

Chapter 4

Responsibilities

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Abstract

Having established that:

- 1) economic determinism is false (in §3.3);
- 2) a businessman is not obliged, as a matter of rationality, to maximise (in §3.5); and
- 3) a businessman is not obliged, by his institutional position, to maximise (in §3.6);

we see that a businessman has some freedom of action, and hence is responsible for what he does. He can be asked 'Why did you do it?', and in some cases 'Why did you not do something to prevent it?'

Responsibility is often delegated, and in most business enterprises there is a chain of responsibility, with subordinates being responsible to a superior. Such responsibility never excludes all discretion, and the duty to do what one is told does not override all other duties, legal and moral.

Even when someone is not responsible *to* anyone, he is still responsible for what he does. The cooperative nature of a business enterprise furnishes certain grounds of obligation, both to those within the organization on the basis of the shared values of the organization, and to those external to it on the basis of justice.

¹ I am not sure where this should go; it used to follow codes in old ch.5, so I have left it following codes still. Possibly it should wait until ch.14, EtheEcon.

§4.1 Responsibility To

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Economic determinism is false. The iron laws of supply and demand are not made of iron, and indicate tendencies only, without fixing everything, and leaving no room for choice. In economic affairs we are often faced with decisions, and often can choose between a number of alternative courses of action. Moreover, our choice is not completely foreclosed by canons of rationality, which would make it irrational to do anything other than maximise our profits, nor by institutional guide-lines, which would lay that down as our only obligation. It is up to us what we do; we are responsible agents, and may fairly be asked to explain why we did as we did.

Responsibility is a difficult concept. It can be shared, without any of those sharing it having less of it than they would if it had not been shared at all. If we both do something, each of us is responsible for what we do, whereas if we both share a bottle of beer, each has only what the other does not drink. Sometimes, especially in business organizations, responsibility is shared unevenly. If the boss tells an employee to do something, the boss is primarily responsible. He needs to have adequate reasons for its being done, whereas the employee can simply say “I was told to”, and that in normal circumstances is justification enough.

We have chains of responsibility, with subordinates being responsible *to* their immediate superior, and through him to the top management. The superior is entitled not only to ask why actions were done, and to assess the account given and blame the subordinate if it is inadequate, but also to give the subordinate instructions for the future, assigning further duties and responsibilities and saying how they are to be discharged. And, correlatively, because his subordinates are carrying out his instructions, he is responsible to his superiors for what they do. It is his business to see that they do not make a mess of things, and he has to carry the can if they do.²

² [Previously this para ran: the person to whom I am responsible is entitled not only to ask me to answer the question of why I did what I did and to assess the account I give and blame me if it is inadequate, but also to give me instructions for the future, assigning me further duties and responsibilities and telling me how to discharge them. And, correlatively, because I am doing what he tells me, he is responsible to his superiors for what I do. It is his business to see that I do not make a mess of things, and he has to carry the can if I do. I have taken out the first person, to avoid clash with next para, but it may make this para too limp]

Although a superior is entitled to call his subordinates to account, there are limits both to the extent to which he can require subordinates to justify their actions, and to the instructions he may properly give. He may tell his secretary to go to a stationer and get some paper-clips. In commissioning her, he not only instructs her, but authorises her to use her discretion in carrying out the commission. She is to decide when to cross the road. If the nearest stationer is out of paper-clips, and she takes longer to go on to the next, that, in the absence of an explicit instruction to the contrary, is for her to decide. Provided she comes back with the paper-clips in reasonable time without having dallied, she cannot be taken to task, or asked to justify the myriad of minor decisions she had to take in carrying out the commission. In commissioning her he implicitly gave discretion to make these minor decisions as she thought best. How much discretion a commission confers depends on the nature of the commission and the circumstances of the case, but always there is some discretion.

