

CHEATING

**THE ORIGIN, NATURE, IMPORTANCE
AND IMPROVEMENT
OF BUSINESS AND OTHER ETHICS**

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paragraphs above show how varied and nuanced the answer can be.

10. CAN ETHICS BE ENFORCED? RELATION BETWEEN ETHICS (MORALITY), LAW AND JUSTICE

Minimum ethics tend to be enforced by law where the law is effectively enforced. Some individuals are selfish, envious, greedy, avaricious, violent and not always intelligent, so civilized societies need minimum rules of conduct enforced in practice by some authority. This authority is usually the State, the usual provider of justice through application of legal procedures. Some state power is practically non-existent like in Somali where powerful leaders enforce their rules more effectively.

Justice can be harsh and severe like in the Old Testament. Or it can be more merciful and human. In either case it is closely related to ethics. This is obvious after one reads the leading books on Justice: “Justice in Robes” by Ronald Dworkin (2006), Justice What’s the Right Thing to Do? Mitchel J. Sandel (2009) and “The Idea of Justice by Amartya Sen (2009). Ethics and Justice are adjacent concepts. Justice perhaps has a more public side than ethics and often implies enforcement in court. Aristotle wrote about justice and ethics. His justice is closely tied to citizenship and the good life¹⁹². A company's reputation depends in part upon how it applies social justice in dealing with employees and other third parties.

A leading scholar has written that the concept of justice arose in ancient Greece¹⁹³ when there were conflicts and disputes between the noblemen and the common people when the latter's economic position improved.

¹⁹² Sandel, Mitchel J. 2006, Justice.

¹⁹³ Jaeger, Werner. 1979. *Paideia: The Ideal of Greek Culture*. Oxford University Press, pp. 102-104.

In reaching justice, developed societies have usually relied on written rules. In civil law countries, the law is more often found in written codes. In common law countries, written court decisions have played a more significant role. Written rules are better than unwritten rules because they serve as a better guide for the judge or the authority making the decision and make arbitrary decisions more difficult to render. A written law tends to apply more naturally to all humans in society, wealthy and poor. Written rules also help the parties in society to know in advance what is lawful conduct. They can therefore better avoid unlawful conduct. But it should be noted that rigid application of laws, especially if out-dated, can lead to inequitable results. There must be some flexibility in interpretation of law to fit new situations.

Justice can be defined as equality before the law. This means an unbiased judge and a procedure designed to evoke the truth. Each party should be given an equal chance to prove its case is just.

Alternative dispute resolution often provides a more equitable way to find a solution to disputes by taking each parties interests and special situation more into account than is possible in a court proceeding where a judgment is rendered by a judge.

Leibnitz's idea of universal justice was charity or disinterested love, which he defined as finding pleasure in the happiness of others¹⁹⁴.

***Definition of Law – Complexity Herbert A. Simon,
Melanie Mitchell***

For the author the definition of law is as an artificial complex adoptive system converting chaos to order based in part upon the research and writing of Herbert A. Simon¹⁹⁵,

¹⁹⁴ Sullerat, Vincent. Jan. 2003. *Réflexions sur l'éthique*. Magazine Littéraire, n° 416, pp. 56-57.

¹⁹⁵ Simon, Herbert A., 1994; *The Science of the Artificial*. MIT Press, Cambridge MA.

probably the most brilliant political scientist of the last century, also proficient in mathematics, artificial intelligence, sociology, psychology and economics.

He used the word "artificial" as meaning not found in nature. Citing the dictionary definition he used "as produced by art rather than by nature". Artificial systems are designed by man. He also wrote that an artificial system is "inextricably interwoven with complexity (page XI in the Preface of the book cited).

Complexity, although never really well defined, generally has several characteristics according to Melanie Mitchell of the Santa Fe Institute. The system is dynamic, it changes over time, it adapts and sometimes has feedback. She also notes that when she refers to complexity, she assumes there is information or data involved and computers.¹⁹⁶

She notes that complexity is best explained by distinguishing it from reductionism. Reductionist thinking is based on the idea that study of each part of a situation will lead to the understanding of the whole. However, this way of thinking does not work when applied to explaining complex systems such as: how swarms of ants accomplish their tasks: brains, immune systems, economics, the World Wide Web (WWW) and stock markets. One cannot explain how the whole system works even though one understands each of its parts.

Many lawyers, judges, legal philosophers and scholars think of law as being a subject partially or wholly separate from ethics but with some relationship to ethics. Those who believe law is separate from ethics, a separate body of knowledge which should not be confused with morality or ethics, are generally described as "positivists" and belong to the positivist school of law. Positivists insist on distinguishing "the law that is from law that ought to be".

¹⁹⁶ Mitchell, Melanie. 2009. *Complexity: A Guided Tour*, Oxford University Press.

If one thinks of the criminal law punishing murder, this law seems to have very high ethical content going far back to one of the Ten Commandments. A law requiring a stamp tax on certain documents or an income tax seems to have less ethical content but other objectives regulating conduct or raising revenue.

