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Defending Liberty Pursuing Justice

Corruption and Whistleblowing in Everyday Life

by Roberta Ann Johnson

[Editor's Note: This issue of Focus *explores ethical problems arising in politics, medical research centers, governments, corporations, and universities. The contributing authors discuss legal and political responses to such ethical controversies in the United States and internationally.]*

August 25, 2006, the day I was invited to write this article, the *San Francisco Chronicle* published two stories about political wrongdoing. One story highlighted the fact that the majority of government awarded contracts for Hurricane Katrina were given without full competitive bidding. The other story described how Kentucky Governor Ernie Fletcher passed over state employees due for promotion and instead gave protected state jobs to political supporters. Curiously, both of these stories have features in common and can inform us about corruption in American everyday life.

Each story reported apparent wrongdoing. They were examples of public agencies or officials that appeared to be breaking the rules. The Federal Emergency Management Agency (FEMA) was supposed to be awarding contracts to businesses that fairly competed for them. The governor of Kentucky, Ernie Fletcher, was supposed to be awarding jobs based on merit, not politics. In addition, in both cases appropriate institutions were officially addressing these suspicious activities. The FEMA exposé of no-bid contracts came from a congressional study of government audits. Governor Fletcher's behavior was examined by a grand jury and then a special judge assigned to the case.

Both stories were prepared by journalists for the Associated Press and were freely reported as national news. In both cases, the questionable actions were made transparent. Information on who got contracts was available to the public. The names of the governor's appointees were known, not hidden. Both stories also had a partisan element to them. The exposé of FEMA practices was prepared by Democrats in the House of Representatives. The Kentucky scandal centered around a Republican governor with a Democratic attorney general, Greg Stumbo, who was not only involved in the settlement but was the likely Democratic candidate who would run against the governor in the next gubernatorial election. In both cases, the wrongdoing was not punished. A national FEMA spokesperson promised that the agency would work to improve its contracting process. In the case of Governor Fletcher, he was pardoned and the charges against him were dismissed; in exchange, he acknowledged inappropriate actions, and four of his appointees had to resign.

These cases, while very different, are useful vehicles for demonstrating many of the important environmental ingredients that assist in addressing problems of corruption in America–a neutral press; transparent process; established institutions to expose, judge, or call into question the actions; and sometimes a partisan ingredient to press the case. Having studied the kind of deep-seeded systemic corruption that plagues many other countries, I've come to marvel at the contribution these contextual ingredients can make to reduce corruption. Let me illustrate this further by comparing the United States with Russia, where corruption is pervasive and part of everyday activities.

Currently in Russia, the press is not always free to investigate and report government corruption; partisan criticism is commonly silenced; official investigations of corruption are consistently thwarted; and there are no neutral institutions that can be depended upon to enforce anticorruption rules. Unable to count on the courts to adjudicate problems, Russian entrepreneurs provide their own protection–in 1997, in the city of Moscow alone, 600 people were killed by contract killers. Important elements needed to address, reduce, and control corruption, like a neutral press and effective law enforcement, are absent in Russia.

Accordingly, it appears that the two random stories about American wrongdoing reported in the *San Francisco Chronicle* can be used to demonstrate some of the

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Ethics and the Law in ...

How Being a Research Subject Differs from Being a Patient–And Why We Should Care

by Jerry Menikoff

The realm of research with human subjects increasingly presents two very different faces to the world. Historically, it often invoked the image of grade B black-and-white horror movies from the 1950s: a Frankenstein-like scientist performing horrifying experiments on someone strapped to a table in the dank and gloomy basement of some castle. Even today, traces of that image linger, especially when relatively healthy research subjects die. For example, in 1999 when 18-year-old Jesse Gelsinger died days after receiving "gene therapy" at the University of Pennsylvania, *U.S. News & World Report* responded with a cover story entitled "Dying for a Cure," illustrated by a skull-and-crossbones.

But there is also a quite different face to such research studies. More and more, in a world where even longstanding "proven" medical treatments are frequently being shown to be not quite what we thought–Vioxx causing heart attacks in tens of thousands, hormone replacement therapy leading to the health problems it was designed to prevent–the option of getting some new treatment in a research study can seem quite reasonable. Millions of people each year enter "clinical trials"–the highly regulated type of research study designed to prove the worth of a new medical treatment (no one knows the exact numbers; curiously enough, only for animals used in research do federal regulations require such record keeping). Increasingly, a doctor is likely to tell a patient that enrolling in a clinical trial is perhaps the best option for treating their disease. And a related part of the picture is the fact that clinical trials have become a very big business. The pharmaceutical and medical device industries generate hundreds of billions of dollars of revenue each year, with the enrollment of a sufficient number of research subjects often described as the rate-limiting step in producing new products.

What are the protections afforded to participants in clinical trials? The starting point is a set of federal regulations that apply to most research conducted in the United States. In simplified terms, these regulations require research studies to be reviewed by committees known as institutional review boards, or IRBs (of which there are thousands). An IRB must determine that there is an appropriate relationship between risks and benefits, and that subjects enroll voluntarily only after being given sufficient information about what would happen to them in the study. Another part of the picture–and still very much a work in progress–is state tort law. The federal regulations have consistently been interpreted as not providing research subjects with any right to sue; for that, they need to bring some type of "research malpractice" lawsuit under tort law.

The goals of research almost always conflict with a patient's best interests.

Given the growing importance of medical research studies, and the increasing attention being paid to them (both in law and ethics), it seems reasonable to ask how good a job our system is doing in protecting the well-being of subjects. In a recent book, I try to tackle that question. To provide a meaningful answer, I begin by exploring how being a research subject differs, ethically and legally, from being a patient. As a general matter, a doctor's primary goal should be to protect the well-being of the patient. This is reflected in ethical pronouncements such as the Hippocratic Oath and core ethical principles such as beneficence and nonmaleficence. Beneficence refers to acting in a way that benefits a patient, while nonmaleficence refers to acting in a way that causes the patient no harm. On the legal side similar duties exist, primarily through the medical malpractice branch of tort law, which generally requires that doctors provide patients with the standard of care, or have a good reason for departing from it. Doctors are also considered to have a fiduciary relationship with patients, which further requires them to protect a patient's best interests in a variety of ways.