It follows that the ultimate responsibility, of the subordinate is never completely abolished. Although normally, if challenged, the subordinate can say simply "The boss told me to", the defence of superior orders has limits. It gives the subordinate a *prima facie* adequate answer to the question 'Why did you do it?', but not a conclusive one. There could be a further 'but': 'but he clearly did not mean it', or 'but he would have had second thoughts about it', or 'but it was illegal', or 'but it was immoral'. Although it is the duty of a subordinate to do what his superior tells him to do, it is not an absolutely overriding one, but, rather, has to be set in a general context of interpreting his instructions in the light of the situation. In the same way an instruction to contravene the law of the land does not override the duty to obey the law of the land, nor does an instruction to contravene the moral law override the duty to obey that. In the case of the secretary, she may be a subordinate, but she is still a person, who is therefore ultimately responsible for all she does. In commissioning her to carry out any task, she is implicitly given some discretion to use her own judgement in discharging the commission: and in commissioning her to do anything, her autonomous responsibility for all her actions is similarly to be respected. If an amoral tool is wanted, a robot should be bought.³

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even if I am not responsible to anyone, I am still responsible. I am not obliged to answer another's questions, but must still answer my own.

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³ See further below, ch.7, §4, (p.3 of employ4).

§4.2 Responsibility For

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If you do something, you can be asked why you did it. It does not follow that if you do not do something you can equally be asked why you did not do it. Some modern philosophers—utilitarians, for example—miss this point, and argue that we should do a cost-benefit analysis of all the alternatives open to us, and choose the one that will maximise human happiness, which implies that if there is any course of action we might have done but did not, we can be asked why we did not do it, and blamed unless it would have produced less happiness than what we actually did. This doctrine of unlimited negative responsibility lands an impossible burden on every decision-maker. There are all sorts of things that might have been done and were not, and some of them, for all we know, might have been productive of much human happiness. Certainly there is much unalleviated human misery. But human beings are limited. No one of us can do everything, or think of everything. If we are to accomplish anything at all, we have to concentrate our efforts, confining our attention to achieving those limited aims that are within our power. Before we can be required to answer the question ‘Why did you not do it?’, we are entitled to ask ‘Why should I?’. We can be blamed for leaving undone those things we ought to have done, but not for all the innumerable things we might possibly have done, which, had we done them, would have turned out well.

Except at the lowest level, businessmen do take on some negative responsibilities. They not only do as they are told, but see to it that nothing goes wrong in the area for which they take responsibility, being always ready to take remedial action to prevent untoward events happening. Being always ready implies a certain degree of alertness which characterizes the business executive in contrast to the person paid simply to perform routine tasks. The senior executive has to be looking round all the time to see if there is anything arising that he needs to deal with. He can never be completely switched off. The Latin word for business, *negotium*, captures this sense of never being entirely at leisure, which goes with taking on the responsibility for something.⁴

With this commitment to continual wariness goes a wide discretion about what measures to adopt in dealing with events as they occur. If you are responsible for recruitment, it is very largely

⁴ See above, ch.2, §2.2, p.21.[n.3 of 1st draft]

up to you to take the appropriate steps to attract suitable applicants, interview them, and select the most suitable within fairly broad outlines laid down by the directors. Wide responsibilities and detailed accountability are not compatible. There is always a trade-off between detailed accountability and general responsibility for the success of the commission. If the secretary is told she must go to a particular shop, and it is out of paper-clips, she is not to blame if she returns empty-handed. If she is to be sure she succeeds in getting paper-clips, she must have some discretion over the means she adopts to get them. She should not be called to account for having gone to Rymans rather than W.H. Smith. If asked why she did, she can properly reply “You told me to get some paper-clips, and that is what I did.”

The last point has in recent years been forgotten. The word ‘accountability’ has been much used, without any understanding of its conceptual limitations, or recognition of the wide discretion that great responsibility requires. We can ask questions, but we cannot ask many questions all at once, and need to determine what questions are, and what are not, appropriate to ask in calling someone to account. If we press very detailed questions—‘Why did you cross the road at the traffic lights and not at the zebra crossing?’—we withdraw the discretion that normally goes with the commission, and thereby narrow the commission to the carrying out of the more detailed instructions. Conversely, if we give a manager the responsibility for a wide range of matters, we implicitly accept his judgement about how best to deal with them, and provided the things he is responsible for go well, we should not press him to justify further the decisions he took. It wastes time. It engenders a spirit of defensiveness in the person being called to account,⁵ because it indicates a certain lack of trust. It is a good practice to delegate responsibility as much as possible, assigning to each person the widest responsibility he is capable of undertaking.⁶ Besides respecting the individual’s autonomy, and treating him not merely as a means, but as an end in himself, it is also a counsel of prudence—people do not want to do things because they are told to, but would rather decide for themselves what needs to be done—and if we give people more responsibility, they will throw themselves more whole-heartedly into the job.

