

MORAL RESPONSIBILITY AND LEGAL LIABILITY, OR, ETHICS DRIVES THE LAW

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ABSTRACT

As William Shaw's (2008) textbook states, by way of observation, "To a significant extent, law codifies a society's customs, ideals, norms, and moral values" (pp. 10-11). Shaw adds that "changes in the law tend to reflect changes in what a society takes to be right and wrong..." (p. 11).

We think Shaw is correct, and we work to have our students understand that ethics drives the law. Focusing on moral responsibility and legal liability, we offer a model that can help students see the relationship between law and ethics. First we highlight the broader concepts establishing moral responsibility and legal liability. Then we show that narrower, more specific principles in ethics have a parallel in law. For the former, we rely on long established considered judgments from ethics and established legal concepts. For the latter, we rely on the four specific elements associated with moral wrong-doing in organizational settings and on the famous 1983 Soldano v. O'Daniels case.

INTRODUCTION

As McGowan (2005) pointed out, strong pedagogical arguments exist for students in business ethics classes to understand the relationship between law and ethics. Students should understand that an act may be legal and unethical, but an act could also be ethical and illegal. The example of slavery, legal and unethical, and the underground railroad, ethical and illegal, come to mind. Students who grasp the distinction between ethics and law are more likely to think critically.

Cultural reasons also exist for having students understand the relationship between law and ethics. Shaw's (2008) textbook states, by way of observation, "To a significant extent, law codifies a society's customs, ideals, norms, and moral values" (pp. 10-11). Shaw's (2008) textbook adds that "changes in the law tend to reflect changes in what a society takes to be right and wrong..." (p. 11). Other business ethics textbooks make the same observation.

We think the observation is well-grounded. Therefore, we work to have our students understand that ethics drives the law. This paper provides a pedagogical example of how

that understanding can be more effectively achieved. Focusing on moral responsibility and legal liability, we offer a model that can help students see the relationship between law and ethics. First we highlight the broader concepts establishing moral responsibility and legal liability. Then we show that narrower, more specific principles in ethics have a parallel in law. For the former, we rely on long-established, considered judgments from ethics and settled legal concepts. For the latter, we rely on the four specific elements associated with moral wrong-doing in organizational settings and on the famous Soldano v. O'Daniels (1983) case.

MORAL RESPONSIBILITY AND LEGAL LIABILITY

Years ago, in perhaps the first business ethics textbook, Thomas Garrett (1966) observed that "Man is responsible at least for what he freely wills whether as a means or an end" (p. 8). He observed that "To a large extent, this theory is found in civil law as well as in ethics" (p. 8). Finally, he asked if "I have no responsibility for the evils which I foresee will flow from my actions" (p. 8). In short, Garrett

(1966) followed traditional notions of moral responsibility, where an individual is thought morally responsible if the individual knowingly and freely pursues an action that causes harm.

Over the years, business ethics textbooks have refined accounts of moral responsibility. For instance, Velasquez's (2012) business ethics textbook, the first edition of which revolutionized how textbooks were structured, states:

A person is morally responsible for an injury or wrong if:

1. The person caused or helped cause it, or failed to prevent it when he or she could have and should have; and
2. The person did so knowing what he or she was doing; and
3. The person did so of his or her own free will (p. 57).

De George's (2006) textbook offers a similar analysis, as do others. The previous analyses, however useful, presume a context of a single individual's making a decision about right and wrong. That is, morality in the contexts above is primarily personal and largely private. Neither corporate contexts nor the law exists in private, though, so an individual's decisions are not concerned exclusively about individual moral perfection. Instead, they must be accounted for in a social context. Legal codes aid in that decision-making, generally and specifically.

