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Cooperate, Comply, or Evade? A Corporate Executive's Social Responsibilities with Regard to Law

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This article seeks to advance discussions of the topic of corporate social responsibility by critically examining the relationship between a businessperson's social and legal duties.[1] In particular, the article distinguishes situations in which a corporate executive has a social duty to cooperate with the spirit of business laws from situations where mere compliance with the

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[1]The relationship between social and legal duties can be viewed from a number of perspectives. For a collection of philosophical works addressing the topic, see THE DUTY TO OBEY LAW: SELECTED PHILOSOPHICAL READINGS (William A. Edmundson ed., 1999). The collection reprints several oft-cited works, including John Rawls, *The Justification for Civil Disobedience*, *in* CIVIL DISOBEDIENCE 240–55 (1969) (specifying the conditions necessary to justify willful evasions of law); Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 139 (1984) (arguing that the duty to obey law varies with the moral content of the law in question); Richard A. Wasserstrom, *The Obligation to Obey Law*, 10 UCLA L. REV. 780 (1963) (drawing an oft-cited distinction between an absolute and a prima facie duty to obey law); and Robert Paul Wolff, *The Conflict between Authority and Autonomy*, *in* DEFENSE OF ANARCHISM 3–19 (1971) (denying that there is any prima facie duty to obey law). Management scholars typically assume that a businessperson must obey law and then ask whether there are social duties in addition to these legal duties. *See, e.g.*, Archie B. Carroll, *The Pyramid of Corporate Social Responsibilities: Toward the Moral Management of Organizational Stakeholders*, 34 BUS. HORIZONS 39, 42 (1991) (depicting a hierarchy of responsibilities: first economic, then legal, then ethical, and finally philanthropic); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (assuming without elaboration that a corporate executive has a social duty to obey the law and arguing that there are few social responsibilities beyond legal obedience). At least one scholar has criticized this compartmentalization of legal and ethical realms as potentially misleading. *See* Lynn Sharp Payne, *Law, Ethics, and Managerial Judgment*, 12 J. LEGAL STUD. EDUC. 153 (1994) (criticizing the tendency to separate legal and ethical inquiries).

letter of those laws is sufficient.[2] The article also inquires whether willful evasions of law can ever be justified. To this end, it examines both the notion of an "efficient breach" of regulatory law[3] and the proper role of civil disobedience in business settings.[4]

The analysis proceeds in two parts followed by a conclusion. Part I begins with a review of the early corporate social responsibility literature. This literature supports the general normative proposition that a businessperson has a social obligation to inquire into the social purposes that underlie law and to cooperate with those purposes. Part I then refines and extends this proposition by critically examining the distinction between legal compliance and legal cooperation and by considering justifications for willful legal evasion. Part I concludes by developing an analytical framework that asserts and defends the idea that the social duty to cooperate, comply, or evade law varies systematically with reference to the moral content of the law in question. Immoral law should be evaded, morally neutral law requires compliance, and morally just law deserves cooperation.

Part II illustrates the usefulness of this framework with reference to an extended hypothetical case. A sole proprietor of a manufacturing company must decide whether to cooperate with, comply with, or intentionally evade a series of eight environmental regulations. Relevant to each decision are the letter of the law, the social purposes that underlie the law, and the relative economic consequences of cooperation, compliance, or evasion. The analytical framework provides a means of understanding the interplay between legal, ethical, and economic forces so as to both predict and critique business conduct.

Given the recent spate of corporate scandals, including widespread instances of white-collar crime, an inquiry into the legal duties owed by corporate officers seems both timely and needed. A nuanced understanding of why businesspeople obey law and an understanding of the conditions that are most likely to elicit cooperation can help inform the likely effects of any regulatory reforms. Simply assuming that law is a precise command of the sovereign to which businesspeople are morally bound to obey hides more than it reveals. Ultimately, regulatory laws vary in moral content and the social duty to cooperate, comply, or evade varies

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[2]*See infra* notes 34–43 and accompanying text.

[3]*See infra* notes 64–70 and accompanying text.

[4]*See infra* notes 82–87 and accompanying text.

systematically with that content. This article seeks to advance scholarly discussions of the topic of corporate social responsibility by offering such a jurisprudential view together with a means for keeping the view tractable.

I. Relationship Between a Businessperson's Social and Legal Duties

It is difficult to talk about a businessperson's social duties without referencing law. Social and legal duties are intertwined. A legal duty is enforceable through a legal sanction such as a fine, imprisonment, or civil liability. Social duties, by contrast, include duties that are not enforceable through legal sanctions. Social duties typically include legal duties,[5] but the concept of a social duty is more expansive.

In examining the extent of a businessperson's social duties to cooperate with law, a number of interesting questions present themselves. For example, when the letter of the law is vague or ambiguous, is a businessperson free to exploit that legal ambiguity for personal gain, or must he or she seek to cooperate with the intent or social spirit behind the law? If the law is unjust or inane, must the businessperson nonetheless follow it, or is she free to engage in a form of civil disobedience and intentionally evade the law? When lobbying, must the businessperson consider the public good, or is he or she ethically authorized to unabashedly seek the self-interests of his or her firm? And if the answers to these queries depend on other factors, what are these factors?

The analysis of these and similar questions begins with a brief review of several well-known and influential works from the corporate social responsibility (CSR) literature. Taken collectively, these early works posit a fairly robust normative stance. That is, each suggests that businesspeople generally must cooperate with law and the regulatory process rather than

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[5]Recognizing the possibility of a legitimate form of civil disobedience, a person "typically" has a social duty to follow the law, but not always. For example, a person has no social duty to follow an unjust law, but he or she does have a "legal duty" to do so, enforced through threat of legal sanction. Perhaps the most commonly cited passage on civil disobedience comes from Aquinas. *See* Saint Thomas Aquinas, Summa Theologica Q. 90, Art. 4.3 ("[L]aws may be unjust through being opposed to the Divine good; such are the laws of tyrants inducing idolatry, or to anything else contrary to Divine law: and laws of this kind must nowise be observed."). *See generally* Rawls, *supra* note 1 (discussing justifications for civil disobedience); Wasserstrom, *supra* note 1 (same).

seek to exploit it. In the following sections, this normative proposition is clarified and its implications examined more fully.

A. Early CSR Literature: A Progressive View

The topic of CSR is distinctively normative. It addresses the social duties that a businessperson ought to embrace.[6] Academic discussions of the topic began in earnest in the 1950s.[7] Howard Bowen, often cited as a seminal thinker in the field of CSR,[8] offered a particularly insightful view of the relationship between a businessperson's legal and social duties.[9] Bowen began by examining the legal environment preceding the Great Depression, a time with little direct regulation of business.[10] He emphasized that under this laissez faire system, businesspeople were expected to accept a self-imposed set of ethical principles as a guide to business behavior. These principles included honoring promises, avoiding deception, and protecting the life and health of workers and of the general public.[11] Under a laissez faire legal regime, businesspeople were to embrace these social duties even if they had no direct legal obligation to do so.

Bowen illustrated how business practices in the 1920s failed to live up to these ethical standards.[12] In his view, this failure of business ethics was a

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[6]Within the management literature, the topic of CSR occupies a subset of the field of business and society, with CSR scholars asking what businesspersons *should do* about social issues. *See* Daniel T. Ostas & Stephen E. Loeb, *Teaching Corporate Social Responsibility in Business Law and Business Ethics Classrooms*, 20 J. Legal Stud. Educ. 61, 62 (2002). The field of business and society addresses positive questions as well such as how corporate actions affect society and how social goals can be obtained once identified. *Id*.

[7]*See* Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 Bus. & Soc'y 268, 268–69 (1999) (dating the "modern period" of the CSR literature in the 1950s, but noting that concern with the topic appeared earlier); *cf.* C. A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 Kan. L. Rev. 77, 78–79 (2002) (citing a 1931–32 *Harvard Law Review* exchange between Professors Bearle and Dodd as the first "clear debate over corporate social responsibility").

[8]*See, e.g.,* Carroll, *supra* note 7, at 269 (citing Bowen's work as seminal); Lee E. Preston, *Corporation and Society: The Search for a Paradigm*, 13 J. Econ. Literature 434, 436 (1975) (tracing the origins of the business and society literature to Bowen).

[9]Howard R. Bowen, Social Responsibilities of the Businessman (1953).

[10]*See id*. at 14–20.

[11]*Id*. at 19. Bowen enumerated eight distinct duties. *Id*.

[12]*Id*. at 20–21.

factor that contributed to the Great Depression, which in turn ushered in the New Deal and the birth of widespread government regulation. Reflecting on the emergent welfare state, Bowen identified a new social responsibility of business necessary to supplement the business ethics of the previous decades. He wrote:

> [S]ince government has become, and will necessarily continue to be, a partner in all economic affairs, the businessman is expected to *cooperate with government in the formulation and execution of public policy.*[13]

Hence, for Bowen, a firm's social responsibilities were not limited to mere legal compliance. They included an affirmative duty to *cooperate* with the formation and implementation of government regulations and business laws generally.

Writing in 1960, Keith Davis, also a well-known and influential author,[14] continued this theme, penning what is now referred to as the "Iron Law of Responsibility."[15] Davis emphasized that if businesspeople refused to accept the mantle of responsibility made possible by great wealth to which they had access, then the government would fill the void. In essence, Davis admonished business leaders to use their great power responsibly or lose that power to a growing array of government regulations. The idea, much like that offered by Bowen, was that society had certain expectations of business. Those expectations could be addressed through direct regulation, or they could be entrusted to the goodwill and ethics of the business community. If businesspeople proved unable to self-regulate, the law would step in.