When it comes to the world of research–even in clinical trials where a patient with a difficult-to-treat disease is hoping to get the new breakthrough–these concepts are dramatically altered. The concept that the "patient's best interests

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Focus on Law Studies (circulation: 5,504), a twice-annual publication of the American Bar Association Division for Public Education, examines the intersection of law and the liberal arts. Through the articles, dialogues, debates, and book reviews published in *Focus,* scholars and teachers explore a wide variety of policy, empirical, and theoretical subjects pertaining to law, including: campaign finance; international conflicts; civil rights; judicial appointments; gun laws and policies; and families. By examining law from multidisciplinary viewpoints and across the ideological spectrum, *Focus* seeks to engage the community of law and liberal arts faculty in the social sciences, humanities, and related fields who teach about law and the legal system at the undergraduate collegiate level. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the American Bar Association.

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are number 1" no longer holds. Indeed, the primary purpose of a research study is not to provide a mechanism for giving patients access to some new treatment, but rather to answer a research question. To a greater or lesser extent, that goal will almost always conflict with the goal of doing what is in a patient's best interests. There are a variety of accepted and very common research procedures that produce such a conflict. These include assigning treatments to subjects by randomization, following protocols that standardize the treatment given to subjects, and exposing subjects to tests and procedures solely for the purpose of collecting research information. While there are rules about how "bad" for the subjects participation in a study might be, those rules are rather vague and, depending on the details of the study, subjects can be exposed to substantial (and even life-threatening) risks.

Are prospective research subjects being given the information they need to make "enlightened decisions" about whether to participate (to use the language from the Nuremberg Code which, although written by Americans in 1947 in the wake of atrocities in Nazi Germany, has never formally been adopted as part of U.S. law)? A review of what is happening in modern-day research suggests that, in a large percentage of cases, subjects are being denied not just some information but the information they would most find helpful in determining whether participation is in their best interests. And this occurs as a result of widely accepted practices used in obtaining consent, both in the private sector and on the part of the federal government.

One prominent example turns on the common misconception that enrolling in a research study is usually the best way to get access to some new cutting-edge treatment. In fact, for a large percentage of research studies, that is not the case. For example, many experimental cancer treatments merely involve using new combinations of FDA-approved drugs. Federal law gives doctors discretion to use these drugs in an "off-label" way as they deem appropriate. And if a patient has a fatal disease for which existing treatments are ineffective, use of an unproven treatment is likely to be an acceptable deviation from standard care that will not constitute malpractice for tort law purposes.

Imagine that a patient is suffering from an incurable cancer, and they are invited to participate in a research study that randomizes them between standard care (which has poor results) and some new and promising treatment. Should they be told about the possibility of getting the new treatment directly from a doctor, instead of entering the study and only having a 50 percent chance of receiving it? All too often, this option is hidden from patients. Exactly this happened to Daniel Klais, who had head and neck cancer and enrolled in a research study at the Cleveland Clinic where he was randomized to standard care (and died a few years later), even though he told the doctors that he really wanted to get the chemotherapy that was being studied (and which, unbeknownst to him, other doctors in Cleveland were already using on their patients). In *Stewart v. Cleveland Clinic Foundation* (1999), an Ohio appellate court determined that his claim of inadequate informed consent should have gone to trial. The case was quietly settled.

Too often, patients are induced to enroll in research studies.

Another aspect of this issue involves the apparent unwritten agreement among pediatric oncologists to provide new treatments being studied in clinical trials only to children who participate in such trials. In effect, these doctors are saying that they can prioritize the interests of future patients over their obligation to the patients they are currently treating. While it might well be an excellent policy choice to endorse this type of conduct, this deviation from the usual expected behavior of doctors has not yet been approved on either the ethics or legal front (and may constitute a violation of federal antitrust laws). Back in 1974, Charles Fried, former U.S. Solicitor General and current Harvard Law School professor, wrote a now-classic monograph about medical experimentation, observing that a doctor's choice to withhold a possibly beneficial treatment for the purpose of pushing the patient to enroll in a research study should be considered "inhuman."

These are just a few examples. I could easily recount numerous other ways in which patients are induced to enroll in research studies by giving them information that inflates the benefits and minimizes the risks of participation. These commonplace practices are far from subtle. They no doubt represent a sincere belief on the part of some that, if we were truthful with patients, far fewer of them would enroll in clinical trials, and we would all be worse off for our diminished medical knowledge. But encouraging participation in research by a type of deceit is nothing to be proud of. Our legal system is flexible enough to create other far more legitimate ways to assure adequate enrollment in research studies–if nothing else, by openly (and after appropriate legal process) restricting the options of patients so that participation in research is indeed their best choice. For the time being, current consent practices are no doubt a work in progress, one whose end game may well result from the growing attention they are receiving from trial lawyers. ■

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The Global Movement for Government Transparency: The Challenges Ahead

by Alasdair Roberts

The last decade has seen the emergence of a remarkable global movement to improve openness in government. International institutions such as the World Bank and International Monetary Fund, and nongovernmental organizations such as Transparency International, promote openness as a tool for fighting corruption, protecting human rights, and improving economic growth. The enthusiasm for openness is reflected in the dramatic growth of national laws recognizing a right to government information. A decade ago, only two dozen countries had right-to-information (RTI) laws; today, almost 70 have such laws. "Hoy todos estamos en una caja de cristal," says Vicente Fox, former president of Mexico, which adopted an RTI law in 2002: Today, government officials must work in a "glass case."

But is Fox right? There is reason to be cautious in rushing to a judgment about our success in achieving open government. Certainly, there has been widespread acceptance of the *idea* that governments should be more open. However, we must distinguish between the articulation of an idea and the entrenchment of that idea in practice. Two major problems still confront advocates of transparency.

The first of these is ongoing official resistance to transparency. This is a reality that is seldom acknowledged in debates over the adoption of new transparency rules. On the contrary, political leaders often tell us that new laws will bring radical changes in bureaucratic practices and culture. In the United Kingdom, for example, Prime Minister Tony Blair promised that a new Freedom of Information Act would break down the "traditional culture of secrecy" and produce a "fundamental and vital change in the relationship between government and governed."