⁵ See further below, ch.13, §13.3 [accountability]

⁶ Charles Handy, *The Empty Raincoat*, London, 1995, p.115, quotes a papal encyclical, *Quadragesimo Anno*, 1941, “It is an injustice, a grave evil and a disturbance of right order, for a large and higher organisation to arrogate to itself functions which can be performed efficiently by smaller and lower bodies . . .” and says that this is the real principle of “subsidiarity”.

§4.3 Common Concerns

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In deliberating about what to do, and in justifying past decisions, at least to himself if not to any one else, a businessman weighs arguments for and against different courses of action. Some of these arguments arise from the cooperative nature of business. Two grounds of obligation have emerged. In the first place the parties to a business transaction, are never completely external to each other but have some values in common, which constitute some basis for ethical consideration. And, secondly, although the two parties may have significantly different values, the very nature of their transaction is other-directed, and carries with it some concern for the other's point of view.

The parties to a business transaction are not completely external to each other. Just as we are never perfectly of one mind with one another, even in a monastery, even in the most united of families, so one party is never in complete disagreement with another it is doing business with.⁷ If business is to be possible at all, both parties must share some abhorrence of violence and dishonesty.⁸ Where there is no common understanding, no holds are barred, and the parties are completely external to each other, they are not doing business with each other, but are in a state of war. Just as it is a mistake to think in politics that a General Will always exists and can easily be discovered, so it is wrong to assume in economics that the interests of the two parties are completely opposed, and no basis for mutual give-and-take can exist.⁹

Once we recognise that there is no pure case of a business transaction where the values held in common are at an absolutely minimum, that is to say, there are no shared values at all, it is easier to accept that such shared values as there are can provide the decision-maker with arguments as to what he ought to do. What these values are depends on the relationship between the parties and the context in which they are dealing with each other. There

⁷ See above, ch.1, §6 (Paradigms), p.12.

⁸ See above, ch.3 (False Images), §4 (Single Swaps) False3, p.6 (pirate).

⁹ [Green note: "Some of this should go earlier"; but in §1.7 the argument goes the other way. I am inclined either to keep this sentence here, or else to delete it altogether.]

is a wide continuum of cases, from the relationship between currency dealers for whom honesty is almost the only shared value, to monetary transactions between members of a family or within the same group of firms where the shared values predominate, and money is transferred only to meet expenses or equalise accounts. In between are many cases where there is a long-standing partnership with shared concerns for the good name of the trade, the prosperity of the local community, the non-pollution of the environment, and the like, which afford a common basis on which agreements may be reached.

§4.4 The Other's Point of View

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In so far as business relations are external, the grounds of obligation are different. They arise from the fact that economic activity is also other-directed. They are often expressed as counsels of prudence: if I do business with you, I am doing something for you, something you want, and unless I do it to your satisfaction, I shall not long continue as your business partner. But it is also an argument of justice, arising from the two-sided nature of business: I cannot coherently expect you to do business with me solely for my sake. It is built into the concept of a business transaction that it should be for your benefit as well as mine, and if I am to make sense of what I am doing, I must take to heart your point of view as well as mine, and aim to do what should be reasonably acceptable to you as well as to me.