Viewed from today's perspective, Davis appears somewhat prescient, as government regulations and a fully mature welfare state seem to have arrived in full force. The first wave of regulation appeared in the 1930s with the creation of agencies such as the Food and Drug Administration, Securities and Exchange Commission, and Federal Communications Commission.[16] The second wave occurring in the 1960s and 1970s was even

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[13]*Id.* at 28 (emphasis added).

[14]*See* Carroll, *supra* note 7, at 271 (calling Davis the "runner up to Bowen for the Father of the [corporate social responsibility] designation").

[15]Keith Davis, *Can Business Afford to Ignore Social Responsibilities?* 2 CAL. MGMT. REV. 70 (1960).

[16]*See* STEPHEN BREYER, REGULATION AND ITS REFORM 372–75 (1982) (listing federal agencies and noting the date each was created).

more extensive. During those decades the federal government added the Environmental Protection Agency (EPA), the Consumer Product Safety Commission, the Occupational Safety and Health Administration, and a host of other regulatory agencies designed to protect the public from corporate misconduct.[17] By the close of the 1970s, government regulation seemed to be addressing every important ethical and social issue faced by business.

Writing in 1975, Lee Preston and James Post offered a view of CSR particularly attuned to the modern regulatory state.[18] They begin with the proposition that a businessperson's social obligations, properly conceived, are confined to his or her business activities.[19] For example, a trucking executive has legitimate responsibilities concerning transportation safety, fuel economy, and labor union issues.[20] General philanthropic concern with providing shelters for the homeless, by contrast, is too far afield.[21] This relatively circumscribed approach to CSR issues avoids the legitimacy and competency concerns raised by critics of a more expansive view while leaving a fairly wide field for managerial discretion.[22]

Preston and Post then offer a single defining criterion for assessing socially responsible business behavior—*cooperation with the creation and execution of "public policy."*[23] Preston and Post emphasize that their notion of

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[17]*Id.*

[18]*See* Lee E. Preston & James E. Post, Private Management and Public Policy (1975). Attesting to the lasting influence of the work, the book was the subject of a scholarly symposium marking twenty years since publication. *See generally* Symposium, *Private Management and Public Policy,* 35 Bus. & Soc'y 436 (1996).

[19]*See* Preston & Post, *supra* note 18, at 9–10.

[20]*See* Donna J. Wood, *Corporate Social Performance Revisited*, 16 Acad. Mgmt. Rev. 691, 697–98 (1991) (crediting Preston and Post for the proposition that businesses have circumscribed duties associated with their "primary and secondary areas of involvement with society," and then using this definition as a means to judge social performance).

[21]*See* Preston & Post, *supra* note 18, at 9–10.

[22]Christopher Stone outlines and assesses the primary arguments advanced by critics of an expansive view of CSR. *See* Christopher D. Stone, Where the Law Ends: The Social Control of Corporate Behavior 80–87 (1975). The "legitimacy concern" refers to the idea that no one, neither public citizen nor private shareholder has authorized business executives to address philanthropic issues. *Id.* The "competency" issue emphasizes that businesspeople have no expertise in addressing social, as opposed to business, concerns. *Id.* at 86. When businesspeople focus on the responsible conduct of their business activities both issues become moot.

[23]Preston & Post, *supra* note 18, at 100.

"public policy" goes beyond the letter of the law to the social policies that underlie law.[24] It refers not only to regulations spelled out in federal codes and state statutes, but also to the spirit that underlies those regulations.[25] The authors argue that cooperation with the creation, implementation, and reform of business laws defines responsible business conduct. Hence, for Preston and Post, like Bowen, a business executive's social duties include a duty to cooperate, not just comply, with law.

B. Distinguishing Cooperation from Compliance: Loopholes, Ambiguities, and Underenforced Laws

Taken collectively, the works of Bowen, Davis, and Preston and Post offer a fairly progressive and robust view of a corporate executive's social duty with regard to regulatory law. This view, consistent with the so-called "Public Interest Theory" of regulation,[26] casts both law and government in positive lights.[27] Regulators regulate in the public interest[28] and regulations reflect the aspirations of a democratic society.[29] In such a world, businesspeople are expected to cooperate, not just comply, with regulatory law.

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[24] *Id.*

[25] *Id.*

[26] For a concise articulation of the Public Interest Theory of regulation, see BREYER, *supra* note 16, at 1–11.

[27] *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 65–70 (1998) Croley distinguishes between a first generation of Public Interest scholars who wrote in the early twentieth century and a second generation that recently has revived interest in the theory. *Id.* Croley notes that second generation scholars tend to be more modest than the first, content to argue that regulations "vindicate the citizenry's interests not routinely, but sometimes, and much more commonly than other scholars of regulation acknowledge." *Id.* at 66.

[28] According to the Public Interest Theory, most regulators are seen as benign civil servants that selflessly seek to advance the interests of the citizenry at large. *See id.* at 66 n.183. This view can be traced to the nineteenth-century writings of Woodrow Wilson. *See* Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887). *See generally* Michael E. Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 LAW. & CONTEMP. PROBS. 179, 179 n.1 (1981) (providing citations to the early Public Interest Theory literature).

[29] The Public Interest Theory depicts most business regulations as good faith attempts to ameliorate various forms of market failure. *See* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 167–68 (1990) (describing the Public Interest Theory).

This distinction between complying and cooperating with law and the notion that a businessperson has a social responsibility to go beyond the former to the latter, though introduced in the early CSR literature, has never been fully developed. Today, CSR scholars typically speak of "compliance programs" and "compliance officers," terminology that may implicitly suggest that in the legal arena a compliance norm suffices.[30] Yet, compliance embodies a less expansive duty than does cooperation. At its heart, the distinction highlights the difference between the letter and the spirit of the law. One complies with the letter of the law; one cooperates with the law's spirit.

The distinction between compliance and cooperation also reflects a political orientation. *Webster's Dictionary* defines "compliance" as a "tendency to give in readily to others."[31] "Compliant" is defined as "yielding," "submissive," and "obedient."[32] Note that each of these definitions connotes a political hierarchy. The subordinate (businessperson) complies with the demands of his or her superiors (government regulators). The word "cooperation," by contrast, suggests a relationship between equals. To "cooperate" means to "work together with another or others for a common purpose."[33] As stated above, the progressive view of CSR, tracing back some fifty years to the seminal works of Howard Bowen and associated with the Public Interest Theory of regulation, embraces a social duty to cooperate with government to achieve social ends (common purpose).

Reflecting on the practical implications of the distinction, note that sometimes the duty to comply and the duty to cooperate conflate; that is, sometimes one cooperates with law simply by complying. This conflation is likely to occur when both the letter and the spirit of the law are clear and the connection between the two is unambiguous. For example, consider the social duty with regard to a twenty-miles-per-hour speed limit in a school zone. A driver sees children playing in the schoolyard, sees

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[30]*See generally* Joshua Joseph, *Integrating Business Ethics and Compliance Programs: A Study of Ethics Officers in Leading Organizations*, 107 Bus. & Soc'y Rev. 309, 316–19 (2002) (describing the multifaceted role of a corporate ethics officer to include duties related to "legal compliance"). Today there is an Ethics Officer Association with more than 1000 members responsible for both ethics programs and legal compliance with representatives from more than half of the Fortune 100. *See* Ethics Officer Association, at http://www.eoa.org (last visited Dec. 1, 2004).

[31]Webster's New World College Dictionary 298–99 (4th ed. 1999).

[32]*Id.* at 299.

[33]*Id.* at 320.

lights flashing on the posted sign, and recognizes the inherent reasonableness of the rule requiring him or her to slow down. Here, cooperation and compliance amount to the same thing and the driver reduces his or her speed.

In at least three other settings, however, the distinction between compliance and cooperation becomes critical. First, some regulations contain "loopholes" that seemingly enable one to comply with the letter of the regulation while violating its purpose. Second, some regulations are imprecise, inviting a variety of interpretations. Third, other regulations are not effectively enforced either because violators find it possible to conceal their acts or because society provides insufficient resources to prosecute violations. In each of these three settings, the distinction between compliance and cooperation leads to different results. Ultimately, one cooperates by resisting the temptation to exploit legal loopholes, by interpreting legal ambiguities with reference to the public good rather than with sole reference to one's private interest, and by living to the spirit of the law even when the law is not effectively enforced.

Consider first the social duty with regard to legal loopholes. The colloquial term "loophole" refers to an imperfection in the law that enables one to comply with the legal letter while simultaneously violating the law's social purpose.[34] Suppose, for example, that a mining regulation prohibits the release of compounds X or Y into the aquifer. The intent of the regulation is to strike a compromise, balancing the social need for mining efficiency with the social need for pure water. A mining executive discovers a way to combine X and Y into compound XY, which is just as damaging to the aquifer as either X or Y standing alone, but is not legally forbidden. The failure to regulate XY in this example is an oversight, creating a loophole in the law. An executive content to merely "comply" with the letter of the law would seem much more likely to exploit the loophole than would an executive who embraced a norm of "cooperation." In fact, embracing a duty to cooperate would probably require the executive to

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[34]Of course, whenever the law has a loophole, predicting the results of litigation becomes difficult. Sometimes judges look through form to substance, close the loophole and enforce the legislative intent. Yet, at other times, judges enforce the plain meaning of the legal letter and the party seeking strict enforcement of the letter of the law prevails. *See* Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 KAN. L. REV. 325, 354 (2004) (discussing loopholes in the context of tax cases). *See generally* Glitz v. Comm'r, 531 U.S. 206, 221–22 (2001) (Breyer, J., dissenting) (arguing that the majority should have read the language of a tax regulation broadly so as to close a loophole).

inform regulators of the oversight so as to reform the law.[35] In short, compliance seems to permit exploitation of legal loopholes; cooperation forbids it.