Unfortunately, there is little evidence to support the claim that RTI laws produce radical changes in bureaucratic culture. Consider the experience of the United States, which adopted its Freedom of Information Act 40 years ago. Would we say, looking at the controversies of the last six years, that the United States has achieved a culture of openness? Some have called the Bush administration the most secretive in decades. It is clear that the idea of transparency is still resisted by elected officials and bureaucrats throughout government.

Advocates of transparency must deal with resistance, privatization, and international bodies.

This is true in other countries, too. In Canada, which adopted its Access to Information Act over 20 years ago, a recent corruption investigation revealed that officials had invented sophisticated procedures for dealing with information requests which they believed would cause political damage to the government. Australia adopted a Freedom of Information Act in 1982. Today, procedures for controlling politically dangerous requests are now well entrenched in the bureaucracy. Even governments with relatively new RTI laws quickly begin to resist demands for information. Ireland, for example, increased fees for making requests under its 1997 law so substantially that the number of requests dropped by 50 percent.

In sum, a few decades of experience does not provide us with evidence that RTI laws produce radical changes in bureaucratic culture. This has an important implication for citizens and nongovernmental organizations interested in improving governmental openness. There is a strong temptation to think that the battle over transparency is won by the passage of an RTI law. Citizens and nongovernmental organizations turn their attention to other issues, and philanthropies direct their money to other projects. But the battle does not end with the adoption of a law. Indeed, it has hardly begun.

In addition to official resistance, advocates of transparency must also deal with a second problem: profound changes in the architecture of government. The first of these changes is the transfer of governmental functions to the private sector. Private enterprise has penetrated areas once regarded as the core of the public sector. One U.S. company, Edison Schools, boasts that it operates so many elementary and secondary schools that it could be counted as one of the nation's largest school systems. The business of providing water and sewer systems is now dominated by three French and German multinational corporations. A British firm operates a network of prisons and detention centers spanning four continents, while an Australian business operates toll highways and bridges around the world. Even the defense sector has been laid open for commerce—in Iraq, contractors engaged in combat; took heavier casualties than some regular combat forces; and played a controversial role in collecting intelligence.

Privatization poses a substantial threat to transparency because contractors and private firms are usually excluded from RTI laws. Only a few countries have attempted to take a broader approach. For example, the new South African RTI law purports to establish a right to information held by *any* person or organization. However, this law is largely untested. We also know that attempts to introduce similar legislation elsewhere would be doomed to failure. The mere contempla-

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tion of such a policy would trigger a well-organized campaign by businesses and other nongovernmental organizations.

A second important transformation in the architecture of governance is the growing influence of international bodies such as the International Monetary Fund, World Bank, and World Trade Organization. The last two decades have witnessed broad and sometimes violent public protests over the role that these organizations have played in the transformation of national economies. Protest leaders complain about the secretive ways in which decisions are made within these organizations, about policy formulated "behind closed doors" in Washington or Geneva.

Ironically, these organizations say that their own objective is to *improve* openness in governance. At its founding, the WTO affirmed that one of its main aims was to achieve "the maximum possible level of transparency" in national trade practices. Similarly, the International Monetary Fund boasts that it has also undergone a "transparency revolution." This "revolution" refers mainly to the extension of the IMF's effort to monitor the behavior of its member states. This was motivated by a widespread perception that the financial crises of the 1990s had been caused by the financial markets' ignorance about the true state of financial sectors in the crisis countries.

The sort of openness promoted by the WTO and IMF has two distinctive features. First, it has a narrow purpose: advancing the project of global economic liberalization. Second, it is principally about the imposition of transparency requirements on member states. There has been no "transparency revolution" in the internal processes of the international financial institutions themselves. It is true that these institutions now publish more information than they did 15 years ago. However, no international institution has adopted a "right to information" policy comparable to national RTI laws, which establish a general right to documents and procedures for dealing with requests for unpublished documents.

A strong argument can be made that these international institutions should be required to live by the same RTI rules that are imposed on national governments. Nevertheless, a campaign for adoption of such rules will again prove difficult for several reasons. One is the fact that there are multiple targets—many institutions, each of which must be encouraged to adopt a similar policy. Most of these institutions also operate on a model of consensual decision making among member states that makes changes in policy very difficult. In addition, there are legitimate concerns among weaker states that disclosure policies might work to the advantage of better-organized business interests from the developed world.

A third transformation in governance is also likely to complicate the campaign for openness. This largely unappreciated change is occurring within the "security sector" of government—the collection of departments and agencies responsible for defense, intelligence, and policing. The security sector is already the one area of government where predispositions toward secrecy are most firmly entrenched.

The struggle for access to information is a political struggle.

These predispositions are now aggravated by the trend toward increased networking of security agencies. The networking of agencies is not, by itself, problematic; on the contrary, better coordination promotes collective security. But much depends on the procedures that are adopted to guide the operation of these new security networks. The rules on the handling of information within these networks are often designed to assure absolute secrecy, with scant regard for the interests of actors outside the network—such as legislators, journalists, or public interest groups—who may want to hold these powerful networks accountable.

A very old security network—the North Atlantic Treaty Organization (NATO)—provides an illustration of the difficulty. In its early years, NATO drafted rules which prevented any NATO country from divulging *any* information—classified or unclassified—which it had received through NATO channels. NATO countries were required to adopt strict laws to maintain the confidentiality of such information. NATO's influence is observable even today. Over the last decade, countries in Central and Eastern Europe have been obliged to adopt stiff laws on state secrecy in order to qualify for NATO membership. Public interest groups have engaged in futile protests about the harshness of these laws.

The NATO model is now being expanded in other areas. For example, the United States imposes strict rules on governments who chose to collaborate on its ballistic missile defense project. Intelligence agencies in many countries also insist on comparable restrictions against disclosure of shared information. These rules have created substantial obstacles for inquiries attempting to probe the complicity of allied governments in the extraordinary rendition of suspected terrorists, or the detention of suspected terrorists in secret prisons since 9/11.

It is hard for transparency advocates to deal with the impact of these agreements for two reasons. First, the agreements are often negotiated privately. Second, it can be extraordinarily difficult to modify rules that have been adopted by many governments. The bureaucratic procedures of several governments are interlocked over time; when one government wishes to change its rules, it must obtain the agreement of other governments. Similarly, new members of the network have little room for negotiating the terms on which they join: any adjustment would require the consent of all existing members of the network. Strict rules about information sharing become more deeply entrenched as security networks expand.