The word 'reasonably' needs to be stressed. Other people might like it if they always got the best of the bargain, and I the worst. That is a liking I do not need to accommodate. What I do need to do is to address myself to each party who may be adversely affected by a decision of mine, and assess the reasons I could give him for the decision I take. Often they are good reasons, though unwelcome to him. I sack the employee because he is negligent; I take the customer to court because he has not paid his bill; I send back the supplier's goods because they are not up to the standard agreed upon. But by the same token, I pay the employee more if he has worked overtime, even though I did not promise to beforehand; I give the customer a replacement or his money back if the goods I sold him are defective or unsatisfactory; I pay the supplier on time, and give him ample warning if I am going to cease buying from him. What exactly my obligations are will

depend very much on circumstances and context. Quite often, as we saw in Chapter One,¹⁰ obligations conflict, and it is difficult to decide between them. That is not denied. Here the only point being made is that they do arise, and arise from the nature of business. A businessman trying to decide what to do should consider not only arguments about costs and profits, but wider arguments too, which are grounded in the fact that he is doing business with other people, and so needs to take into account the general point of view that others might be reasonably expected to have. This does not imply consensus at all costs, but it does imply at the outset of any business negotiation a clear declaration of intent on the part of both parties as to where they stand, that is, what their views are regarding the desired outcome of the negotiation they are about to begin.

§4.5 Obligations

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In taking decisions a businessman has many considerations to bear in mind. Typically now they are structured by the role he occupies as employee, colleague, manager, or director. It was different centuries ago, when most businesses were run by men who were their own masters, and were perfectly free to apply on weekdays the precepts they had heard and adopted on Sundays. It might be a moral problem whether or not to sack a sick workman, but it was a simple moral problem, uncomplicated by a structure of roles and responsibilities. But a manager now does not have the same absolute discretion. He has duties to his superiors, to his directors, to his shareholders, which certainly restrict his freedom of action, and which may seem to leave him no alternative but that of sacking an unprofitable employee. Yet he feels that the arguments are not all one way, and would like to be able to think clearly through a maze of conflicting responsibilities and obligations. Some of them are directed towards particular classes of person, sometimes called “stakeholder”, and some attach to certain capacities or roles. C.B. Handy distinguishes six different sorts of stakeholder, whose interests ought to be considered by those taking decisions: financiers, employees, suppliers, customers, the environment, and society as a whole; he argues that these six classes constitute a hexagon,

¹⁰ §1.2.

within which a decision-maker has to balance different, and sometimes conflicting, obligations.¹¹ Further distinctions may be drawn. Shareholders are in a different position from other creditors. Obligations to society comprise obligations to the local community, to the nation and perhaps to the international community and the whole of mankind. Many firms also recognise some obligation to their industry or trade. There are certain obligations, as well as certain non-obligations, to competitors.

Obligations to shareholders and employees, as well as obligations of shareholders and employees, are primarily internal obligations, arising out of shared concerns. Obligations to customers, suppliers and competitors are primarily external obligations, arising from our recognition of the validity of the other person's point of view as a necessary condition of making coherent sense of business activity. But in each of these cases some of the other considerations also apply, and the remainder are evidently mixed cases.

Besides obligations, business transactions may generate non-obligations. This is nothing strange: if I am playing chess with you, I am not under an obligation to point out that if you do not move your queen, I shall be able to fork it next turn;¹² if I am playing rugger, I have no duty to cooperate with the opposing team's efforts to score a try. So, too, I do not have to point out to my competitors their mistakes as I would to a friend or even a casual passer-by. The structure of business, like that of games and competitions, and also like that of the law courts, incorporates an adversarial element which not only alters our obligations, but actually suspends some. We need to recognise the considerations which a businessman can properly put out of mind; else he will be immersed in a babel of arguments, unable to think through them clearly, and liable to subside into either a soft emotional mush or a hard-nosed unconcern with genuine obligations. Like the procedure of the law courts, the world of business takes account of the limited range of the individual's concerns, and licenses individual competition for partial ends within an overall structure aiming at an impartial good. Although the importance of cooperation has been insufficiently recognised in Anglo-Saxon thought, competition

¹¹ Charles Handy, *The Empty Raincoat*, London, 1995, pp.130-131, p.143.