Second, the distinction between compliance and cooperation becomes important when the law is ambiguous. The Americans with Disabilities Act (ADA) requirement that an employer make a "reasonable accommodation" for a "qualified individual" with an "impairment" that limits "major life activities" provides a good example.[36] Suppose an executive receives a request for an accommodation and discovers that notwithstanding regulatory guidelines and precedents addressing similar cases, the law remains somewhat gray. Given the ambiguity, competing interpretations can be advanced that the law requires, or alternatively, does not require the accommodation. An executive content to merely comply with the ADA arguably could choose any legally defensible interpretation, including that interpretation that maximized the firm's profits. Cooperation, by contrast, would seem to require a good faith interpretation attuned to balancing the legitimate goal of firm profitability with the social purposes underlying the ADA—eradicating prejudice against and promoting work opportunities for people with disabilities.[37] In short, the notion of compliance permits an aggressive pursuit of private interests while cooperation seems to require a greater attention to social consensus and the democratic aspirations underlying most business regulations.

Finally, the duty to cooperate becomes critical whenever a regulation is not effectively enforced.[38] Sometimes the lack of enforcement is due to an inadequate commitment of resources.[39] The *maquiladora* region just

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[35]Note that both Bowen and Preston/Post argued that a businessperson must cooperate with the reform of business laws. *See* Bowen, *supra* note 9, at 28; Preston & Post, *supra* note 18, at 100.

[36]42 U.S.C. § 12101 (2000) (providing statutory definitions). *See generally* Alan D. Schuchman, Note, *The Holy and the Handicapped: An Examination of the Different Applications of the Reasonable-Accommodation Clauses in Title VII and the ADA*, 73 Ind. L.J. 745 (1998) (discussing competing interpretations of various provisions of the ADA).

[37]*See generally* Terry Halbert & Elaine Ingulli, Law & Ethics in the Business Environment 152–53 (4th ed. 2003) (discussing the policy goals underlying the ADA).

[38]*See* Steven L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545, 1554–59 (1994/1995) (discussing various reasons as to why a law may not be effectively enforced).

[39]*See id.* at 1564–67.

south of the Rio Grande River may provide an example.[40] It seems that Mexican environmental regulations largely mirror those found in the United States, but the Mexican government does not provide sufficient resources to effectively enforce its own regulations.[41] In other settings, underenforcement results from concealment actions by the regulated firm. For example, an executive may discover that if certain precautions are taken, such as entangling the firm's organizational structure in a maze of holding companies and shredding compromising documents, that the chances of detection and conviction of certain regulatory offenses, such as price fixing or insider trading, become negligible.[42] In still other settings, the underenforcement results from fines being set too low. Sometimes given the relatively low price that is to be paid upon conviction and the relatively large sums to be earned by violating the law, it is simply cost effective to break the law and pay the fine.[43] In each of these settings, the law is underenforced and *cooperating* with the law would demand legal obedience even when violating the law is unambiguously cost effective.

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[40]*Maquiladora* literally means "grain mill" in Spanish. It has been broadened to mean an assembly plant. *See* Teresa Edwards, *The Relocation of Production and Effects on the Global Community*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 183, 184 n.14 (2002). *See generally* Kevin Sullivan, *A Toxic Legacy on the Mexican Border; Abandoned U.S.-Owned Smelter in Tijuana Blamed for Birth Defects, Health Ailments,* WASH. POST, Feb. 16, 2003, at A17 (associating problems with environmental pollution in the border area with a failure to enforce existing laws).

[41]*See* Edwards, *supra* note 40, at 190 ("[A]lthough Mexico has fairly strict environmental protection standards, it does not adequately monitor industrial practices to enforce those standards."); Robert Collier, *An Uneasy Partnership; Promise and the Peril in Growth of Trade between California and Mexico,* S.F. CHRON., July 20, 1999, at A1 ("Mexico's enforcement of its own environmental laws is poor.").

[42]*See* Emily A. Malone, Note, *Insider Trading: Why to Commit the Crime from a Legal and Psychological Perspective*, 12 J.L. & POL'Y 327, 345–46 (2003) (stating that it is "probable that much insider trading goes undetected because of the secretive nature of the crime"); Stephen M. Bainbridge, *Insider Trading Under the Restatement of the Governing Lawyers*, 19 IOWA J. CORP. L. 29 (1993) (noting that less than one in five cases of insider trading are prosecuted because of the problems of concealment).

[43]Applying the logic of rational choice to legal obedience, a utility maximizing businessperson will compare the costs and benefits of illegal activity, and commit the illegal act if it is cost effective to do so. *See* Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 WASH. & LEE L. REV. 1189, 1262 (1995) (rational businessperson will only be deterred from insider trading if the "expected sanction associated with the offense exceeds the expected benefit"); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (articulating the rational choice approach to crime); Thomas F. Ulen, *Firmly Grounded: Economics in the Future of Law*, 1997 WIS. L. REV. 433, 442.

In summary, the distinction between compliance and cooperation, though typically finessed in the contemporary CSR literature, can be important. Sometimes the two duties conflate; one cooperates simply by complying. But in other settings, the duties remain distinct with cooperation suggesting a partnership between corporate executives and government officials and compliance suggesting a hierarchy. Partners do not exploit one another by taking advantage of ambiguities or loopholes, nor do they violate the law just because it is cost effective to do so. The corporate executive who accepts the norms of partnership and cooperation respects government officials and works with them with an eye toward advancing the common good.

C. Capture Theory, Public Choice, and the Efficient Breach of Regulatory Law

The idea that a businessperson should work with government officials to advance the public interest casts both those officials and the resulting regulations in a positive light. Of course, not everyone shares this progressive view of government officials and business regulations.[44] In 1980, Ronald Reagan campaigned on the slogan: "Government is the Problem, Not the Solution."[45] Central to his successful political platform was a promise to "deregulate" businesspeople on many fronts.[46] Sounding at times like an empowered Ayn Rand, the Reagan revolution gave voice to a wave of conservative political rhetoric largely disrespectful of government regulations.[47] According to this anti-government view, government regulators

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[44]*See* Gary Wills, A Necessary Evil: A History of American Distrust of Government 17–18 (1999) (distinguishing two "belief clusters" in American society, one which views government in a negative light, the other in a positive light).

[45]President Reagan no doubt tapped into a growing antigovernment sentiment that predated his candidacy and then gave the movement fuel. Several authors have identified a steady decline in the societal trust for government, from about 75% in 1964 to about 24% in 1996. *See* Jozef C. N. Raadschelders, Public Administration: Toward a Study of Government or Public Affairs for a Civil Society 9 (2002) (citing four studies and providing an insightful discussion).

[46]For an insightful overview of the growth of regulations in the 1960s and 1970s and the resulting "deregulation" political movement of the early 1980s, see Breyer, *supra* note 16, at 1–11.

[47]*See generally* Ayn Rand, Atlas Shrugged (1957) (deriding government regulators as mindless buffoons interfering with the creative genius of her protagonist entrepreneur); Leonard Peikoff, Objectivism: The Philosophy of Ayn Rand (1991) (providing an excellent nonfiction account of Rand's philosophy).

may be capable of doing good, but they are certainly capable of inefficacious meddling.

This relatively negative view of business regulations has found widespread support in the scholarly literature.[48] During the 1970s, Chicago-School economists articulated and developed what is commonly called the "Capture Theory" of regulation.[49] According to the Capture Theory, businesspersons use the regulatory process to secure private economic advantages, most notably by erecting barriers to entry that generate economic rents.[50] Regulated firms achieve these advantages, in part, by controlling the flow of information to regulators.[51] Control also derives from the perverse incentives created by the so-called "revolving door" of regulation whereby regulators are recruited from the industry that they regulate and return to that industry after completing their term of government service.[52] According to the Capture Theory, these information flows and perverse incentives result in a set of regulatory laws (e.g., entry barriers, rate controls, product standards) that mirror those created by economic cartels.[53]

Political scientists offer an equally negative view of regulatory law under the rubric of "Public Choice."[54] Like the Capture theorists, Public

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[48]*See* Croley, *supra* note 27, at 31–85 (discussing four competing theories of business regulation).

[49]*See* George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) (providing the seminal work).

[50]*See* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) (modeling both the regulated firm and the politician as "rent-seekers"); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975) (explaining the logic of regulation as a barrier to entry).

[51]*See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective*, 3 TEX. L. REV. & POL. 49, 81 (1998) (noting that interest groups are particularly effective at controlling information flows to legislators when issues are complex).

[52]*See generally* Wendy L. Gerlach, *Amendment of the Post-Government Employment Laws*, 33 ARIZ. L. REV. 401 (1992) (discussing the potential for limiting the conflict of interest); Edna Earle Vass Johnson, *"Agency Capture": The "Revolving Door" Between Regulated Industries and Their Regulating Agencies*, 18 U. RICH. L. REV. 95 (1983) (discussing conflicts of interests faced by regulators).

[53]*See* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 344 (1974).