The law requires the presence of two broad elements for the imposition of criminal liability, namely *mens rea* and *actus reus* (Blum, et al., 2008, sec. 117). The first item involves intention, i.e., a requisite state of mind or intent, analogous to knowingly and freely doing an act. Criminal statutes define the type of mental state necessary for the crime. For example, some criminal laws impose liability only if the act is done with "purpose," while other criminal laws require mere "negligence" with regard to the actor's mental state. Common categories of "intent" are:

- Purpose: An individual acts with purpose when it is his conscious object to cause such a result (American Law Institute, 1985, sec. 2.02).
- Knowledge: An individual acts with knowledge when he is aware that it is practically certain that his conduct will cause such a result (American Law Institute, 1985, sec. 2.02).
- Recklessness: An individual acts with recklessness when he consciously disregards a substantial and unjustifiable risk that his conduct will cause

such a result (American Law Institute, 1985, sec. 2.02).

- Negligence: An individual acts with negligence when he should be aware of a substantial and unjustifiable risk that his conduct will cause such a result (American Law Institute, 1985, sec. 2.02).

The second element for any crime involves the commission of an "act" (Blum, et al., 2008, sec. 117). Merely *thinking* of a crime is insufficient; the actor must *do* something to contribute to the proscribed harm (Farrell & Marceau, 2013, p.1545). Similarly, Velasquez's (2012) concept of moral responsibility depends on the actor *doing* something—either causing the harm or failing to prevent the harm when he or she had an obligation to do so. This condition, *actus reus*, simply demands causal connection, again, analogous to the broad moral reasoning above.

The elements of moral responsibility are also present with regard to civil liability for the tort of negligence. A plaintiff must prove that (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty; (3) the defendant's conduct in fact caused harm to the plaintiff; (4) the defendant's conduct was also the proximate cause of the harm; and (5) the plaintiff suffered damages to his person or property (Dietz, et al., 2004, sec. 71). The first element—duty—recognizes that we have an obligation to act with reasonable care to avoid or minimize harm to everyone around us; to that end, we must undertake all of our actions in a reasonable manner. In other words, we must conform our actions to those of the objective, "reasonable" person under the same or similar circumstances (Dietz, et al., 2004, sec. 132). When we deviate from this standard, we have breached our duty of care and violated the second element. These two elements focus on the "wrongness" of our behavior and the harm that results when we fail to conform our actions to the reasonable expectations of our community. The third and fourth elements focus on the causal connection between the act and the harm, much like Velasquez's (2012) first requirement for moral responsibility. The fifth element of negligence requires a showing of harm to the person or property. Without some type of harm, or "damages," there can be no liability (Dietz, et al., 2004, sec. 71). Similarly, the concept of moral responsibility is rooted in redressing the harms suffered by others as a result of our conduct.

Thus, there is considerable overlap between the elements of moral responsibility, criminal liability, and civil liability. We teach our students that while ethics and the law are not coextensive, they have broad similarities. We can go further and show that even at a more specific level, ethics drives the law. Our discussion starts with collective responsibility.

Assigning Responsibility and Liability Distributively

In the 1960s, philosophers turned their attention to an individual's responsibility in an organizational setting. Some impetus originated in the civil rights movement: to what extent should an individual white male be held accountable for the harm done by other whites to blacks? Feinberg (1968) recognized that "The larger and more diverse the group of alleged fault-sharers, the less likely it is that they all share--or share to anything like the same degree--the fault in question" (p. 682). He observed that accountability, "falling on the group as a whole, will distribute burdens quite unavoidably on faultless members" (Feinberg, 1968, p. 687). Feinberg (1968) set about attempting to analyze the problem and to determine possible mechanisms for distributing responsibility more exactly.

Ethicists continued the examination of moral responsibility in an organizational context and by 1982, Velasquez's first edition of *Business Ethics* identified four elements as significant for assigning individual moral responsibility in an organization (1982; see Velasquez, 2012, pp. 60-61). Magnitude of harm refers to the quantity of harm that will be produced. The greater the quantity of harm, the greater the individual's responsibility is to prevent the harm or certainly not take part in producing the harm. The certitude of harm must also be taken into account, an idea found in Garrett's (1966) textbook (p. 9). The idea is that the greater the likelihood of harm, the greater the agent's responsibility to avoid activities that would produce the harm. The first two factors, we note, involve the act itself. The next two factors focus on the agent.