¹² See further below, ch.6, §6.3, (oprivsec.tex), (p.4 of employ4.doc)[CHECK whether this Xref is called for now]

is important also. It would not be fair if the defence lawyer cooperated with the prosecution to the extent of not putting the best case he could for the accused, and American anti-trust legislation protects the consumer against producers cooperating to form cartels. The non-obligations of competition, however, are not absolute.¹³ I still have an obligation not to cheat, not to commit fouls, not to commit perjury. Our sense of fair play in games is a useful guide, and the practice of the law courts may illuminate the duty of disclosure as it applies in business.¹⁴

Obligations, as we saw in Chapter One,¹⁵ can conflict. A duty of confidentiality to one's employer may conflict with a duty of honesty to a customer. As a father, a friend, a trustee, an executor, an employee, a citizen, a juryman, I may have duties which I should not otherwise have, and which may run counter to ones I normally acknowledge: I cannot as a juryman follow the injunction of the Sermon on the Mount "Judge not that ye be not judged"; I cannot as an employee raid the petty cash for the benefit of a beggar; if I am a trustee or an executor I have a duty not to be generous at the expense of the beneficiaries or legatees; and by a further extension of the same argument the bursar of a college or a treasurer of a charity may feel impelled to allow ribbon development on the land entrusted to his care because his duty is to maximise revenue, not to preserve the environment. We are tempted to resolve these conflicts, by establishing a simple hierarchy of duties, and by attaching them rigidly to roles. But that is a mistake. Often the circumstances of the case affect the overall ordering of obligations. A confidential secretary may be under an obligation not to reveal her boss's misdemeanours, even though they contravene the law, whereas a civil servant may be right to blow the whistle when the Government is trying to lie to Parliament.¹⁶ It would be wrong for the bursar of a college or the Church Commissioners to divert their funds to providing low-cost housing for the poor, or some other good cause, but they are properly sensitive to charges that the houses they own are being used as brothels, though sometimes feeling that their duty as trustees really requires them to turn a blind eye to what is going on, provided the shekels keep coming in to pay the vicars' stipends.

¹³ See further, old §4.7, Duties to Competitors, *competitor.tex*

¹⁴ See further, old §7.8 Confidentiality

¹⁵ §1.2.

¹⁶ See further, old §7.9, Whistle

§4.6 Trusteeship

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The law has not fully accepted the argument of §1 of this chapter. It has tended to circumscribe the discretion of trustees rigidly. The standard legal form of the modern business enterprise, the public limited company, has been developed gradually through a number of stages, some involving *ad hoc* legislation, from earlier concepts of trusteeship, and have taken over an unduly limited view of the manager's role.

In time past it seemed reasonable to charge executors with the duty of carrying out the testator's wishes rapidly and precisely, discharging his legal obligations, and if any further decisions were called for, acting vicariously in his interests, and leaving it to his legatees to do anything else that might seem appropriate. But legal obligations do not exhaust moral obligation,¹⁷ and the concept of interest is not as determinate as has been thought.¹⁸ What if after making his will, the testator had a long and incapacitating illness, in which he was devotedly looked after by a retainer? Should not she have some recognition from his estate? Is it in the interests of the deceased to have a decent funeral? a tombstone? As we move from the death-bed disposition of worldly goods to the long drawn-out winding up of an estate according to a will made many years earlier, it becomes less reasonable, indeed, less feasible, to limit the discretion of the executors rigidly. We begin to want them to take decisions on behalf of the testator in accordance with his general wishes, but not rigidly tied by the letter of a document drawn up years before and not anticipating the situation actually obtaining at the time of death. The executor does not, and should not, have complete discretion—he cannot decide to give the estate to a dog's home instead of to the heirs, But he has to have some, and it cannot be adequately characterized in terms of vicarious self-interest alone, unless that self-interest is glossed as including a man's concern that actions done in his name are ones he would be willing to be responsible for and could happily live with.

The same is true of trustees, and of devolved duties generally. In commissioning someone to do something we cannot totally exclude either his discretion as to how he should act, or his responsibility

¹⁷ See below, ch.6, §2, p.4 of state1.[? relocate?]