[54]Public Choice Theory can be traced to the work of Mancur Olson. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). Other seminal works include JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962) and

Choice theorists assert that the substance of most business regulations has much less to do with the public interest than with the private will of the politically well-organized.[55] According to Public Choice Theory, legislators and agency officials respond to special-interest groups that use the lobbying process and campaign contributions to seek private goals.[56] Of course, if competing special interest groups were balanced, with each given full voice in the regulatory process, then some semblance of the public good might result.[57] But given the logic of collective action, some groups will be represented and some will not.[58] Interacting with the regulatory process is not cost free, and these costs will only be worthwhile if the benefits derived from the regulatory change are direct and substantial.[59] The result, according to Public Choice Theory, is a set of regulations that systematically favors the politically well organized with narrow interests at the cost of the common good.[60]

Views associated with Public Choice and the Capture Theory dominated the regulatory literature throughout the 1980s and

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ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957). *See generally* Levine & Forrence, *supra* note 29, at 169 (discussing the genesis of Public Choice Theory).

[55]The Public Choice literature is immense. For a concise introduction to this literature together with thorough citations to central works, see Croley, *supra* note 27, at 34–40.

[56]*Id.* at 34–35.

[57]The idea that competition between private interest groups can lead to good results reflects the "Pluralist Theory" of regulation prominent in the 1950s. *See id.* at 31–32. *See generally* ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (1961) (articulating the pluralist vision). Croley writes:

> According to the pluralist account, interest groups do not seek to promote public or general interests. . . . Instead, groups struggle—with other competing, groups organized to pursue different interests—for policy outcomes that benefit them most. Responding to pressures exerted in that conflict, and in need of the political resources that interest groups possess, public decision makers broker compromises and trade-offs among competing groups. . . . Policy outcomes that advantaged no specific interest group in particular, but rather reflected an equilibrium among all interests, were considered desirable.

Croley, *supra* note 27, at 32. Croley notes that the Public Choice Theory expressly rejected Pluralism. *Id.* at 33. He writes that "some public choice theorists consider their main project to be exposing the naiveté of pluralist political scientists and economists." *Id.*

[58]Croley, *supra* note 27, at 38–39.

[59]*See* Stigler, *supra* note 49, at 7 (discussing the costs of communicating with regulators including lobbying, consulting, and lawyer fees).

[60]*Id.* at 10.

1990s.[61] Reflecting on these theories, one is struck by the cynical vision of law incumbent in these social science perspectives.[62] Under either theory, most regulatory law lacks social purpose or moral underpinning; it simply articulates a command of the sovereign, which in turn reflects the private interests of the rich and powerful.[63] Of course, if law lacks moral underpinnings or justifiable social purpose, then there is little reason to cooperate. Law becomes an annoying constraint on profit seeking; one complies if compelled by force, but feels little or no social duty to go beyond compliance to cooperation.

In a recent article, Cynthia Williams laments the prevalence of a jurisprudential view that denies social legitimacy to regulatory law.[64] She begins her analysis by citing Frank Easterbrook and Daniel Fischel, two prominent voices within the law and economics movement, for the proposition that there is no moral obligation to obey regulatory law.[65] Easterbrook and Fischel write:

> [M]anagers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; [and] managers not only may but also should violate the rules when it is profitable to do so.[66]

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[61] *See* Croley, *supra* note 27, at 34–40.

[62] *See generally* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 895–900 (1987) (examining empirical studies testing the implications of the "economic theory of legislation" and concluding the "strong versions" of the theory cannot be supported by the evidence); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (same).

[63] *See* Pepper, *supra* note 38, at 1552–54. Pepper describes a distinctively positive view of law that combines Holmes's notion that "law" is merely a "prediction" of what a court is likely to do with an instrumental view of law as a tool of private planning. He suggests that this combination of views renders legal obedience optional and makes legal sanction merely the price to be paid in the event of a voluntary legal violation. *Id.* Labeling this perspective "legal realism," he suggests that this version of realism is the "dominant American understanding of law" taught in law schools. *Id.* at 1552.

[64] *See* Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1997/1998).

[65] *Id.* at 1266–67.

[66] Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982).

Williams notes that the above view, which she calls the "efficient breach" view of regulatory law, has "obvious intellectual connections" to the widely accepted notion of an "efficient breach of contract."[67] An efficient breach of contract occurs whenever the breaching party profits from the breach after compensating the other party for his or her expectation interest.[68] Associated with the economic analysis of law, the idea is that there is no ethical obligation to honor one's contracts. Applied to regulatory law, the doctrine suggests that a businessperson may ethically evade economic regulations whenever it is profitable to do so. Williams argues that the notion of efficient breach is misapplied to the regulatory arena.[69] She writes: "As members of society, we do not have the right to opt out of generally applicable laws or regulations by risking paying penalties, although we clearly have that power."[70]

Reflecting on the analogy between contractual and regulatory breach, the notion of an efficient breach does seem over-extended. The idea that breaching a contract is ethically permissible so long as the breaching party sufficiently compensates the aggrieved party is widely accepted. Yet, the propriety of extending this idea to regulatory breaches is far from clear. There are a number of important distinctions between contracts and regulations. The parties themselves determine the substance of a contract and upon a breach the party harmed can be identified and damages determined. These factors typically are not present in the regulatory arena. Regulatory fines typically do not go to citizens who are harmed by the regulatory breach, but rather to government coffers. The substance of regulatory law often reflects a compromise intended to advance the public good. In this light, the claim that a businessperson is ethically authorized to violate regulatory law seems to overstate the case.

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[67]Williams, *supra* note 64, at 1267; *see also* Pepper, *supra* note 38, at 1550 (noting that "the dominant modern understanding of contract law is that one is [ethically] free to breach a contract").

[68]*See* Richard A. Posner, Economic Analysis of Law 118–20 (4th ed. 1992).

[69]*See* Williams, *supra* note 64, at 1270 (arguing that "regulatory law should not be viewed as voluntary").

[70]*Id.*

D. A Hierarchy of Law: Malum in Se and Malum Prohibitum

Comparing the Public Interest Theory of government regulation that underlies the progressive view of CSR with the political visions of Public Choice, Chicago-School economics, and the deregulation movement generally, perhaps one can find truth in both worldviews. On one hand, regulations do not always serve the public good, and some things that are currently regulated might be better addressed through a market supported solely by common law and business ethics rather than through affirmative regulation. On the other hand, some regulations serve important public purposes quite well. In this light, perhaps a businessperson's social duty to comply with, cooperate with, and potentially even evade law may vary with regard to the regulation in question. Laws with firm moral underpinnings that serve important social purposes deserve respect; regulations void of these underpinnings and purposes do not.

The idea that a businessperson has a social responsibly to inquire into the moral underpinnings and/or social purposes that underlie law and to choose from among various laws as to which to comply with, cooperate with, or evade may appear novel. Actually, the idea is quite consistent with most jurisprudential views.[71] Perhaps it rests most comfortably with natural law reasoning.[72] According to natural law jurisprudence, a person facing an unjust law has no moral duty to obey; in fact, he or she may be morally obligated to disobey.[73] In addition, according to natural law reasoning, just law requires more than mere compliance; it commands cooperation. Hence, according to natural law, a responsible businessperson

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[71]*See* Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 Am. Bus. L.J. 261, 264–77 (2001) (considering the admonition to "obey law" from four distinct jurisprudential views including positive legal formalism, legal realism, natural law, and legal pragmatism). The notion that laws vary in terms of ethical pedigree is consistent with both sociological and instrumental visions of law. *Id.* at 273–76. Sociological visions emphasize that law is a product of social mores and customs; instrumentalism sees law as a means of effectuating democratically determined social policy. *Id.* Under either vision, the letter of the law and its social mores/purposes are distinct and the notion that a businessperson is expected to cooperate in effectuating legitimate social goals remains intelligible. *Id.*

[72]*See id.* at 271–73 (considering the implications of a natural law perspective on a firm's social responsibilities).

[73]*See generally* Manuel Velasquez & F. Neil Brady, *Natural Law and Business Ethics*, 7 Bus. Ethics Q. 83 (1997) (detailing four natural law traditions: traditionalists, proportionist, right reason, and historicist).

must judge the moral content of each law and act in accordance with that judgment.

The notion that laws vary in terms of ethical pedigree is also consistent with the common law distinction between *malum in se* and *malum prohibitum*.[74] *Malum in se* refers to acts that are in themselves evil without reference to law.[75] For example, murder constitutes *malum in se* because even without a specific law forbidding the act, it would still be wrong. *Malum prohibitum*, by contrast, refers to matters that are wrong solely because the law says they are wrong.[76] The classic example is speeding along a clear and open highway. The act is wrong because law has declared it, not because the act is inherently wrongful. With regard to *malum in se*, one typically must cooperate. One does not commit murder simply because a legal loophole permits it, or arson, simply because the chances of detection are slight. With regard to matters that are *malum prohibitum*, by contrast, one's social duty may be limited to mere compliance rather than cooperation.

Turning first to *malum in se*, consider the social obligation to cooperate with a set of regulations designed to protect the health and safety of workers in chemical plants. The plant owner would have a robust affirmative duty to cooperate with the goal of workplace health and safety, to take steps to assure that regulations reflect the proper level of precautions, and to cooperate with government regulators in the formulation and implementation of those regulations. Laws directly affecting human health and safety have a high degree of moral saliency and call upon a spirit of cooperation, not mere compliance or evasion. A businessperson does not, or at least should not, exploit legal loopholes or take advantage of the lack of legal enforcement when such actions increase the risks to human life and limb.