Inasmuch as a moral agent can be held accountable only for what is freely and knowingly done, coercion must be examined. The demand that coercion be taken into account is especially important in an organizational setting, where superiors can apply pressure to subordinates to perform certain actions. Coercion obviously interferes with free choice.

Finally, the amount of cooperation in or in connection to the nefarious action must be appraised. In general, the less a person contributes to or is connected to an act, the less responsibility the individual has. An interesting and as yet unresolved issue in this area is the amount of blame that should be assigned to a superior or a subordinate. The subordinate is often very closely identified with the action and thus has a strong connection. On the other hand, the subordinate often would not have done the act without the superior's directives. The subordinate is not as well positioned to foresee ramifications of an act, so it may be said that the superior made the greater contribution to the act.

As philosophers examined the sort of concerns relevant to moral responsibility in corporate and organizational settings, the law did not stand idly by. In fact, the *Soldano v. O'Daniels* (1983) case, decided by the California Court of Appeals, appropriated the distinctions and conclusions philosophical investigation had produced.

Soldano provides students with an excellent example of the influence of ethics on the law. In that case, the court wrestled with a question of first impression in California: whether a business could be civilly liable for wrongful death where the business refused to allow a good Samaritan to use the telephone to call the police to report a life-or-death emergency (*Soldano v. O'Daniels*, 1983, p. 312). The plaintiff's father, Darrell Soldano, was shot and killed at Happy Jack's Saloon. Shortly before the shooting, a patron of Happy Jack's Saloon ran across the street to The Circle Inn and informed the bartender that a man at Happy Jack's Saloon had been threatened, and he asked if he could use the phone to call the police. The bartender did not allow the patron to use the phone, nor did he call the police himself. Mr. Soldano was murdered, and his son brought a wrongful death action against The Circle Inn alleging that The Circle Inn's failure to allow the good Samaritan to use the telephone caused his father's death (*Soldano v. O'Daniels*, 1983, p. 312).

The Circle Inn argued that it had no legal obligation to allow the Happy Jack's patron to use the phone. In essence, The Circle Inn failed to act to prevent a harm. While the law imposes liability for negligent acts, to what extent should the law impose liability for *inaction*? The black-letter law is that liability cannot be based on a mere failure to act unless there is some special, close relationship between the parties that imposes a duty to act (Dietz, et al., 2004, sec. 90).¹ The rule of non-liability for "nonfeasance" arose in part because at common law, the courts found it challenging enough to manage humanity's various forms of active misbehavior—there was little time left to impose liability on individuals who simply failed to act. (*Soldano v. O'Daniels*, 1983, p. 312). In addition, a rule imposing a duty to act to prevent harm would be difficult to adminis-

1 Courts have found the following relationships sufficient to give rise to a duty to act: employer and employee, innkeeper and guest, carrier and passenger, parent and child, and school and student (Dietz, et al., 2004, sec. 83). For an excellent discussion of the no-duty-to-rescue rule and its exceptions, see Romohr (2006). It is worth noting that the no-duty-to-rescue rule remains intact in most jurisdictions and *Soldano* is viewed as something of an outlier in the area of negligence law; nonetheless, the no-duty-to-rescue rule has been criticized by legal experts and ethicists as morally indefensible. (Heyman, 1994; W. Keeton, Dobbs, R. Keeton & Owen, 1984, pp. 375-376).

ter—should the observer of a heart attack be liable for failure to render C.P.R.? Should the driver on the highway be liable if harm comes to a stranded motorist he passes en route to his destination? The reluctance to impose liability for failure to act thus arises from practical concerns as well. It is difficult to make uniform standards and apply them evenly, especially given that “Many citizens simply ‘don’t want to get involved’” (*Soldano v. O’Daniels*, 1983, p. 316).

Nonetheless, the *Soldano* court noted the shaky moral footing of a rule that, in essence, allows citizens to look the other way when another person is in grave danger. The court quoted the Restatement (Second) of Torts when it wrote:

“The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense.” (Rest.2d Torts, *supra*, §314, *com. c*) (*Soldano v. O’Daniels*, 1983, p. 312).

