seven features, which reflect the inherent liberalism of American criminal law at the dawn of the twentieth century, render the white collar criminal law virtually unenforceable. Consider the effect of the presumption of innocence and the requirement of proof beyond reasonable doubt. White collar crime typically consists in deceptive behavior that is intentionally designed to be indistinguishable from non-criminal activity. Unlike traditional crime, there is no *corpus delicti* or smoking gun to introduce into evidence. As a result, considerable investigation may be required merely to establish that a crime has been committed, and even then, a great deal of legal and/or accounting sophistication may be required to unravel the deception. Under these circumstances, compliance with procedural rules that require “the government not only to establish its case, but to do so by its own resources”⁵ can be extremely expensive. The assets that the government must expend to satisfy such liberal safeguards in each case it brings greatly reduces the total number of cases it can afford to bring, significantly reducing the deterrent value of white collar criminal statutes.

Further, in the absence of vicarious liability, the *mens rea* requirement means that to obtain a conviction, the government must show that a defendant intentionally or recklessly engaged in or authorized dishonest business practices or the violation of regulations. But in the corporate context in which decision-making responsibility is diffused, this can be extraordinarily difficult, if not impossible, to do. Because “[c]orporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components,”⁶ they frequently take actions that were never explicitly known to or authorized by any identifiable

⁵Id.

⁶United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

individual or individuals within the firm. This renders the *mens rea* requirement a significant impediment to conviction in white collar criminal cases.

In addition, the principle of legality requires that criminal offenses be defined clearly enough to give citizens adequate warning of what conduct is prohibited and, thus, that criminal statutes be narrowly construed. But the more definite the law is as to what is prohibited, the more guidance it provides to what former Chief Justice Burger referred to as “the ever-inventive American ‘con artist’” to come up with “new varieties of fraud” that are not technically illegal.⁷ This narrow construction of criminal statutes, in effect, creates “loopholes” in the fabric of the white collar criminal law through which con artists can squeeze dishonest practices that are beyond the reach of the government.

Finally, the attorney-client privilege and the right against self-incrimination create serious obstacles to the successful prosecution of white collar criminal offenses. Because such offenses consist primarily in crimes of deception, the evidence upon which conviction for a white collar offense must rest will be almost entirely documentary in nature and will consist predominantly in the business records of the firm for which the defendant works. But to the extent that these records are in the personal possession of the defendant, contain communications between the defendant or other members of the firm and corporate counsel, or are the work product of corporate counsel, the right against self-incrimination and the attorney-client privilege render them unavailable to the government. Thus, to a much greater extent than in traditional criminal activity, the evidence necessary for a conviction for a white collar offense will be in the hands of those who cannot be compelled to produce it.

⁷United States v. Maze, 414 U.S. 395, 407 (1974) (Burger, C.J. dissenting).

IV. Illiberal Enforcement

The difficulty inherent in using the criminal sanction to enforce honest dealing in business confronted the federal government with a choice: abandon the effort or discard the liberal features of the criminal justice system. Since the former option was unpalatable, the government naturally chose the latter. The vehicles it employed to accomplish this end were the concept of corporate criminal responsibility, the legislative creation of new criminal offenses, and the United States Sentencing Commission's sentencing guidelines for organizations.

A. Corporate Criminal Responsibility

Corporations, like all businesses, are abstract entities. They have no minds in which to form intentions, no hearts in which to conceive a guilty will, and no bodies that can be imprisoned or corporeally punished in response to bad behavior. How, then, can they be subject to criminal punishment in contradistinction to their individual members?

The federal courts answered this question by discarding the ban on vicarious criminal liability and eviscerating the *mens rea* requirement. In *New York Central & Hudson River Railroad Co. v. United States*,⁸ the Supreme Court held that corporations are criminally liable for the actions of any of its employees taken within the scope of their employment. Indeed, as subsequent decisions made clear, this is the case even when the employees act in contravention of general corporate policy and express instructions to the employee himself or herself.⁹ Furthermore, because corporations are charged with the collective knowledge of all of its employees, they can be guilty of an offense even though no individual member of the firm has

⁸212 U.S. 481 (1909).