The question of the relation of law and ethics if any was analyzed by two remarkable legal scholars. The first was H. L.A. Hart, a professor at Oxford who wrote in a famous article in the Harvard Law Review Vol. 71, number 4, February 1958, page 593, entitled "Positivism and the Separation of law and morals".

Professor Lon L. Fuller discusses Professor Hart article in "Positivism and Fidelity to Law – a reply to Professor Harts" in the Harvard Law Review beginning immediately after Professor Hart's article at page 630. The article "rephrases the question of law and morals in terms of order and good order". The following pages summarize parts of these famous articles.

There is a moral aspect to being faithful to the law because this tends to avoid arbitrary unreasonable personal decisions of a judge who does not follow the law. Consistency in the rules of law is part of law and order which is generally believed to be good for society because lawyers can better predict future decisions of the courts. However, if following precedent is too slavish with the passage of time, this can stray farther away from what appears morally correct, especially if public opinion has changed. In such cases, Courts often ignore precedents or go to great lengths to distinguish the facts from prior precedent to reach a better decision.

Normally law respects a promise to perform a contract and awards damages for a failure to perform. Failure to perform, especially if willful, is generally considered unethical. But sometimes a good businessman is justified in unilaterally terminating a contract if he prefers to pay

damages. Although this appears less unethical than respecting the original contract to the extent damages give the equivalent to what he contracted to receive, the result is less inequitable.

Professor Hart points out in cases where facts differ from the core decisions of settled case law or statutory language, the judge is forced to interpret or legislate but can't merely deduce through reasoning a result consistent with the law as it is. In this case the judge draws on what is socially useful or even fundamentally humanitarian principles or what is moral. So in such case the law that is opens up to be the law that ought to be.

The most extreme situations occurred in Nazi Germany where Nazi laws were evil. A positivist judge held in one case that a court should ignore an evil law, an extremely anti-positivist point of view.

According to Austin, law is the command of the highest legislative power or the sovereign. Gray wrote that law consists in the rules laid down by the judges. Professor Hart wrote that it is "certain fundamental accepted rules specifying the essential lawmaking procedures".

Professor Fuller does not believe that law is really separate to what law ought to be. When he comments on the fundamentally accepted rules mentioned by Professor Hart, these rules derive their efficacy from a general acceptance which in turn rests ultimately on a perception that they are right and necessary. They can hardly be said to be law in the sense of an authoritative pronouncement since their function is to state when a pronouncement is authoritative... Here again we must confess there is something that can be called a "merger" of law and morality and to which the term "intersection" is scarcely appropriate.

The Morality of Law

The Morality of Law written by law professor Lon L. Fuller in 1946 and revised in 1949 follows the two

famous articles written by him and Professor Hart in 1958¹⁹⁷.

Morality of Duty and Aspiration

The first chapter in this book is entitled the Two Moralities and quotes Webster's New International Dictionary's definition of sin "1. To depart voluntarily from the path of duty prescribed by God to man." His distinction is between the Morality of Duty and Aspiration. For professor Fuller the Morality of Aspiration is exemplified in Greek Philosophy as the "Morality of the Good Life, is excellence of the fullest realization of human powers". For Fuller the morality of aspiration "starts at the top of human achievement, the morality of duty starts at the bottom". He cites the Old Testament and the Ten Commandments – the thou shalt not rules as the morality of duty as the bottom – the minimum.

He then cites Adam Smith as follows:

"In his *Theory of Moral Sentiments*, Adam Smith employs a figure that is useful in drawing a distinction between the two moralities I am here describing.¹⁹⁸ The morality of duty "may be compared to the rules of grammar"; the morality aspiration "to the rules which critics lay down for the attainment of what is sublime and elegant in composition." The rules of grammar prescribe what is requisite to preserve language as an instrument of communication, just as the rules of a morality of duty prescribe what is necessary for social living. Like the principles of a morality of aspiration, the principles of good writing, "are loose, vague, and indeterminate, and present us rather with a general idea of the perfection we ought to aim

¹⁹⁷ Fuller, Lon L. (revised 1949) *The Morality of the Law*, Yale University Press, Book Crafters Inc., Fredericksburg, Virginia

¹⁹⁸ *The Theory of Moral Sentiments*, 1, 422. The distinction taken by Smith is not between a morality of duty and a morality of aspiration, but between justice and "the other virtues." There is plainly, however, a close affinity between the notion of justice and that of moral duty, though the duty of dealing justly with others probably covers a narrower area than that embraced by moral duties generally.

at, than afford us any certain and infallible directions of acquiring it.”

Professor Fuller sets forth in his book a moral scale that he compares to a yard stick. At the bottom it begins with the basic virtues that are necessary for harmonious social living. At the top of his imaginary yardstick, he places the “highest reaches of human aspiration”. Part way up the scale there is a marker which indicates where duties stop and the higher reaches of excellence begin.

There is no agreement where this marker should be placed. He concludes that to know what actions are evil, one needs to know what is very good and every action must be judged in accordance with how well it contributes to a perfect life.