The morally offensive nature of the rule drove the court to reexamine it in the context of Mr. Soldano’s death. The court quoted Francis H. Bohlen when it noted that morality provides the underpinning for law, and broad societal conceptions of morality are inevitably reflected in the concept of legal obligation:

“While it is true that the common law does not attempt to enforce all moral, ethical, or humanitarian duties, it is submitted, equally true that all ethical and moral conceptions, which are not the mere temporary manifestations of a passing wave of sentimentalism or puritanism, but on the contrary, find a real and permanent place in the settled convictions of a race and become part of the normal habit of thought thereof, of necessity do in time color the judicial conception of legal obligation . . .” (Bohlen, *op. cit. supra*, pt. II, 56 U.Pa.L.Rev. 316, 334-337) (*Soldano v. O’Daniels*, 1983, p. 313).

After exploring the role morality plays in setting the law, the court turned to the facts of the case to evaluate whether The Circle Inn owed a duty to Mr. Soldano. The court noted that there was no special relationship between The Circle Inn and Mr. Soldano (like that of common carrier/passenger, parent/child, innkeeper/guest, etc.), so The Circle Inn’s conduct did not fit within any of the recognized exceptions to the rule of non-liability for nonfea-

sance (*Soldano v. O’Daniels*, 1983, p. 314). However, the court noted that a duty may nonetheless be imposed for negligence based on the following factors:

“(1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant’s conduct and the injury suffered, (4) the moral blame attached to the defendant’s conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, (7) and the availability, cost and prevalence of insurance for the risk involved.” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113. . .) (*Soldano v. O’Daniels*, 1983, p.315).

Applying these factors to the facts of the case, the court found that the harm to Mr. Soldano was clearly foreseeable, and a jury could find that the bartender’s refusal to allow the good Samaritan to call the police contributed to Mr. Soldano’s death (*Soldano v. O’Daniels*, 1983, pp.315-316). With regard to the fourth factor, the court found that the “employee’s conduct displayed a disregard for human life that can be characterized as morally wrong: he was callously indifferent to the possibility that Darrell Soldano would die as a result of his refusal to allow a person to use the telephone” (*Soldano v. O’Daniels*, 1983, p. 316). The minimal burden of allowing someone to use the telephone was far outweighed by the potential benefit—saving a person’s life (*Soldano v. O’Daniels*, 1983, p.316). The court concluded that the bartender owed a duty to Mr. Soldano to allow the good Samaritan to use the Circle Inn’s phone to call the police, or to place the call himself (*Soldano v. O’Daniels*, 1983, p.317).²

Soldano v. O’Daniels provides students with a straightforward demonstration of the way ethics drives the law. The court expressly acknowledged that legal rules can—and should—change to reflect society’s moral standards. Moreover, much of the court’s discussion of whether to impose a legal duty on The Circle Inn focused on the elements of moral wrongdoing identified above: the certitude and magnitude of the harm, as well as the contribu-

² The court also noted that the facts of the case were similar to conduct prohibited by section 327 of the Second Restatement of Torts, which suggests that liability should be imposed on one who negligently prevents a third person from giving aid to another (*Soldano v. O’Daniels*, 1983, p.317).

tion of the agent and whether he acted free of coercion. The court came down hard on The Circle Inn because the threat of harm was great and the certitude of harm was high. A murder was imminent. Moreover, the court found the behavior of the agent—the bartender—to be morally repugnant because he chose of his own free will to ignore the patron’s plea, despite the fact that allowing the patron to use the phone presented no meaningful burden to The Circle Inn. The court found that such callous indifference to another human life could only be “characterized as morally wrong” (*Soldano v. O’Daniels*, 1983, p.316).

The ideas in law and ethics regarding moral responsibility and legal liability are analogous. If our students see that connection, they are more likely to understand that ethics is as important as or more important than law. By presenting the relationship of ethics to law in our classroom, we hope to inculcate in students the habit of thinking of right and wrong. They would be less likely to follow the rules of an organization when those rules appear to be morally problematic.

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