⁹*United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1007 (9th Cir. 1972).

committed any crime. Thus, whether or not “employees administering one component of an operation know the specific activities of employees administering another aspect of the operation . . . ‘the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their [actions.]’”¹⁰

This conception of corporate criminal responsibility essentially forces corporations to act as deputy law enforcement agencies since the only way for them to avoid criminal liability is to monitor the behavior of its employees to ensure not only that none of them violates the law individually, but also that no laws are unintentionally violated as a result of employees’ ill-informed or poorly-coordinated actions. It also reverses the presumption of innocence by conclusively presuming the firm to be guilty not only of any crime committed by its individual employees in the scope of their employment, but also of any crime that could have been committed if the firm had assembled the requisite collective knowledge, whether it did so or not. In addition, it eliminates the burden of establishing corporate *mens rea* in the form of a collective, corporate intention to engage in criminal activity by imputing the intention of any of its agents to the corporation even when the agent is acting contrary to corporate policy or instructions, and by converting the unintentional and uncoordinated actions of the firm’s individual employees into the intentional action of the firm. Finally, because businesses have no Fifth Amendment right against self-incrimination,¹¹ corporate criminal responsibility opens the door to evidence that would otherwise be Constitutionally unavailable to the government.

B. New Offenses

¹⁰United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

¹¹Braswell v. United States, 487 U.S. 99, 105 (1988).

To escape the confines of the principle of legality, Congress created broad, vaguely defined new criminal offenses, typified by the federal fraud statutes previously discussed. Another example of this type of legislation is the Racketeer Influenced and Corrupt Organizations Act (RICO), which made it a federal offense to agree to or to engage in any group activity designed to commit more than one crime in a period of ten years.¹² To escape the *mens rea* requirement, Congress created a myriad of new regulatory “public welfare offenses” that either required no culpability at all or that could be committed through mere inadvertence.¹³ And to escape the restrictions of the presumption of innocence and the reasonable doubt standard, Congress created new “secondary” offenses, such as money laundering,¹⁴ false statements,¹⁵ and obstruction of justice,¹⁶ that consist in actions that are innocent¹⁶ in themselves but make it more difficult for the government to prosecute other substantive offenses. Because such offenses do not require proof that the defendant is guilty of any underlying substantive criminal offense, they give the government, in the words of two federal prosecutors, “the ability to prosecute a wrongdoer when there is either insufficient evidence of the underlying criminal conduct or insufficient evidence connecting the wrongdoer to the conduct.”¹⁷

¹²See 18 U.S.C. §§ 1961-63.

¹³See *Morissette v. United States*, 342 U.S. 246, 255 (1952); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999).

¹⁴See 18 U.S.C. § 1956, 1957.

¹⁵See 18 U.S.C. § 1001.

¹⁶See 18 U.S.C. §§ 1503, 1505, 1512, 1519, and 1520.

¹⁷B. FREDERICK WILLIAMS, JR. & FRANK D. WHITNEY, *FEDERAL MONEY LAUNDERING: CRIMES AND FORFEITURES* 14-16 (1999).

C. The Organizational Sentencing Guidelines

In 1991, Chapter 8 of the United States Sentencing Commission’s Guidelines Manual, the Organizational Sentencing Guidelines, went into effect. These Guidelines determine the fine a corporation must pay upon being convicted of a federal crime. This fine is determined in part by a corporation’s “culpability score,” which can reduce its fine by up to 95% or increase it by up to 400%. Corporations can attain the lowest possible culpability score by having an effective compliance program and by cooperating with the government.¹⁸ To have an effective compliance program, a corporation must “monitor and audit” the behavior of its employees to detect criminal conduct and impose “disciplinary measures,” (typically firing) on those who engage in it.¹⁹ To cooperate with the government, a corporation must report any suspected wrongdoing to the government; disclose to the government “all pertinent information known by the organization” about such wrongdoing, whether or not protected by attorney-client privilege or other promise of confidentiality; refrain from advancing legal fees to or entering into joint defense agreements with its employees; and accept responsibility for the wrongdoing, which means being willing to plead guilty because the “adjustment is not intended to apply to an organization that puts the government to its burden of proof at trial.”²⁰

The Organizational Sentencing Guidelines represent an extraordinarily effective device for undermining all of the civil libertarian protections of the traditional criminal law. Because the

¹⁸See UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, [hereinafter U.S.S.G.] §§8C2.4-2.6 (1992).

¹⁹See U.S.S.G. § 8B2.1(b)(6).