The overall situation confronting advocates of transparency can be summarized in the following terms. On one hand, the idea of transparency is becoming widely accepted. On the other hand, there are substantial forces that will compromise efforts to entrench that norm in everyday practice. Officials will continue to resist transparency requirements, and they may find more sophisticated and less easily detected ways of doing this. The structure of government will also change in ways that compromise openness.

We should not be surprised by this result. The struggle for access to informa-

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Law Displaced

by Craig Ehrlich

I practiced law for 15 years, and my clients were usually glad for my counsel, or at least it seemed that way. Some of my years in practice were spent in East Asia, where lawyers were addressed with an honorific and held in esteem. In 1996, I switched careers and began teaching law at an East Coast business school. I recall my initial surprise at the low regard that my faculty colleagues had for law and lawyers. Something worth paying attention to is happening in our nation's business schools.

One consequence of the recent large-scale accounting frauds in publicly traded companies is an increased emphasis on business ethics in business schools. This is odd because these cases involved violations of law and have been successfully prosecuted in courts of law. For example, the scandals described in the Preliminary Report of the American Bar Association Task Force on Corporate Responsibility, July 16, 2002[1], including Enron, WorldCom, Adelphia Communications, Tyco International, and Global Crossing, involved fraud, insider trading, and breaches of the fiduciary duty of loyalty. Yet, at the same time, business law courses are being cut from the MBA curriculum in business schools around the nation. Many MBA programs neither offer nor require it. Professors of business law now claim an expertise in business ethics in order to remain relevant, and professors of ethics teach subject matter that really presents questions of law. The embryonic business managers trained in such an environment learn that law is something to be concerned about in the margins, if at all. They are inadvertently taught to think that legal issues are really ethical ones. It has become popular to tout one's mission and product as being "ethical."

This has happened partly because of confusion in the use of language. The term "business ethics" is used incorrectly to describe situations that involve legal issues. The legal profession has assisted in causing this confusion. For example, the 2004 version of the Federal Sentencing Guidelines for Organizations directs judges to consider whether the organization has a culture that "encourages ethical conduct" as well as a "commitment to compliance with the law."[2] The obvious purpose of such an ethics program is to detect and deter criminal conduct[3], defined by law, so the word "ethical" appears to be a misnomer. Ethics is the application of the analytical techniques developed by moral philosophers.

The American Law Institute's (ALI) Principles of Corporate Governance also confuses law with ethics. It states that "a manufacturer of consumer goods may owe an ethical obligation to produce safe goods" and that "the content of the fairness obligation owed to groups such as employees may depend in part on past statements and practices that have engendered reasonable reliance or legitimate expectations."[4] The duty of a manufacturer to produce safe products is the concern of products liability law. Past statements or practices that engender reliance or create expectations are the concerns of employment law (the implied in fact contract) and the doctrine of promissory estoppel. The ALI gives no indication how ethical conduct in these cases differs from simple legal compliance.

How does ethical conduct differ from simple legal compliance?

Consider the Hewlett-Packard (H-P) pretexting mess. The company hired investigators who are alleged to have lied in order to gain access to the private personal phone records of board members and journalists. "The lawyer asked by Hewlett-Packard to examine the way it conducts investigations has said that it is ethics, not law, that needs to be paid more heed." This is odd, since fraud and invasion of privacy have long been legal wrongs, and the H-P actions resulted in criminal indictments in California. It would have been enough if H-P had followed the law.[5]

The in-house codes of business ethics, now widely adopted for reasons that may have little to do with business ethics, tend to be simple restatements of the law. The same is true of the ethics cases used in business schools. They usually present obvious legal issues, e.g., employment discrimination, environmental protection, product safety, bribery, fraud (including deceptive advertising and consumer fraud), misappropriation of trade secrets and corporate opportunities, and insider trading. Most of the daily work of in-house corporate ethics officers is to answer questions about conflicts of interest, an aspect of the duty of loyalty and a question of law. This is not surprising. Business law is well developed in the United States.

By using language imprecisely, and calling law ethics, there is a chance that a business ethicist will be asked to answer a question of law and do so incorrectly, or that business managers will not understand they must act in a certain way and that the choice is not wholly theirs to make. The risk of misunderstanding is compounded by the business school curriculum. For a business school to be accredited by the Association to Advance Collegiate Schools of Business, its undergraduate curriculum must teach "ethical understanding," and on both the undergraduate and graduate levels "ethical and legal responsibilities." But there is no explicit requirement that students study business law[6], and many MBA programs do not require it.

The law neither compels nor forbids a specific course of conduct in most cases, but business ethics may still be superfluous. A merchant treats customers well, particularly when there will be repeated transactions and enduring relationships, not because the law requires it or even be-

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cause it is the ethical thing to do, but because the gain from future cooperation exceeds the immediate gain that cheating might bring. Adam Smith noted that contractual promises are often kept even without access to the courts because no merchant wants to default and ruin one's reputation.[7] There are obvious incentives to follow the law and to deal with market constituents in a way that makes them happy. These aren't perfect incentives, of course. The punishments for criminal misconduct might not be properly calibrated and might be too severe or too lenient. Or, a person might choose an immediate gain instead of a larger one that might accrue in the long term, hence the tendency to engage in fraud and self-dealing. A person might not understand the situation that confronts them and choose unwisely for this reason. As flawed as these mechanisms are for deterring unsavory dealings, they still offer rewards (e.g., happier employees and customers) and punishments (prosecution) that shape behavior. Business ethics, in contrast, offers none, hence Hume's well-known dictum that "reason alone cannot be a motive to the will." Even if "frown power" really works, and the moral disapproval of others is a motivating force, this suggests only that business managers should take stock of the moral sentiments of those with whom they deal, which is simple self-interest. It does not suggest the need to undertake the effort to engage in an original ethical analysis. Hence, most questions of business ethics do not present genuine problems, because an ethical manager behaves no differently than one who follows the law and is concerned for the long-term profitability of his or her business.