The remainder of this book has chapters with titles such as “The Morality that Makes Law Possible”, “The Concept of Law” and “The Substantive Aims of the Law” which includes a section on “Legality and Justice” in which the author writes: “One deep affinity between legality and justice has often been remarked and is in fact explicitly recognized by Hart himself (p. 202). This lies in a quality shared by both, namely, that they act by known rule. The internal morality of the law demands that there be rules, that they be made known, and that they be observed in practice by those charged with their administration.”

So the fact that good legal rules exist is a contribution of law that provides ethics and morality by the fact that clear rules exist.

Enforcement of Ethics – Public Opinion, Boycotts, Lawsuits, Ethical Funds, Peer Pressure

Public opinion through boycotts or unfavorable publicity in the press can bring pressure on those in violation of ethical principles as well.

Greenpeace, a non-governmental organization, objected when Shell planned to sink its petroleum drilling

platform into the Baltic Sea. Threats of boycotts of Shell products by the public convinced the company to dispose of the old rig in another more expensive way, which it claimed was more harmful to the environment since the rig contained a minimum amount of petroleum products. A dialogue with Greenpeace at an earlier stage might have avoided this environmental conflict.

Investors in ethical funds have begun to apply pressure by withholding investment in companies in businesses considered unethical like tobacco and the arms industry, often through government-owned companies, and by imposing other ethical criteria on investment companies.

Peer pressure by other companies also induces companies to be more ethical even though it is to a certain extent "window-dressing". Competitive pressures motivate companies to keep up with their peers in term of human relations and environmental conduct.

Lawsuits are another effective means of enforcing higher ethical conduct of many multinationals and governments.

One leading oil company which also manufactures chemicals, with activities in exploration and production, refining and marketing, has taken a step to enforce the ethics set forth in its corporate code of conduct by providing for referral of ethical dilemmas to an Ethics Committee and ethics seminars for managers and a review of ethical performance by an unrelated company with United Kingdom accreditation¹⁹⁹.

We have noted above that leaders can by their power enforce ethics and punish violations. Equally or more important is the role of leaders who set an example and encourage and induce ethical conduct in their subordinates.

¹⁹⁹ Total. 2004. *Corporate Social Responsibility Report Showing our Energies, Ethics and Governance*.

Business Risks

Failure to act ethically can increase business risks which sometimes is costly (consider the cost of the recent hacking scandal in the UK in the Murdoch group). Reinforcing punishment in appropriate cases and more investment in effective policing personnel can help.

More Transparency

With the recent growth and efficiency of information and communication technology and effective regulation there is often more transparency, so hiding unethical conduct has become more difficult.

However, experience also indicates where there is intentional and intelligent fraudulent conduct, other executives in the organizations and auditors and regulators rarely find it, so the public is misled by assuming audits catch fraudulent criminals in most cases.

Prosecuting Politicians and Underwriters Packaging Subprime Loans

According to the 6 March 2012 issue of the Financial Times at page 2, the government of Iceland has filed a criminal case against its former prime minister who was in power during the time of the banking boom, when banks in that country expanded ten times before three of the largest banks failed and precipitated the horrible economic crises there. He is charged with gross negligence for lack of oversight of banks.

Bear Stearns now a J.P. Morgan subsidiary has been sued by the New York Attorney General relating to mortgage – backed securities "alleging the bank [...] did not meet underwriting standards promised to investors [...] resulting in 20 bn in losses". (See page 10, Financial Times 6/7 October, 2013).

Intelligence Agencies Enforcement

Another factor cited by foreign competitors of the U.S. businesses is the involvement of U.S. intelligence agencies in helping U.S. business by discovering and publicizing offers of illegal payoffs by their foreign competitors in other countries and learning what contract terms competitors are offering. After the end of the cold war it has been alleged that U.S. intelligence turned their skills to this new activity²⁰⁰. This is an additional weapon in enforcing honesty of other non-U.S. businesses and governments' employees or customers. However, one can also question the ethics of this activity as unfair competition by U.S. companies, to the extent they have better and deeper information from U.S. spies on the terms offered by foreign competitors. U.S. companies which make corrupt payments to foreign governments officials violate U.S. law. This may not be the case with non-U.S. competitors. Other countries' intelligence agencies have also been involved on sales of important companies outside the U.S. Such activity, if both competitors have their intelligence agencies cooperating with them, may level the playing field and tend to prevent contracts negotiated with illegal payments.

11. HOW CAN RESEARCH AND EDUCATION IMPROVE BUSINESS ETHICS?

An initial problem in answering this question is the great variety of different types of people problems and subject matters involved in a study of ethics. However, as there are many different ethical problems, research can help in many different ways. This section will give a number of examples of useful work preparatory to research and examples of useful research. We will then discuss a number of ways in which more research could help.

First of all, since the ethical questions arise in a myriad of different contexts, a technical or professional knowledge

²⁰⁰ See Jean-Jacques Prompsy goes to Jail page 249.