Matters that constitute *malum prohibitum*, by contrast, probably require a compliance norm. Consider, for example, a tax regulation distinguishing between expenditures that can be deducted in full from ones that

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[74]*See generally* Pepper, *supra* note 38, at 1576–80 (discussing the distinction between *malum in se* and *malum prohibitum* in the context of legal ethics); Raz, *supra* note 1, at 160–61 (suggesting that the duty to obey law depends on the moral grounding of the law in question).

[75]Steven H. Gifis, Law Dictionary 123 (1975) (defining *malum in se* as "naturally evil, as adjudged by the sense of a civilized community").

[76]*Id.* at 124.

are subject to the rules of depreciation. The purposes of this regulation, like the purposes of tax law generally, are to generate revenues for the government, provide a common set of playing rules upon which all can agree, and assure that everyone pays a fair share of tax.[77] These social purposes, though important, do not carry the same degree of moral saliency as health and safety on the plant floor.[78] In addition, this particular rule is intended to work in conjunction with a complex and expansive set of other rules, the combination of which is designed to achieve legislative goals. Perhaps most importantly, from the businessperson's perspective, whether he or she should deduct or depreciate can only be determined with reference to the law itself. There simply are no external referents.

In short, the depreciation/expense regulation in this example, like most tax regulations, suggests *malum prohibitum* rather than *malum in se*. Correspondingly, the social duty seems to be no more extensive than mere compliance. In fact, when it comes to tax law, it seems likely that a businessperson could ethically defend most decisions to exploit tax loopholes, to take an "aggressive tax posture" interpreting ambiguities in light of the businessperson's private interest, and to lobby for reduced levels of taxation.[79] When it comes to tax, and possibly other matters that constitute *malum prohibitum*, the societal norm seems to be "comply," not "cooperate."

E. Completing the Framework: Inane Laws, Unjust Laws, and the Role of Civil Disobedience

The distinction between *malum in se* and *malum prohibitum* suggests a hierarchy among business regulations, with some laws having a higher degree of moral saliency than others. Extending this logic, one finds that some

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[77] *See generally* Bernard Wolfman & James P. Holden, Ethical Problems in Federal Tax Practice (1985) (discussing the professional responsibilities of a tax lawyer in giving advice regarding tax avoidance); George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 Colum. L. Rev. 1553 (1980) (same).

[78] Notwithstanding Holmes's quip that "[t]axes are what we pay for civilized society," *Compania General de Tabacos v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting), it would seem that paying an unfair share of tax is a different kind of evil than compromising the health and safety of one's employees and the general public. *See generally* Bowen, *supra* note 9, at 19 (enumerating a hierarchy of social duties).

[79] *See* Pepper, *supra* note 38, at 1551–52 (noting that an aggressive tax posture is the norm in tax practice).

regulations have no moral content or justifiable social purpose whatsoever. Some regulations are inane, requiring useless and wasteful acts, while others are substantively unjust, with compliance causing significant societal harm. Whenever a regulation is inane or unjust, the socially responsible choice is no longer between cooperation and compliance; but rather, between compliance and willful evasion.

Consider, for example, the social responsibility to comply with or to evade two misconceived workplace-safety regulations. The first requires wasteful expenditures without generating an increase in safety; the second is not only expensive, it is actually dangerous, leading to less safety, not more. Note that the social duty to comply with each regulation rests entirely on the businessperson's social obligation to comply with law in general.[80] With regard to the inane regulation, this general obligation, though somewhat weak, probably dictates compliance.[81] With regard to the dangerous regulation, however, the businessperson would have a social duty to evade. It seems fairly clear that one's duty to protect the health and safety of one's employees outweighs one's duty to comply with a misconceived safety regulation.

This notion of misconceived and/or unjust laws raises the issue of civil disobedience.[82] Most political philosophers recognize a general duty to obey most, if not all, laws generated within reasonably just societies.[83] Most commonly, this duty is defended with reference to some variant of social

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[80]The duty to obey law alternatively has been grounded to the social contract theories of Hobbes and Locke, to the utility of Bentham and Mill, and to a "natural duty to support just institutions" associated with the writings of John Rawls. *See* M. B. E. Smith, *Is There a Prima Facie Obligation to Obey Law?*, *in* THE DUTY TO OBEY LAW: SELECTED PHILOSOPHICAL READINGS 75, 77–93 (1999) (providing a critique of each justification).

[81]For example, John Rawls argues that people owe a natural duty to support just institutions; hence, they must obey laws that are not grossly unjust. *See* JOHN RAWLS, A THEORY OF JUSTICE 334–37, 350–62 (1971). With regard to inane law M. B. E. Smith writes that "every legal system contains a number of pointless or even harmful laws, obedience to which either benefits no one, or worst still causes harm." Smith, *supra* note 80, at 82–83. He concludes that "in a great many instances the obligation [to obey law generally] will not require that we obey specific laws." *Id.* at 83.

[82]*See generally* Martin Luther King Jr., *Letter From a Birmingham Jail (1968), in* LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY 453, 459 (David Dyzenhaus & Arthur Ripstein eds., 1996) ("I submit that an individual who breaks a law that conscience tells him is unjust and willingly accepts the penalty . . . is in reality expressing the very highest respect for the law.").

[83]*See* Smith, *supra* note 80, at 84–88 (documenting alternative means to support the duty).

contract reasoning.[84] Yet the contours of one's hypothetical social contract allow for a modicum of civil disobedience.[85] Addressing both the source and the limits of one's duty to obey law, John Rawls writes:

> The difficulty is that we cannot frame a procedure which guarantees that only just and effective legislation is enacted. . . . While the citizen submits in his conduct to the judgment of the democratic authority, he does not submit his judgment to it. And if in his judgment the enactments of the majority exceed certain bounds of injustice, the citizen may consider civil disobedience.[86]

Classic examples of civil disobedience involve refusals to comply with laws on the grounds of strong moral principle.[87] Harriet Tubman encouraged runaway slaves; Gandhi incited disobedience of the British Salt Act; Martin Luther King Jr. spent time in a Birmingham jail in fighting segregation; and Nelson Mandela was confined in a South African prison for resisting apartheid. In each case, the socially responsible act was to evade law, rather than cooperate or comply. In addition, in most of these instances the law was violated openly in hopes that others would consider the injustice of the law and reform it. This was true for Gandhi, King, and Mandela. Tubman, however, was more pragmatic, secreting her Underground Railroad from prying eyes. This suggests that open violation, though typical, may not be necessary to justify legal disobedience.

The present question is whether civil disobedience can ever be justifiable in business settings. Reflecting on the misconceived safety regulations discussed above, the answer seems to be an unqualified "yes" with regard to unjust law, and a qualified "maybe" with regard to inane law. Ultimately the distinction between unjust laws and inane laws is more a matter of degree than of kind. In a world of scarcity, inefficiency appears unconscionable, as wasted resources could be used to ease human suffering. Hence, if the inefficiency is sufficiently pronounced, then the business actor would probably be justified in following the dictates of self-interest,

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[84]For a contemporary discussion of social contract reasoning by an advocate of the view, see Mark C. Murphy, *Surrender of Judgment and the Consent Theory of Political Authority*, 16 Law & Phil. 115 (1997).

[85]*See* Rawls, *supra* note 1, at 49–54 (discussing the necessary prerequisites for civil disobedience within a framework of social contract reasoning).

[86]*Id.* at 54.

[87]*See generally* Law and Morality: Readings in Legal Philosophy, *supra* note 82 (collecting several classic examples of civil disobedience).

and complying with the inane law only if it is cost effective to do so. Of course, care must be taken that self-interests not cloud one's judgment as to the moral validity of business regulations. Yet, with the proper precautions, it seems that evading inane laws may be ethically justified, and evading unjust laws ethically required.

F. Summary

In summary, Part I of this article suggests that a businessperson has a general social obligation to inquire into the moral underpinnings and social policies that underlie the various business regulations to which he or she is subject. Ultimately, the business actor must choose to comply with, cooperate with, or evade each law. This choice, though often finessed in the CSR literature, plays a central role in defining socially responsible business actions. One cooperates with law by interpreting legal ambiguities in light of the public good, by living to both the letter and the spirit of the law even when the law is not effectively enforced, and by resisting the temptation to exploit legal loopholes that enable one to comply with the letter of the law while violating its purposes.

Part I also suggests that the higher the moral content that underlies the regulation in question, the greater the social duty to cooperate. As depicted in Figure 1, laws with high moral content, addressing matters that are *malum in se*, demand cooperation. If the spirit or purpose of the law has relatively less moral content, addressing matters that are *malum prohibitum*, then the businessperson's social obligations typically can be satisfied by mere compliance. In situations in which the law is inane, compliance is probably required; however, if compliance with an inane law were extremely costly, then evasion could be expected and perhaps even justified. In the limited situations in which a law is demonstrably unjust, a business actor has a moral right, and perhaps a moral duty, to evade the law, either surreptitiously or in the open.

Figure 1: Social Responsibilities with Regard to Law.

Evade		**Comply**	**Cooperate**
Unjust Law	Inane Law	*Malum Prohibitum*	*Malum In Se*

II. Extending the Analysis

To illustrate the distinction between cooperation, compliance, and evasion, and to explore how one's sense of public duty and self-interest are likely to interact, the article offers the following hypothetical case. The case involves a businessperson who must cooperate with, comply with, or evade a series of environmental regulations. The discussion is motivated by the truism that a business actor will do what is in his or her pecuniary self-interest unless he or she feels a sufficient social obligation to do otherwise.[88] Relevant to the discussion are the letter of the law, the moral or social spirit that underlies the law, and the pecuniary self-interest of the businessperson. After presenting the case in a fairly concise fashion, several implications are discussed more fully.