Still, there can be cases in which a well-run, sustainable business follows the law, but the outcome seems bad and the law insufficient. Examples of "ethically problematic" conduct come easily to mind, though of course value judgments are often quirky: tobacco products, assault weapons, wasteful SUVs, polluters in places or at times of inadequate environmental law, employers who pay a lawful but inadequate minimum wage (the standard example of this being a Third World sweat shop), purveyors of violent or vulgar pop culture, or sellers of unwholesome fast foods or useless nutritional supplements. Ethical thinking might come into play if one were considering to forego a profitable and legal opportunity (e.g., marketing without false advertising a useless but harmless product) or to incur voluntarily a cost that one might legally avoid (e.g., some sort of environmental remediation in excess of regulatory standards), where doing so brings no offsetting payoff. It seems unlikely that this would happen since altruism is not the dominant motivator of people in market transactions, but even if there is a place for ethical analysis in the management of a business operating in a competitive marketplace, one must still be careful not to confuse legal obligations with ethical aspirations.

Moreover, the relatively few questions that may present genuine problems are not usefully resolved by the techniques of moral philosophy. For example, let's apply two commonly discussed ethical approaches to the sale of Internet censoring software to the government of China, criticized as being unethical because it aids repression. The utilitarian approach asks which option will produce the greatest benefits and do the least harm, but how is a manager to know from whose perspective the benefits and harms are to be assessed–that of the U.S. sellers, the U.S. government, the foreign government, or the foreign population? How will the manager balance incommensurables–real dollars to one's firm as against the intangible cost of restricted Internet access? Presumably, some Internet access for Chinese citizens is better than none, which is what they would have if the U.S. firms decided not to make sales there in protest against government policy. Messy trade-offs elude simple solution. Another approach teaches that if you would be embarrassed to see your act in tomorrow's headline, the act is unethical. This only tells you what you already think. A guilt-ridden person is embarrassed by everything, a sociopath by nothing. There is no standard conscience, which is why the positivists extracted law from religion and morality and made it a separate technical discipline. As we move away from the core of universally condemned moral wrongs–genocide, war crimes, slavery, torture, summary execution[8]–towards more uncertain terrain, it is unclear why we should expect corporate managers to be able to resolve such problems. The law, at least, is external to one's own perspective; it exists independently of any one of us.

Most business ethics writing ignores existing law, however.[9] One ethics writer, for example, regards the fiduciary duty of loyalty as a "metaphor" and is concerned that his MBA students assume it to be true that corporate managers should work to maximize shareholder wealth.[10] Why have the ethics experts gotten such traction at the expense of the law in the business school? Maybe the ethics writers tend to be moral philosophers and not lawyers, or they distrust lawyers who too narrowly serve their clients' ends, or they find positivism distasteful because it separates law from morality and can result in unprincipled action. Maybe they mean to criticize the body of business law as immoral, or they find a virtuous man to be better than one who is merely law-abiding. It is possible to have unethical laws; the Nazi's Nuremberg Laws quickly come to mind. The Nazi regime was not a problem of business ethics, though, and U.S. law is not comparable to Nazi law. It seems unlikely that the typical business manager will ever encounter a situation that would suggest the possibility of engaging in civil disobedience.

In 1994, Professor Lynn Paine of the Harvard Business School wrote that a "legal compliance approach [to responsible management] is very misguided," and that "an ethics-driven approach is much better."[11] Law is insufficient, Paine wrote, because it does not inspire human excellence. Behaviors that strike us as being sleazy and unfair do not represent a failure to aspire to or achieve the heights of human potential. They are a simpler failure to stay off the bottom, and someone like Ken Lay, who wasn't deterred by the risk of prison and the destruction of his firm, wouldn't have done any better had he thought about ethics. The wrongdoers in recent corporate scandals most probably knew the rules but thought themselves to be above the rules. This is not a problem of cognition but of character. How might ethics instruction be helpful in fixing this? Knowing what is moral has little or nothing to do with wanting to do a moral act. There may be a small number of executives who genuinely don't understand that fraud and insider trading violate the law; for this select group, a refresher in law may be helpful. ■

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Talking Ethics, Plagiarism, and Other Troubles in the History Profession with Jon Wiener

Q: How did you first become interested in this topic?

Wiener: In 1984, an assistant professor of history at Princeton named David Abraham was featured on page one of the *New York Times* because two senior historians–at Yale and Berkeley–accused him of research fraud. I knew a lot of the people at Princeton and believed with them that a great injustice was being done. I wrote my first big article for *The Nation* magazine about it. After that, historians in trouble became my beat at *The Nation,* and the cases just keep coming, right down to Ward Churchill [a professor of ethnic studies at the University of Colorado] today.

Q: In your book *Historians in Trouble: Plagiarism, Fraud, and Politics in the Ivory Tower,* you provide case studies of about a dozen historians who were the subject of allegations of plagiarism or personal misconduct. What lessons or conclusions do you offer?

Wiener: I observe that some historians accused of misconduct have their careers destroyed, while others are ignored, and a few actually win advancement and honors. The reason for these different outcomes can be found in the power mobilized by the accusers and by the accused. In general, the right has been much more effective at attacking those it considers its enemies and at defending those it considers its friends. Thus, I conclude, it's not the seriousness of the charges that determine the outcome, but rather the power of your friends–and your enemies.

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Q: Two of your examples involve gun scholars–historian Michael Bellesiles and economist John Lott. In your judgment, how and why are these cases, and their punishments, so different? *[* Focus *Readers: Note that the Spring 2003 issue, "Gun Laws and Policies," at www.abanet.org/publiced/focus/home.html, contained a dialogue among gun scholars who commented extensively on the work of Bellesiles and Lott].*

Wiener: Bellesiles, at the time a tenured professor at Emory, was attacked by gun rights advocates who demanded that Emory fire him for what they said was fraudulent research in his book *Arming America* (Knopf, 2000). A panel of distinguished historians concluded that there were problems in one of his tables, and he resigned–even though that table was referred to only a handful of times in a great big book. Lott is on the other side politically–he wrote "the bible of the gun rights movement," but his claims to have done a national opinion survey on "gun brandishing" were widely criticized as fraudulent. The charges against Lott, however, never made it into the mainstream media. Lott had left academia for a position at the American Enterprise Institute, so he was not subject to any kind of academic inquiry. But his publisher was the University of Chicago Press, which of course has a great deal of scholarly prestige, and the Press ignored the charges of fraud in one of their books. So Bellesiles's book was taken out of print by his publisher, while Lott and his book continue to flourish. Indeed, Lott recently filed a defamation suit against a University of Chicago economist who criticized his research–asking the court to halt sale of the book until the critical passages about Lott were removed. It's a perfect example of how the right wields power in the world of ideas.