²⁰See U.S.S.G. §8C2.5(g)(1); and U.S.S.G. §8C2.5, comments 12 & 13.

increase in fine that a corporation can receive by going to trial and losing rather than pleading guilty and cooperating is so massive, it is usually economically irrational for a corporation to maintain its innocence. This presents corporations with an almost irresistible incentive to perform a thorough criminal investigation of its employees, turn the results of this investigation over to the government, and do nothing to help its employees defend themselves against criminal charges. Thus, the Guidelines not only render the corporation's presumption of innocence meaningless, but, by turning corporations into an arm of the prosecution of its employees, they bring enormous pressure on individual defendants to plead guilty as well. And, of course, once the government is able to generate sufficient pressure to coerce guilty pleas, it need not concern itself with impedimenta such as the Fifth Amendment and attorney-client privileges, the need for proof beyond reasonable doubt, and the constraints of the principle of legality.

V. Five Illustrative Ethical Dilemmas

All contemporary theoretical approaches to business ethics converge in recognizing that business people retain all the ordinary ethical obligations that they possess as human beings and that they must fulfill their corporate obligations within the law. Thus, to the extent the law requires business people to act in ways that would violate either their personal ethical obligations or those additional obligations that arise from their status as corporate officers, a business person's legal and ethical obligations are in conflict. The question then becomes which obligation should predominate. Currently, this question arises in at least five areas of managerial decision-making—those concerning the organization's efforts to realize organizational justice, properly respect employees' privacy, maintain needed confidentiality, engender trust within the organization, and engage in ethical self-assessment.

A. Organizational Justice

Justice is not merely a legal virtue, but is a general virtue that requires the fair treatment of individuals in all interpersonal relationships. Because corporations consist in networks of interpersonal relationships, questions of justice necessarily arise. Although it may not be entirely clear what organizational justice consists in, it is reasonable to assume that it requires adherence to at least three principles—reciprocity, the presumption of innocence, and due process.

Reciprocity refers to the obligation to honor one's commitment to a mutually beneficial relationship when the other party has met his or her commitment to you. Reciprocity requires a corporation that expects its employees to exhibit loyalty to it to exhibit a similar loyalty to employees who do so. The presumption of innocence, in the business context, holds that because of employees' limited resources and dependence on the employer, a corporation should not assume that its employees have behaved improperly in the absence of adequate evidence. Finally, due process requires a corporation to judge its employees by fair processes that include an opportunity to speak in one's own defense.

If organizational justice truly demands that businesses act in accordance with the principles of reciprocity, the presumption of innocence, and due process, then a business manager's legal and ethical obligations are in conflict. The concept of corporate criminal responsibility and the requirements of the Organizational Sentencing Guidelines place corporations and their employees in an adversarial relationship. Because corporations are strictly liable for the actions of their employees, the only way for them to reduce their exposure to financial penalties is to cooperate with government investigations of their employees. Under the Guidelines, cooperation requires corporations to essentially become part of the prosecutorial team. But in all cases in which a

corporation either believes its employees to be innocent or does not know whether its employees are innocent or guilty, such cooperation requires it to violate all three of the principles of organizational justice. The corporation must breach reciprocity by eschewing aid to a potentially loyal employee, act in contravention of the presumption of innocence by firing and helping the government convict its employees without adequate evidence of wrongdoing, and violate due process by either denying the employee a fair hearing or acting in derogation of what such a hearing would establish. Yet, because the Department of Justice employs the same definition of cooperation as the Guidelines in deciding whether to indict a corporation,²¹ failure to act in this way exposes the corporation to a greatly increased risk of criminal indictment and to potentially massive financial penalties if convicted.

B. Privacy

Although employees have only a limited right to privacy in the workplace, they do not have none. Generally speaking, employers are entitled to the “job-related” information about their employees necessary to ensure that employees can adequately perform their jobs, and to monitor their employees’ behavior to the extent necessary to ensure that they do so perform. But they are not ethically entitled to pry into employees’ personal lives or to monitor employees’ behavior for other purposes, even though acquiring such information or engaging in such action may improve overall corporate performance. The law of white collar crime, however, virtually requires corporations to exceed these ethical constraints.