A. An Illustrative Case: Cooperate, Comply, or Evade?

A manufacturing firm is operated as a sole proprietorship.[89] The firm's owner must decide whether to implement costly controls to reduce emissions of a set of toxins. Without controls, emissions of each of eight toxins would be 25 parts per million (ppm). The EPA regulates emissions of Toxins A, B, C, and D, permitting 10 ppm for each toxin and providing fines for exceeding those limits. Emissions of Toxins E, F, G, and H are not regulated (Table 1, Column 1, Letter of Law).[90]

The firm's owner, who is also an environmental engineer and a Ph.D. toxicologist, is convinced that Toxins A, B, E, and F are dangerous unless

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[88]This assumption essentially follows an economic perspective that people value material rewards. *See generally* Becker, *supra* note 43. It tempers this perspective, however, with a direct recognition that people will voluntarily sacrifice material gain to advance other values such as self-respect and a desire to see others do well. *See* Daniel T. Ostas, *Why People Obey Law: Implications for Reforming Corporate Governance,* 32 Acad. Legal Stud. Bus. Nat'l Proc. (2003), *available at* http//www.alsb.org/2003proceedings/ostas2.pdf (last visited Feb. 19, 2005) (articulating a trade-off between the desire for material gain and the desire for self-respect).

[89]The choice of sole proprietorship in this hypothetical is designed to deflect attention away from the agency issues associated with a misalignment of shareholder and managerial incentives. The relevance of organizational structure is discussed *infra* Part II.D.1.

[90]The hypothetical does not specify what harm is sought to be prevented by the regulations. Perhaps the regulation seeks to reduce the risks of human birth defects, or perhaps it seeks to protect bird habitat. The relevance of this distinction is discussed *infra* notes 97–98 and accompanying text.

Table 1

	Letter of Law *(What do current regulations say?)*	**Spirit of Law** *(Balancing social needs, what should regs say?)*	**Profit Max** *(Given law & reputation risks, which level maximizes profit?)*	**Prediction** *(What is the firm most likely to do?)*	**Assessment** *(What should the firm do?)*
Toxin A: Normal Case	10 ppm	10 ppm	10 ppm	10 ppm	10 ppm
Toxin B: Crime Pays	10 ppm	10 ppm	25 ppm	?	10 ppm
Toxin C: Civil Disobedience	10 ppm	25 ppm	10 ppm	10 ppm	10 ppm
Toxin D: Civil Disobedience	10 ppm	25 ppm	25 ppm	25 ppm	25 ppm
Toxin E: Legal Loophole	25 ppm	10 ppm	10 ppm	10 ppm	10 ppm
Toxin F: Legal Loophole	25 ppm	10 ppm	25 ppm	?	10 ppm
Toxin G: Reputation Effect	25 ppm	25 ppm	10 ppm	10 ppm	10 ppm
Toxin H: Normal Case	25 ppm	25 ppm	25 ppm	25 ppm	25 ppm

sufficiently diluted.[91] In fact, the owner believes emissions of these toxins would only be safe at 10 ppm, not beyond. The owner also believes that Toxins C, D, G, and H are not dangerous, and is convinced that emitting any of these four toxins at 25 ppm poses no significant harm (Table 1, Column 2, Spirit of Law).

Upon conferring with legal counsel, the owner concludes that in both the short run and the long run, after accounting for potential criminal fines, civil liabilities, and the possible economic harm to the firm's reputation, it is not cost effective to control for emissions of Toxins B, D, F, or H.[92] It is, however, in the owner's pecuniary interests to reduce emissions of A, C, E, and G to 10 ppm (Table 1, Column 3, Profit Max).

What will and/or should the owner do? Emit at 10 ppm, or at 25 ppm?

B. General Discussion

Table 1 summarizes the salient facts posed in the hypothetical case. The contents of the first and third columns should be fairly self-evident. The first column (Letter of Law) simply reflects the regulations as specified in the first paragraph of the case. The number "10" indicates that the toxin is regulated; "25" indicates that it is not. The third column (Profit Max) identifies whether emitting at 10 ppm or 25 ppm would be in the pecuniary interests of the owner given the current state of the law. The profit-maximizing decision depends on such factors as the likelihood of detection, likely fines and prison terms, potential civil liabilities, and potential economic harms to the firm's reputation if the illegal activities became publicly known. Column 3 reflects the level of emission the owner would choose if his or her only motivation were to maximize his or her own risk-adjusted, long-run pecuniary interests.

The second column (Spirit of Law) requires a bit of explanation. The "spirit" of the law refers to the policies that underlie the law with particular

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[91]The decision maker in this hypothetical is an expert. In fact, the owner knows more about the toxins produced by the manufacturing operations than anyone in the world. The relevance of expertise is discussed *infra* text following note 110.

[92]Inevitably, predictions of economic consequences are embedded in uncertainty. *See* Ostas, *supra* note 71, at 279–85 (noting the sources of economic uncertainty and discussing the implications of uncertainty with reference to the topic of CSR).

emphasis on the social and ethical values that the letter of the law either reflects or seeks to project.[93] Ideally, the spirit of environmental law includes, at least in part, a calculus in which the likely consequences of alternative levels of emissions have been identified and weighed. Relevant consequences include the impact the toxins will have on the ecosystem, wildlife, and ultimately on humans. Other relevant consequences include the need for economic efficiency in the firm's manufacturing processes.[94] Ideally, the spirit of environmental laws also reflects democratically determined societal values. For example, recognizing that the ultimate consequences of toxic emissions may be hard to predict, regulators may decide that they have a duty to err on the side of public safety.

Hence, the second column of Table 1 reflects the level of emissions that should be allowed given the current state of social mores and the aspirations that the society wishes to realize. More precisely, Column 2 reflects the owner's good faith assessment of what he or she thinks a set of properly balanced and publicly minded regulations should provide. In other words, the spirit of the law addresses the ethical dimension of environment decisions, specifying what should be done if one were relatively unconcerned with the letter of the law or with one's own economic incentives.

C. Predicting and Assessing the Owner's Decisions

The fourth column of Table 1 (Prediction) identifies a prediction as to what the owner would most likely do given the letter of the law, the spirit of the law, and the economic logic of pecuniary self-interest. The final column (Assessment) specifies what a responsible owner should do. A brief discussion of these positive predictions and normative assessments with regard to each toxin follows.

1. Toxin A: The Normal Case—Law, Ethics, and Economics Align

The first toxin reflects a "normal" state of affairs. EPA regulations specify that Toxin A may only enter the environment in diluted form

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[93]So defined, the "spirit of the law" is essentially the same thing as the notion of "legislative intent." The legislative body may seek to reflect current social norms; or alternatively, seek to change those norms. *See generally id.* at 264–77 (distinguishing between reflective and aspirational legislative intent).

[94]*See generally* HALBERT & INGULLI, *supra* note 37, at 208–36 (discussing environmental policy from a variety of perspectives).

(Letter of Law = 10), and the toxin truly is dangerous and needs to be regulated (Spirit of Law = 10). In addition, although it is costly for the firm to reduce emissions, given the current state of the law, including potential fines, the likelihood of detection, and the potential costs to the firm's business reputation, it would be even more costly for the firm not to control these emissions (Profit Max = 10). In this situation, compliance and cooperation conflate, and there simply is no incentive to evade.[95] Hence, one can confidently predict that the owner will comply with the law (Prediction = 10) and safely say that the owner should do so (Assessment = 10). Toxin A involves a scenario where legal, ethical, and economic motivations align and serves as a useful baseline with which to consider the other toxins.

2. Toxin B: Crime Pays—Underenforced Law

The second toxin pits economic incentives against legal and ethical ones. The EPA restricts emissions of Toxin B (Letter of Law = 10) and the toxin truly is dangerous (Spirit of Law = 10); hence, once again compliance and cooperation conflate. But this time the owner makes more money by evading the regulation than by complying (Profit Max = 25). Perhaps the likelihood of detection is relatively slight and the potential for civil liability, criminal fines, and the costs to the owner's business reputation are all negligible.[96] In such a setting, it seems unambiguous that the owner *should* comply with the law and restrict output of Toxin B (Assessment = 10). Whether the owner is likely to do so is less clear (Prediction = ?).

Whether a businessperson will evade a law that is not effectively enforced depends on two competing factors. First, it depends on just how profitable evading the law appears to be. The greater the expected return, ceteris paribus, the more likely the evasion. But the decision also depends on the owner's sense of social obligation to obey law in general, and on the moral saliency of the particular regulation in question.[97] Compare, for

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[95] *See supra* text following note 33 (noting that when the letter and the spirit of the law are unambiguous and the connection between the two is clear, then there is no meaningful distinction between cooperation and compliance).

[96] *See supra* notes 40–42 and accompanying text (discussing underenforcement of laws in the *maquiladora* district and the difficulty of proving insider trading violations).