The outcome is about the power of your friends and your enemies.

Q: Where would you draw the line between sloppy data gathering or fact-checking, on the one hand, and ethical transgressions in historical research?

Wiener: In my first article on the David Abraham case, I quoted Princeton historian Lawrence Stone, who said Abraham was guilty of error but not fraud. He said "archival research is a special case of the general messiness of life." On the other hand, the great British historian E. H. Carr wrote, "accuracy is a duty, not a virtue." If a researcher somehow misses or buries evidence that contradicts his thesis, that is suspect. Plagiarism of course is a much simpler case–you line up two texts side by side, and if they are the same, you can conclude the second is copied from the first. I'm not very sympathetic to the writers who say "my research assistant forgot to put in the quotation marks and the footnote."

Q: How would you assess the performance of the media in uncovering and/or publicizing impropriety in historical research? Has the history profession performed its role adequately?

Wiener: The media have generally bowed to pressure from activist groups on the right–the Bellesiles case is the prime example, but there are many others. The history profession took a big step backward two years ago when the American Historical Association voted to end its practice of adjudicating disputes over plagiarism and other offenses. They feared litigation they could not afford and said they lacked both the necessary resources as well as enforcement power. That may be true, but in the end it gives the right even more power to define the issues for the media.

Q: What has been the reaction to your book among historians and the profession?

Wiener: Reviewers have generally accepted my overall argument that it's the power outside the profession that explains the different results when historians are charged with misconduct. There is a group that remains focused on the Bellesiles case and argues that I underestimated the seriousness of the problems with his research. ■

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virtues of the American political and legal system. They also can be used to examine the definition of corruption.

What Is Corruption?
Both the FEMA administrators and Governor Fletcher did break administrative rules that they were required to follow. The Kentucky governor publicly admitted that the evidence against him "strongly indicated wrongdoing." And FEMA officials, in 70 percent of their cases, ignored the administrative requirement to use competitive bidding to award contracts. They did wrong, but did their wrongdoing rise to the definition of corruption? Political scientists would divide over that.

The general definition of a corrupt act is *using public office for private gain*. Was there evidence of private gain or benefit in the two cases? Narrowly defined, private gain–which puts extra money in your pocket or your family's pocket–does not seem to have happened here. Instead, it was not an individual (not the FEMA administrator nor the governor of Kentucky) but a political party, administration, or partisan friends that benefited from the wrongdoing.

Many political scientists and lay people would call this corrupt. They would point to the fact that elected and appointed public agents are expected to serve the public, not their own interest or their party's narrow interest. In fact, among the many recognized forms of corrupt practices that I list in my book *The Struggle Against Corruption: A Comparative Study* (2004) is "influence peddling." This category seems to fit the offense in both cases because related elements of influence peddling include "favor brokering" and "conflict of interest." At FEMA, because administrators did not abide by the required neutral competitive bidding, there was, at the very least, an appearance of favoritism. As for specific evidence of favor brokering, the congressional study documents how two of the favored companies that were awarded no-bid contracts had in residence long-time friends of the president. As for evidence of the Kentucky governor's favor brokering, that is precisely what he was formally accused and found guilty of. Governor Fletcher was indicted for favoring his party supporters over state employees and charged with a misdemeanor offense of "political discrimination."

In both cases, the suspect actions had a dollar cost. An administrator at FEMA may not have been lining his own pockets but, according to auditors, by favoring contractors without competitive bidding, FEMA cost the public millions. And in the case of the Kentucky hiring scandal, when the governor favored the party faithful, it cost many state employees their jobs and promotions.

But for some political scientists, particularly those who specialize in political economy, however wrong the above acts might seem, decisions taken to benefit political cronies and supporters are not automatically considered corrupt. While they agree that it is corrupt to use a government office for *personal pecuniary gain,* they reason that it is not corrupt for public officials to make decisions to help stay in office. In fact, some argue that officials are *expected* to use their office to serve their political interests, pointing to the fact that all public officials continually make decisions to keep themselves in power. It is for this reason that some political economists recommend clarifying the definition of corruption to exclude "patronage services" from the list of corrupt practices. Of course, we then are invited to ask whether providing contracts (FEMA) and jobs (Kentucky) counts as "patronage services." If so, the suspect practices may be acceptable, and although acting in these provocative ways to remain in office appears to others like it achieves a kind of "private gain," many political economists would not consider this corrupt. This demonstrates that, while there may be agreement that it is corrupt to use public office for private gain, what this means exactly in practice is a matter of debate. The approach in the United States is to settle these debates with laws and lawyers.

A Legal Approach
In America, a legalistic approach drives anticorruption activities. This approach relies on specific and detailed proscriptions of outlawed practices, and it relies for judgment and enforcement on various agencies, such as the Federal Election Commission, the courts, the congressional Ethics Committee, and (post Enron) the Public Company Accounting Oversight Board.

Americans are optimists. While there is an understanding that people may cheat, they expect laws with appropriate enforcement to catch some of the crooks and by example prevent others from cheating. These laws prohibit practices, articulate limits on influence, and require transparency. This seems to create a sense of order, predictability, and the feeling that corruption is under, or soon will be under, control.

As I say in my book on corruption, "An American city's morning newspaper may include stories about how a police department covered up an investigation of 'one of their own,' how an election campaign ignored legal fund-raising limits, and how a business executive was enriched at the company's expense. But the typical U.S. citizen reading about these scandals might also feel a certain degree of comfort knowing that at *least* these corrupt activities were uncovered, publicly disclosed in the press, and might possibly be investigated and even prosecuted and punished" (Johnson, 2004: 146).

After all, the United States is considered one of the least corrupt countries in the world and for a decade has been very actively involved in teaching other countries how to reduce corruption.

Global Corruption
In 2005, the United States was rated a low 17th among 158 nations (lower rankings reflect low corruption) by Transparency International (TI), a well-respected nonprofit organization based in Germany. TI created and used a Corruption Perceptions Index based on how corrupt the countries appear to be to business people, risk analysts, and the general public. The TI Index is not without its critics, because their rankings are not based on an empirical foundation but rather on people's perceptions, and because their ratings ignore large sociocultural differences between countries. Nevertheless, the Index has been used with positive effect.