Because the standard for corporate criminal responsibility makes corporations strictly

²¹See Memorandum from Deputy Attorney General Larry Thompson, U.S. Dep’t of Justice, to Heads of Department Components, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter the Thompson Memorandum].

liable for the offenses of their employees, corporations can avoid criminal liability only by preventing their employees from violating the law. This pressure is reinforced by the Guidelines, which reduce a corporation's culpability score if it maintains an effective compliance program. But a business can prevent its employees from violating the law only by gathering sufficient information about them to allow it to determine who is likely to violate the law and by intensely monitoring the actions its employees take within the scope of their employment. Indeed, this is precisely what the Guidelines require because a compliance program is not considered effective unless the corporation "take[s] reasonable steps to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct."²² Therefore, the law creates incentives for corporations to violate their employees' privacy in ways that conflict with the organizations' ethical obligations not to do so.

C. Confidentiality

When one party reveals information to a second only because the second promises to keep the information confidential, the promise ethically binds the second party to do so. This is equally true when the second party is a corporation that is promising confidentiality to an employee or other stakeholder. To obtain information under a promise of confidentiality and then disclose it under circumstances not agreed to by the confiding party is essentially to obtain the information by means of a false promise on which the confiding party relied in revealing the information; conduct that is ethically indistinguishable from fraud.

Corporations usually promise confidentiality in two ways. First, as a means of generating sensitive information, corporations create confidential lines of communication that circumvent the

²²U.S.S.G. § 8B2.1(b)(5)(A).

ordinary corporate chain of command, such as employee hotlines or organizational ombudsmen. Second, in order to accumulate the information necessary both to defend the corporation against civil lawsuits and criminal charges and to ensure that the corporation is complying with the law, corporations encourage their employees to provide information to corporate counsel under the protection of the attorney-client privilege.

The incentives created by the law of white collar crime are at odds with honoring these promises. Corporations' strict liability for the offenses of their employees and the requirements of the Organizational Sentencing Guidelines imply that corporations can avoid indictment or reduce their exposure to financial penalties only by cooperating with government investigations of their employees. But cooperation requires "the disclosure of all pertinent information known by the organization," which in turn, may require the waiver of the attorney-client privilege.²³ Refusing to disclose on the ground that doing so would violate a promise of confidentiality would subject a corporation to a potentially massive increase in liability.

This places corporate managers in an extremely difficult ethical situation. To generate the information necessary to maintain an ethical workplace and ensure that the corporation's employees are complying with the law, management must promise its employees confidentiality. But to avoid subjecting the corporation to indictment and large monetary fines, management must breach that promise. Furthermore, management cannot avoid the dilemma by making only a conditional promise to keep information confidential unless disclosure is necessary for the corporation to cooperate with the government. Such a promise would be patently self-defeating since it is tantamount to saying that the corporation will keep the information confidential unless it

²³See U.S.S.G. § 8C2.5, comment 12.

is in the corporation's interest to disclose it, which is the same as saying it will not keep the information confidential at all. In addition, even a corporation that decided not to promise any confidentiality at all could not escape from the dilemma. By refusing, on ethical grounds, to make a promise that it knows it will have to break, such a corporation could decide to conduct its business without the information that such a promise would generate. But in doing so, it would be willingly forgoing one of the most effective means of detecting violations of law by its employees—a decision which, under the Guidelines, would cost the corporation the reduction in culpability score for having an effective compliance program.

D. Trust

In recent years, business ethicists have taken to warning business people of the importance of creating a climate of trust within a corporation. This would be good advice if the incentives created by the law of white collar crime were not completely antithetical to the development of such a climate. The standard for corporate criminal responsibility makes the corporation strictly liable for the criminal offenses of its employees. The advent of broad new substantive, regulatory, and secondary offenses exponentially increases the chances that employees will either intentionally, negligently, or, in the case of public welfare offenses, innocently violate the law. The Organizational Sentencing Guidelines punish corporations that fail to aid in the prosecution of any of its employees whom the government suspects of committing an offense. These are hardly conditions that make it comfortable for corporations to repose significant amounts of trust in their employees or for the employees to feel secure in relying on the corporation's commitment to protect their rights or interests. It is very difficult for a corporation to generate trust in its employees while violating its promises of confidentiality to them and aiding in their prosecution.