[97] Tom R. Tyler examines the competing factors that lead to legal obedience, distinguishing between "instrumental" or deterrence-based reasons and "normative" reasons associated with the sense that law is worthy of following. *See* Tom R. Tyler, Why People Obey the Law 3–5, 32–45 (1990) (articulating the distinction between instrumental and normative motives and reporting previous empirical findings as well as his own). Tyler concludes: "In trying to

example, the likelihood that the owner would knowingly violate a regulation designed to protect a migratory bird habitat with one meant to reduce the likelihood of human birth defects.[98] Obviously, the owner would be more likely to evade the former than the latter. This is true because the regulation protecting unborn children has a higher degree of moral saliency than the one intended to protect birds. In fact, it seems that most people would be unwilling to risk human birth defects regardless of how profitable it appears to be; respect for bird habitat, by contrast, may very well have a price.

3. Toxin C: Civil Disobedience—Inane Law

Toxin C is regulated (Letter of Law = 10) even though it poses no significant risks to the environment or to society at large (Spirit of Law = 25). Perhaps the regulation resulted from lobbying pressure where a competing firm has captured the law so as to achieve an anticompetitive advantage.[99] Perhaps the regulation is just a mistake. In either event, this regulation is either unjust or inane. The regulation, however, is enforced and given the likelihood of civil fines and potential harms to the firm's business reputation, if the owner evades the law it will hurt the firm (Profit Max = 10).

Whether the owner *should* comply with an unjust or inane law is essentially a question of civil disobedience. In the present case, it seems unlikely that the owner would feel ethically compelled to evade the command to reduce emissions. This is because reducing Toxin C is unlikely to affirmatively harm the environment. This law is inefficient or inane, but not otherwise harmful, and with regard to inane law, the owner probably has a weak duty to comply, unless compliance is very costly. Of course, if reducing the level of Toxin C caused direct and severe harm to the environment, then the owner might have a social responsibility to sacrifice his or her

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understand why people follow the law, we should not assume that behavior responds primarily to reward and punishment (as do traditional theories of deterrence). Instead we should recognize that behavior is affected by the legitimacy of legal authorities and the morality of the law." *Id*. at 168 (author's parentheses, citations omitted).

[98]*See* discussion *infra* Part II.D.2.

[99]*See supra* notes 48–53 (discussing the Capture Theory of regulation); *see also* TYLER, *supra* note 97, at 31–32 (discussing empirical work studying the effect that a perception that a law is illegitimate has on one's willingness to comply).

pecuniary interest and refuse to comply with the letter of the law. Because such a scenario seems unlikely here, Table 1 reflects both a prediction that the owner will seek to maximize profit by reducing emissions of Toxin C (Prediction = 10) and an assessment that the owner should follow the letter of the law even though the law in this case appears to be somewhat inane (Assessment = 10).

4. Toxin D: Civil Disobedience—Underenforced and Inane Law

Toxin D again involves an inane or unjust law (Letter of Law = 10; Sprit of Law = 25), but unlike the previous toxin, this time, evading the letter of the law *is* cost effective (Profit Max = 25). Hence, the only reason the owner might comply with this regulation is from a generalized habit of obeying law or out of a sense of duty to the "rule of law" in general. In this case, where the regulation is both underenforced and seemingly inane, these reasons appear relatively weak. As a general rule, people comply with law only if compliance is compelled or if the person perceives a sufficient social duty to comply that outweighs his or her economic self-interest. In short, Toxin D represents an interesting situation where the owner is likely to break the letter of the law (Prediction = 25) and probably is morally justified in doing so (Assessment = 25).[100]

5. Toxin E: Legal Loophole—It's Legal, But It Shouldn't Be

Toxin E is not regulated by the EPA (Letter of Law = 25), but it should be (Spirit of Law = 10). In fact, Toxin E poses dangers identical to those posed by the first two toxins and the failure to regulate appears to be an oversight. This oversight has created a "loophole" in the law that enables the owner to comply with the letter of the law while simultaneously violating its spirit.[101] That is, the owner can endanger the public interest without violating the letter of the law. However, if the owner does so, the

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[100]The assessment that the owner should violate the letter of Regulation D is one upon which reasonable people may differ. Comparing Regulations C and D, note that although both are inane, the former is effectively enforced either through reputation effect and/or through civil and criminal liability, whereas the latter is not. This lack of enforcement may reflect a relatively lower social concern with toxin D and hence may help justify a willful violation of the letter of this regulation. *See generally* Pepper, *supra* note 38, at 1554–59 (discussing the doctrine of *desuetude* and the various reasons that a law may be underenforced).

[101]*See supra* notes 34–35 and accompanying text (discussing the normative implications of legal loopholes).

market will punish the firm, perhaps through a public boycott or through more general harms to the firm's reputation (Profit Max = 10).

Toxin E involves a scenario in which market forces have created an economic incentive to hold oneself to a higher environmental standard than required by the letter of environmental law. In such a situation one can confidently predict that the owner will seek to maximize profit by reducing emissions (Prediction = 10), and because the toxin is truly dangerous, this action is socially responsible as well (Assessment = 10). In fact, the owner is probably ethically obligated to cooperate with the EPA and inform government regulators that Toxin E is dangerous so as to help eliminate the legal loophole.[102] Toxin E illustrates a situation where the letter of the law neither predicts the business decisions nor adequately assesses the social responsibility of business conduct. In fact, Toxin E illustrates that when economic and ethical incentives converge, the letter of the law becomes largely irrelevant.[103]

6. Toxin F: Legal Loophole—It's Legal, It Shouldn't Be, and It's Cost Effective to Exploit

Like the previous toxin, Toxin F presents a legal loophole that enables the owner to comply with the letter of the law while simultaneously violating its spirit (Letter = 25, Spirit = 10). This time, however, it is in the owner's pecuniary interest to exploit the legal oversight rather than seek to correct it (Profit Max = 25). Of course, because Toxin F is truly dangerous, the owner should reduce the emissions (Assessment = 10). What the owner is likely to do, however, is less clear (Prediction = ?).

The prediction regarding whether the owner will exploit a legal loophole follows that same logic as the prediction with regard to Toxin B and white-collar crime. On one hand, the more money there is to be made by exploiting the loophole, the more likely the exploitation. On the other hand, the owner may be willing to sacrifice profit if he or she perceives a sufficiently compelling social duty to do so. This perception of a public duty is likely to depend on the owner's respect (or disrespect) for environmental regulations in general and his or her assessment of the gravity of the potential harms posed by Toxin F.

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[102]*See supra* note 35 (discussing the duty to implement socially minded reforms).

[103]Note that the same observation can be made with reference to Toxin D.

7. Toxin G: Reputation Effects—Market Constraints Exceed Legal Constraints

Toxin G presents a seemingly odd situation in which economic constraints exceed ethical and legal constraints. Toxin G is not dangerous (Spirit = 25), and it is not regulated (Letter = 25); nonetheless, it is cost effective for the firm to reduce emissions (Profit Max = 10). This situation may be caused by the threat of a misguided boycott. Perhaps the owner's customers wrongly believe that Toxin G is dangerous and if the he or she refuses to reduce emissions these customers will take their business elsewhere. In this situation, the owner will follow economic incentives and reduce emissions (Prediction = 10). Whether bending to misguided market pressures is socially acceptable probably depends on whether reducing emissions harms the environment. Because harming the environment seems unlikely here, kowtowing to economic pressures, even when those pressures are misguided, is probably socially acceptable (Assessment = 10).

8. Toxin H: The Normal Case—Law, Ethics, and Economics Align

The final toxin, like the first, involves a scenario where legal, ethical, and economic motivations align (Letter of Law = 25, Spirit of Law = 25, Profit Max = 25). When these three realms are consistent with one another, both positive predictions and normative assessments become easy. Correspondingly, Table 1 indicates that the owner will not reduce emissions of Toxin H (Prediction = 25) and has no social obligation to do so (Assessment = 25).

D. Implications and Discussion

Reflecting on the case study, a number of implications can be drawn. Three receive special attention here. First, the case provides a means to discuss the relevance of both organizational structure and subject matter expertise on business decisions. Second, the case highlights the trade-offs between a firm's profit motive and its social obligations. Third, the case provides insights into the relative potency of the letter of the law as a factor in predicting and assessing business conduct. A brief discussion of each topic follows.

1. Irrelevance of Organizational Structure

The manufacturing firm in the hypothetical is a sole proprietorship. It is interesting to ask what effect this choice of organizational structure has

on both the positive predictions and the moral assessments with regard to each toxin. For example, what changes if one assumes that the decision maker is the CEO of a publicly traded firm rather than a sole proprietor? This question may have particular relevance for analysts who apply a "stakeholder" approach to CSR issues.[104] Stakeholder analysis focuses attention on the various constituencies to whom a CEO may owe a duty of care.[105] Because a CEO owes a legal duty of fidelity to shareholders, the question becomes whether he or she can ethically choose to go beyond legal compliance to legal cooperation, even if doing so means sacrificing shareholder interests.[106] This question, prominently raised by Milton Friedman several decades ago and answered by Friedman in the negative,[107] continues to resurface in discussions of the topic of CSR today.[108]

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[104]*See generally* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 66 (1995) (providing an overview of the literature and distinguishing between "normative," "instrumental," and descriptive works).

[105]Popularized in the management literature in the 1980s, the term "stakeholder," is a play on the word "stockholder," and refers to the various constituencies such as employees, communities, customers, and suppliers that are affected by corporate actions. *Compare* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984) (providing an early articulation of the notion), *with* Marianne M. Jennings, *Teaching Stakeholder Theory: It's for Strategy, Not Business Ethics*, 16 J. LEGAL STUD. EDUC. 203 (1998) (criticizing the normative aspects of the theory as essentially vacuous).