Transparency International succeeded in raising consciousness and moving corruption into the open when, in 1999, it began to administer its surveys around the world and widely publicize the results. Those countries ranked least corrupt and most corrupt were of great interest. In 2005, of the 158 countries surveyed, Russia was ranked 126, among the most corrupt. According to TI rankings, the least

corrupt countries were Iceland and Finland; the most corrupt countries were Bangladesh and Chad.

There is a widely held consensus that corruption not only demoralizes citizens but stunts a country's economic growth. This is especially true when corruption stands in the way of full participation in the global economy. To address this problem, in addition to the efforts of Transparency International, there were other ambitious transnational responses to global corruption. These include efforts by the Organization for Economic Cooperation and Development (OECD) and the World Bank. In 1996, the World Bank publicly joined the fight against corruption and in the next few years engaged in over 600 anticorruption programs and initiatives involving 95 borrower countries. OECD anticorruption efforts had earlier origins.

In the United States, the passage of the American Foreign Practices Act in 1977 was a reaction to the use of bribery by American companies in foreign countries. In this bill, Congress forbade the practice of bribery abroad, putting American companies at a competitive disadvantage. In fact, the U.S. Treasury and Commerce Departments estimated that American business lost at least $30 billion annually because of this restriction.

The antibribery law created an incentive to convince more countries to agree not to use bribery. The effort paid off, and by 1997 representatives of 33 of the wealthiest countries met and formally agreed to a "no bribery" principle. This convention against bribery created the Organization for Economic Cooperation and Development (OECD), which then spawned numerous international conferences to publicize the principle and educate other countries about the new rule.

Other United States anticorruption efforts have also generated workshops, programs, and conferences and have established networks and corporate role models to address the corruption problem in other countries. U.S. participants in this worldwide outreach against corruption include government agencies such as the U.S. Departments of State and Commerce, a range of for-profit companies that include American Express and Citicorp, and many nonprofit organizations such as the Washington-based Government Accountability Project (GAP) and the American Bar Association (ABA).

The ABA joined the global anticorruption activities in the 1990s. While it has long had a section on international law and practice, the ABA expanded into Eastern Europe and created the Central and Eastern European Law Initiative (CEELI), which established programs in 23 countries in the region. CEELI's work in countries such as Albania and Uzbekistan included activities such as helping to draft new laws, training prosecutors and judges, and helping to create law libraries. By 2000, the ABA was expanding its work to include other regions–Asia, Africa, and Latin America. In my book *Whistleblowing: When It Works–And Why* (2003), I describe how, as part of their mission to teach good governance and reduce corruption, all of these groups, including the ABA, encouraged the use of whistleblowing as an anticorruption tool in their literature and presentations. They also encouraged hotlines and promoted whistleblower protection.

In the United States, whistleblowers are heroes and experts.

Whistleblowing

Whistleblowing is a distinct and important form of dissent. The generally agreed upon definition of a whistleblower is: (1) an individual who acts with the intention of making information public; (2) the information is successfully conveyed to parties outside the organization; (3) the information has to do with possible or actual nontrivial wrongdoing in an organization; and (4) the person exposing the agency is a member or former member of the organization. Whistleblowing is understood to be an important ingredient for achieving accountability and transparency, especially when there is systemic corruption.

Whistleblowing was familiar to the Americans who were promoting it abroad. In the United States, whistleblowers were often featured as heroes and experts on news shows and in newspapers, and they were sometimes star witnesses at congressional hearings. Whistleblowers were legitimized and accepted as a part of America's everyday life.

U.S. whistleblower hotlines are busy; the busiest ones help illustrate how large is the number of whistleblowers. The Department of Defense (DOD) hotline to report waste, fraud, and abuse, like all federal department hotlines, was established by Congress in 1978. By 2000, the DOD hotline was receiving well over 1,000 contacts by phone and mail every month. Use of the Securities and Exchange Commission (SEC) hotline skyrocketed after the Enron scandal; daily, it receives over 1,000 e-mailed whistleblower contacts.

It is not surprising that whistleblowing has been a theme in some Hollywood films such as *Serpico, Silkwood, Marie,* and *The Insider*. There are more whistleblowers in the United States than anywhere else in the world, and whistleblowers are more protected in the United States than anywhere else. Even the use of the term "whistleblower" as a means of describing dissenters in a bureaucracy is of American origin from the late 1960s. Now, whistleblowing was being exported to other parts of the world.

Conclusion

I have just described the United States as relatively uncorrupt. This was not done as a patriotic gesture or in a Pollyanna fog. My book on corruption includes discussion of serious American government scandals, detailed descriptions of the corrupting influence of lobbyists on U.S. elected officials, and the damning influence of money on a system that produces elections in which only those with access to a lot of money can run for office. I also describe American business corruption and the fall of Enron in 2001, which triggered a pandemic of corporate revelations and indictments still going on. But the book is an edited, comparative one with chapters on Russian, Indian, and Israeli corruption. Seen with this wide lens and a worldwide comparative perspective, the United States, even with all of these scandals, has a comparatively low level of corruption.

Perhaps it stems from this relatively low corruption level, but you've got to love a

country that makes docudramas about its corruption. "It is so typically American that the experience and lessons of Enron would be turned into a Hollywood film. Ex-Enron employee and casualty of the economic bubble burst Brian Cruver wrote a book, *Anatomy of Greed,* about his Enron experiences. Although he spent less than a year with Enron, Cruver used his nonfiction book pitch to find an agent and had a book contract within two weeks. Even before the book was published, story rights were snapped up by TV producers" (Johnson, 2004: 39).

More unbelievable is that lobbyists have also had their own Hollywood day in the sun with a made-for-TV series called *K Street*. K Street in Washington, D.C., is where large numbers of lobbyists have offices; this television show was about their influence peddling and the "power brokers, lobbyists, and consultants who shape Beltway politics." The idea for the show, which premiered in 2003, came from an insider, Michael Deaver, a former aide to President Ronald Reagan. In the short-lived series, actors portrayed fictional public relations firm advisers, and real politicians (including Howard Dean, John McCain, Hillary Rodham Clinton, and Orrin Hatch) played themselves. Each show revolved around the week's "hot subjects" and revealed the maneuvers of lobbyists and consultants peddling their influence. Only in America! ■

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Johnson, Roberta Ann. *Whistleblowing: When It Works–And Why.* Boulder Colorado: Lynne Rienner Publishers, 2003.