E. Ethical Self-Assessment

However one may describe managers' normative obligations, managers are obviously ethically bound to make good faith efforts to honor them. This requires, at a minimum, that they know what is going on within their corporation. Because many features of a corporation's structure can impede the flow of information up the chain of command, e.g., the so-called "organizational blocks" and bureaucratic "moral mazes,"²⁴ managers cannot meet their ethical obligations merely by reviewing the information that reaches their desks. They must actively seek out the information necessary to form an accurate picture of what is taking place within their corporation. Thus, corporations have a positive duty to engage in ethical and legal self-assessment.

Once again, however, the law of white collar crime makes engaging in such self-assessment a dangerous and potentially costly activity. Under the Guidelines, any self-assessment that produces evidence suggestive of criminal activity would trigger a duty to immediately report the potential violation to the government and fully cooperate in any resulting investigation. But because under the standards of corporate criminal responsibility, organizations are strictly liable for the offenses of their employees, and because the reward for cooperation is not immunity from prosecution, but reduced penalties upon conviction, this places corporations in the position of having to aid in their own prosecution. There is considerably less incentive to undertake voluntary self-assessment when by doing so a corporation may be developing the evidence that

²⁴See James A. Waters, *Catch 20.5: Corporate Morality as an Organizational Phenomenon*, in CONTEMPORARY MORAL CONTROVERSIES IN BUSINESS 160 (A. Pablo Iannone ed., 1989); Robert Jackall, *Moral Mazes: Bureaucracy and Managerial Work*, HARV. BUS. REV. Sept.-Oct. 1983, at 118-130.

will lead to its conviction of a criminal offense. Furthermore, because cooperation requires waiver of the attorney-client privilege, any information developed during the self-assessment will be discoverable by private parties as well.²⁵ Therefore, undertaking a self-assessment is practically inviting civil litigation. Indeed, a survey of major U.S. corporations undertaken by the Center for Effective Organizations at the University of Southern California suggested that organizational self-assessments are underutilized because corporate directors “are worried that any record of self-criticism might come back to haunt them in a shareholder suit or a government investigation” and “are fearful that [damaging] statements will show up in court proceedings (or be leaked to the press by plaintiffs’ attorneys).”²⁶

VI. Business Ethics in the Real World

If the law demands cooperation, does that make it ethical for a corporation to help the government prosecute those who are or might be innocent or to deny organizational due process to its employees? On the other hand, is it ethical to put the stockholder’s money and the well-being of the corporation’s other stakeholders at risk merely to give a fair hearing to those who may have broken the law and put the corporation in jeopardy?

Do legal obligations to act as deputy law enforcement agents trump corporations’ ethical obligations to respect their employees privacy? If not, how much risk of criminal liability or increased criminal penalties are managers required to run?

If a corporation promises to keep communications made through the employee hotline or

²⁵Courts do not recognize the doctrine of selective waiver. Waiving the privilege for one purpose, i.e., cooperation, waives it for all purposes. *See United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 685 (1st Cir. 1997).

²⁶David A. Nadler, *Don’t Ask, Don’t Tell*, WALL ST. J., Nov. 25, 2003 at B2.

under the protection of the attorney-client privilege confidential, is it ethical to breach that promise to protect the corporation as a collective entity? Can corporate managers afford to honestly tell employees that the corporation will disclose any incriminating communications made to the “confidential” employee hotline or to corporate counsel whenever doing so is necessary to gain the benefits of cooperation under the Guidelines? If they do, would any employee involved in an offense be willing to come forward? If not, how deceptive may managers ethically be on this point?

How much of their employees’ trust should corporations be willing to sacrifice to protect themselves from potential criminal liability? Is it ethical to expose the corporation to the risk of indictment and enhanced criminal penalties in order to protect the interests of their individual employees sufficiently to generate trust?

Under what conditions should a corporation undertake an ethical/legal self-assessment? Precisely what obligation does a corporation have to undertake such a self-assessment when the discovery of any wrongdoing must be made public and can subject the corporation to criminal penalties and civil liability?

These are some of the most significant ethical questions corporate officers face in the real world of business today. Currently, conscientious business people are continually called upon to balance their obligations to act for the good of the corporation as a collective entity against their conflicting obligations to act in good faith toward one or more of the corporation’s stakeholders. In the contemporary legal environment, this means choosing between ethical non-compliance and unethical compliance with the law. Faced with this choice, the nostrums of academic business ethics such as the stakeholder or integrative social contract theories, which do not even recognize

the impact of legal incentives, are simply beside the point. To these important questions, the response of the contemporary academic business ethics community is, for all intents and purposes, a non sequitur.