[106]*See generally* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1780–96 (2001) (providing the legal background and insightful commentary on the various fiduciary duties owed by corporate executives).

[107]*See* Friedman, *supra* note 1, at 33 (arguing that the appropriate goal for a corporate executive is "to make as much money as possible while conforming to the basic rules of society, both those embodied in law and those embodied in ethical custom"). Friedman did not distinguish legal compliance from legal cooperation, and given his belief in freedom as an absolute, or at least primary, value, *see generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (articulating an essentially libertarian philosophy), Friedman would likely be cited for the more limited social duty. *See, e.g.*, STONE, *supra* note 22, at 75–77 (speculating on what Friedman might have meant by his reference to "rules of the game" and using Friedman as an exemplar of the narrow view of CSR).

[108]*See, e.g.*, ROBERT C. SOLOMON, A BETTER WAY TO THINK ABOUT BUSINESS: HOW PERSONAL INTEGRITY LEADS TO CORPORATE SUCCESS 30–31, 34 (1999) (finding Friedman's thoughts on CSR "provocative," yet "incomplete"); TOM L. BEAUCHAMP & NORMAN E. BOWIE, ETHICAL THEORY AND BUSINESS 51–55 (6th ed. 2001) (reprinting Friedman's essay in a contemporary textbook); DAVID M. ADAMS & EDWARD W. MAINE, BUSINESS ETHICS FOR THE 21ST CENTURY 41–45 (1999) (same).

Interestingly, the social responsibilities with regard to each toxin do not change with the firm's organizational structure. That is, the social responsibilities of a CEO are exactly the same as the social responsibilities of a sole proprietor. The sole proprietor is generally free to maximize the profitability of his or her business operations; however, he or she cannot do so in a way that violates the spirit of high moral content regulation. If the proprietor becomes a passive shareholder and hires the CEO to manage the firm, the proprietor has no moral authority to authorize the CEO to do anything that the proprietor could not ethically do.[109] Because the proprietor has a social responsibility to consider the effect that his or her actions would have on society, so too does the CEO.

The change of organizational structure, however, does change the analyst's predictions as to how the firm will behave. The predictions change because the cost-benefit analysis that generates the "profit max" column of Table 1 must now be recalibrated from the perspective of the CEO rather than from the perspective of the sole proprietor. Certain activities that may not have been in the best interests of the sole proprietor may be in the interests of the CEO.[110] For example, a CEO may be more willing to engage in a white-collar crime such as financial fraud where the legal liabilities may be passed on, at least in part, to shareholders. In these situations, whether the CEO restrains himself or herself will depend upon whether he or she feels a sense of commitment to the spirit of fiduciary law. In this light, Friedman's concern with executive fidelity centers on agency costs and positive predictions of self-dealing, and has relatively little to do with a CEO's social duties with regard to law or a CEO's direct ethical duties to various stakeholders.

The case study also highlights the relevance of subject-matter expertise on corporate decision making. The sole proprietor in the case study was described as an environmental engineer and a Ph.D. toxicologist.

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[109]*See* Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 Bus. Ethics Q. 53, 68 (1991); Joseph S. Spoerl, *The Social Responsibility of Business*, 42 Am. J. Juris. 277, 278–79 (1997).

[110]The implications of the divergence between the managerial and shareholder interests were first explored in the 1930s. *See generally* Adolph A. Berle Jr. & Gardiner C. Means, The Modern Corporation and Private Property (1932); Ronald H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937). These seminal works spawned contemporary "agency theory." *See generally* Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 8 J. Pol. Econ. 298 (1980); Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. Fin. Econ. 305 (1976).

When assessing whether a given regulation made environmental sense (e.g., Toxins C, D) the hypothetical owner could be confident in his or her understanding of the technical issues. Remove that technical certainty, and the owner would seemingly need to err on the side of caution, being more likely to comply with questionable regulations regarding matters of *malum prohibitum*, and to cooperate with laws addressing matters that constitute *malum in se*.

2. Trade-Off Between Pecuniary Self-Interest and Social Responsibility

Although most of this article focuses on normative issues, the case study also provides positive predictions. The positive analysis assumes that businesspeople will do what is in their own pecuniary self-interest unless they feel a sufficient social responsibility or moral obligation to restrain themselves. This assumption reflects the truisms that people like money and that they are capable of self-restraint. The various toxins illustrate that the social responsibility to comply with the letter of the law, without sufficient respect for the spirit of the law (Toxin B), may be insufficient to motivate self-restraint. Yet, even without the letter of the law, an appeal to the spirit of the law (Toxin F) can restrain self-interest, but only if the businessperson places sufficient weight on the purposes that underlie the law. The businessperson must think that the purpose behind the law is sufficiently noble to be willing to sacrifice pecuniary gains.

It also seems reasonable to assume that businesspeople will obey or disobey laws in systematic ways. One the one hand, white-collar crime is positively correlated with the promise of pecuniary gain. The more profitable the crime appears, ceteris paribus, the more likely it is to be committed. On the other hand, legal obedience depends on the person's sense of fidelity to the law. The more respect for the law a businessperson has the less likely the crime. The level of respect, in turn, would depend, at least in part, on the moral content of the particular law. A businessperson might sacrifice pecuniary self-interest so as to cooperate with high moral content laws (Toxins B and F). But society should not expect cooperation with low moral content laws (Toxins C and D). In fact, society will not even get compliance with a low moral content law unless the business actor concludes that compliance is in his or her pecuniary interests (Toxin C).

This trade-off between pecuniary self-interest and social responsibility may help explain the recent wave of business scandals and provide insights to the likely effects of recent reforms. In part, the wave of scandals may reflect a lack of effective deterrence. Perhaps various business actors

did a cost-benefit analysis ex ante, and decided that financial fraud and other white-collar crimes appeared to pay. But equally importantly, it seems that many of these business actors failed to restrain themselves. This lack of self-restraint, in turn, reflects a lack of respect for the law. To heighten deterrence of white-collar crime, regulators need to increase the likelihood that violations will be detected and prosecuted, and increase the severity of penalties upon conviction. But even more importantly, businesspeople must embrace a social obligation to comply with reasonable regulatory law even if evasion appears cost effective.

3. Relevance of the "Letter of the Law"

Finally, the case study also provides insights into the relevance of the letter of the law as a factor in predicting and assessing business behavior. Collectively, the eight toxins illustrate the interdependent nature of legal, ethical, and economic incentives. The first and last toxins are particularly useful for examining the potential for self-serving rationalization. For example, ask the owner why he or she is reducing emissions of Toxin A, or failing to reduce Toxin H, and any of three answers could be offered. The owner might say that (1) the letter of the law requires (or permits) it, (2) the toxin is dangerous (or not dangerous), or (3) it is economically advantageous (or disadvantageous) to reduce emissions. To tell which of these three motivations is most potent, one needs to examine what the owner would do when the legal, ethical, and economic factors conflict, rather than when they align.

Reflecting on the patterns of predictions and assessments in Table 1, it is interesting to compare the first four toxins with the latter four. The first four toxins are regulated whereas the latter four are not; yet, the patterns of predictions and assessments for the two groupings are the same. This congruence suggests that when comparing the relative potency of the letter of the law, the spirit of the law, and the desire to maximize profits, the letter of the law plays the smallest role. The letter of the law impacts economics because there typically is a price associated with breaking the law, and it affects ethics because one presumably has a duty to obey laws that are not demonstrably unjust. But in the final analysis, predictions of business decisions turn less on the letter of the law than on a trade-off between economic incentives and self-imposed moral restraints. Similarly, one's moral assessments have much more to do with the social impact of one's actions than with the general duty to obey the law just because it is the law.

III. Conclusion

This article seeks to contribute to the CSR literature. The primary scholarly contributions are twofold. First, the article develops a distinction between legal compliance, cooperation, and evasion. Second, the article argues that a businessperson's social duty with regard to law varies systematically with reference to the moral content of the law in question. Morally just laws deserve cooperation, morally neutral laws require compliance, and, in limited situations, morally unjust laws should be evaded.

The distinction between legal compliance and legal cooperation may prove to be particularly noteworthy. Introduced in the early CSR literature, the distinction has been largely neglected. The present article argues that the distinction between complying and cooperating becomes critical whenever the law has ambiguities, has loopholes, or is underenforced. One cooperates by interpreting legal ambiguities in the light of the public good, by resisting temptations to exploit unintended loopholes, and by complying with the letter of the law even when the law is underenforced. This view is illustrated with several examples.

The article also develops the idea that a businessperson's social duty with regard to law varies systematically with the law or regulation in question. Considering both the Public Interest Theory and the Capture Theory of regulation, the article explores the notion that some business regulations are more socially justifiable than others. The article offers a hierarchy that distinguishes between important and necessary laws (*malum in se*), reasonably just laws (*malum prohibitum*), inane laws (silly and misconceived), and unjust laws (laws that are affirmatively harmful). The notion that one may ethically evade "inane" laws may be particularly interesting, with prior discussions of civil disobedience tending to focus on emotionally charged and substantively unjust laws such as racial segregation rather than inane or silly laws such as a misconceived bird regulation.

Finally, the article demonstrates the usefulness of the above insights with reference to an extended hypothetical case. The case highlights the interdependent nature of legal, ethical, and economic influences and illustrates that the three influences coincide with one another to differing degrees in differing contexts. Ultimately, the case study offers a means to advance discussions of CSR issues by providing a nuanced jurisprudential view together with a systematic means for keeping the trade-offs and congruencies between law, ethics, and economics tractable.