Yen, Hope (Associated Press). "Katrina funds wasted, study says," *San Francisco Chronicle,* August 25, 2006, p. A4.

The Global Movement for Government Transparency
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tion is, as a Canadian politician said a quarter-century ago, a struggle over the distribution of political power. "Real power," said Prime Minister Joe Clark in 1979, "is limited to those who have facts." We should not expect that a demand for the sharing of political power will be honored unless the groups who hold that power feel intense, continued pressure to do so.

This implies the need for a well-organized coalition that is able to campaign for openness for years after an RTI law is adopted. Such a coalition will have two important resources–a growing public appreciation of the value of openness and the remarkable transnational network of activists that has emerged over the last five years. It is easier than ever before for activists to call on colleagues in other countries for advice and moral support.

On the other hand, there are dangers. Critical partners, such as philanthropies or nongovernmental organizations, may be unwilling to make commitments to long-term projects with uncertain results. The popular media, distracted by other news, may stop paying attention to the problem of government secrecy. Debates over openness may seem to become more complicated and technical. To build a robust and enduring alliance for transparency, activists will have to devise clever ways of overcoming these problems. ■

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End Notes

[1] Preliminary Report of American Bar Association Task Force on Corporate Responsibility 5, (July 16, 2002) http://www.abanet.org/buslaw/corporateresponsibility/preliminary_report.pdf

[2] United States Sentencing Commission, *Guidelines Manual,* Section 8B2.1, (Nov. 2004), http://www.ussc.gov/2004guid/8b2_1.htm

[3] Id. at §8C2.5(f)(2).

[4] The American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations,* section 2.01, comm. h.

[5] "H-P focused on legality, not ethics, adviser finds," *International Herald Tribune,* October 4, 2006. www.iht.com/articles/2006/10/04/business/spy.php

[6] AACSB International, Eligibility Procedures and Accreditation Standards for Business Accreditation, January 2005, 18, http://www.aacsb.edu/accreditation/business/AACSBSTANDARDS-Jan05-Final.pdf

[7] Adam Smith, Lectures on Jurisprudence, report dated 1766, 326, available at http://oll.libertyfund.org/Texts/LFBooks/Smith0232/GlasgowEdition/Jurisprudence/HTMLs/0141-06_Pt03_1766.html See also Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," 28 *Am. Sociological Rev.* 55 (1963)(since a businessman cares about his reputation, extra-legal self-enforcement is often effective).

[8] These are some of the acts that constitute violations of customary international law for purposes of the Alien Tort Claims Act. *Flores v. Southern Peru Copper,* 343 F.3d 140, 150 (2d Cir. 2003).

[9] "A significant amount of the criticism that is directed against the stockholder theory [that managers should maximize the financial returns of stockholders] results from overlooking constraints embodied in laws," John Hasnas, "The Normative Theories of Business Ethics: A Guide for the Perplexed," 8 *Business Ethics Quarterly* 19, 22 (Jan. 1998). See also Jeffrey Nesteruk, "Reimagining the Law," 9 *Business Ethics Quarterly* 603, 606 (October 1999)("But viewing law as rules nonetheless positions it as external to our moral lives in a significant sense.") The writer also notes "the paucity of articles in business ethics examining the general relationship of law and ethics." Id. at 615.

[10] Ronald M. Green, "Shareholders as Stakeholders: Changing Metaphors of Corporate Governance," 50 *Wash & Lee L. Rev.* 1409, 1416 (1993).

[11] Lynn Sharp Paine, "Law, Ethics, and Managerial Judgment," 12 *The Journal of Legal Studies Education* 153 (summer/fall 1994).

BOOKS

Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader, by Susan D. Carle, ed. New York: New York University Press, 2005.

In this reader a wide variety of legal scholars addresses legal ethics in criminal law, government, and corporate settings. Extensive historical perspectives are included alongside contemporary discussions, which draw upon interdisciplinary legal scholarship, critical legal studies, critical race theory, and feminist theory. Contributors include Richard Abel, Stephen Carter, Robert Gordon, David Luban, Carrie Menkel-Meadow, and Lucie White.

Jury Ethics: Juror Conduct and Jury Dynamics, by John Kleinig and James P. Levine, eds. Boulder, CO: Paradigm Publishers, 2005.

This anthology explores the ethical obligations and behaviors of juries and jurors in various stages of trials and the legal process, including jury service, jury selection and voir dire, jury instructions and deliberations, nullification, and post-trial comments and behaviors. To encourage dialogue and the exploration of different points of view, essays are followed by responses. Contributors from law, psychology, and other disciplines include Jeffrey Abramson, Shari Diamond, Norman Finkel, Valerie Hans, Nancy King, Tom Munsterman, and Neil Vidmar.

Legal Ethics: Law Stories, by Deborah L. Rhode and David Luban, eds. Eagan, MN: Foundation Press, 2005.

This collection of essays raises distinctive questions about ethical issues and legal representation in a variety of contexts, including black lawyers and the KKK (David Wilkins), the Unabomber at trial (Michael Mello), parents of children with disabilities and school districts (David Vladeck), confidentiality and disclosure requirements (Roger Cramton), and diversity in the legal profession (Deborah Rhode).

Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime, by Stuart P. Green. New York: Oxford University Press, 2006.

Green explores moral, ethical, and legal perspectives on such crimes as fraud, insider trading, bribery, and tax evasion, using recent high-profile cases such as those of Martha Stewart, Kenneth Lay, Scooter Libby, Tom DeLay, and the Arthur Anderson firm. More broadly, he probes the moral ambiguities of white-collar crime, including the difficulties of distinguishing lawful from unlawful behavior and civil liability from criminal wrongdoing.

Ethical Issues in the Courts, by Julie C. Van Camp. Wadsworth, 2nd ed., 2005.

This undergraduate casebook presents excerpts from more than seventy leading court cases on ethical issues in such areas as abortion, assisted suicide, same-sex marriage, freedom of expression, race and gender discrimination, and business, computers, and privacy. Discussion questions and study guides accompany the cases.

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