¹⁸ See above, ch.1, §4, CHECK and §*6*(professions/needs).

for what he does. There are, indeed, many things I can commission you to do, and if asked why you did them, you can properly justify them on the grounds of my having told you to do them. But to some actions there are moral objections which cannot be overridden by any defence of superior orders. Many such objections are enshrined in the law, and it is generally recognised that trustees and agents must act within the law. But the law is necessarily an incomplete articulation of our basic morality, and there always some actions not actually prohibited by law but evidently wrong none the less,¹⁹ and these we cannot commission another to undertake. It follows that we cannot adequately specify any commission or trust in terms that exclude moral considerations altogether. If I commission you to look after my interests, there is an implicit restriction that what you are to do must be not only legal but moral. For you are a moral agent, and though I can properly ask you to do things you would not otherwise do, and even land you in situations of moral conflict, I cannot ask you to abrogate your status as a moral being.

The degree of moral discretion and autonomous responsibility varies very much with the commission.²⁰ It is minimal in the discharge of specific tasks over a short period of time—when I tell a secretary to go to a stationer and get some paper-clips, there is hardly any point of entry for serious moral argument. But it increases as the commission becomes more wide-ranging and long-term. Trustees and boards of directors cannot be coherently given commissions which appear to exclude all discretion in maximising profits. If they are to be trusted with the assets of the charity or the shareholders, they must be trusted also to forbear on occasion from driving the hardest bargain possible with their employees, from polluting the environment, from devastating the local community. They cannot be coherently asked to exercise their judgement in the one respect without being allowed to exercise it in the other. This has now been recognised by the courts. Lord Murray in *Martin v. City of Edinburgh District Council* (1989), said “I cannot conceive that trustees have an unqualified . . . duty simply to invest Trust Funds in the most profitable investment available. To accept that without qualification would, in my view, involve substituting the

¹⁹ See below, old ch.5, §3, (codes4/legislation p.4)[relocate]

²⁰ See above, ch.4, §1 (respfor).

discretion of financial advisers for the discretion of trustees.”²¹ We thus are being led to a fuller concept of the public limited company, and of corporations generally. Corporations may have no souls, but they do have bodies—that is to say, they are incorporate as legal personalities, they are centres of decision-making. We can speak of ICI or General Motors doing something, and can ask why they do it, and asses their answers. In this sense corporations are agents in the same way as individual persons are, and can be held accountable for their actions, and their managers cannot claim that moral considerations should be altogether excluded in reaching decisions on their behalf.

§4.7 Legalism

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Some thinkers will accept the argument of the previous section only in so far as it reports a change in the law. In their view it is the function of the law to indicate the limits of acceptable business practice, and once the law has been laid down, the businessman is free—indeed, obliged—to pursue profits within the limits laid down by law. Thus Milton Friedman says:²²

In . . . (a free) economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.

It is a view widely held, but mistaken none the less. In the first place, the law needs to be predictable, and hence rigid. Often it is formulated in a code, and like codes in general, suffers from the defect of not covering all cases adequately.²³ Moreover, for reasons which will appear later,²⁴ the law tends to set a minimal standard. And in any case, reliance on the law is not a substitute for morality, but presupposes it.

²¹ Quoted by Richard Harries, *Is There a Gospel for the Rich?*, London 1992, p.146.

²² Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, 1962, p.133; quoted, Elaine Sternberg, *Just Business*, Little, Brown and Company, London, 1994, p.30.

²³ See below, this chapter, §4.* (codes)

²⁴ In ch.7 (State),S7.3. (law)

Two positivist doctrine, logical positivism and legal positivism, lie behind the rejection of moral responsibility in favour of bare compliance with the law. Logical positivism maintained that moral terms were merely emotive, attempts to manipulate the attitudes of others in some desired direction, and that moral arguments lacked cogency, and could always be ignored.²⁵ Law, by contrast, is definite and real, a hard external constraint, akin to those of the natural world, and a fit subject of study in the social sciences. Although few philosophers accept the tenets of logical positivism now, it remains a pervasive background to the thought of many others. But it would lie outside the scope of this work to adduce the arguments against it.

Legal positivism insists upon the separation of law from morals. It confuses a real distinction with a complete separation. It is true and important that the law is different from morality, but it does not follow that they have no close connexion. We generally acknowledge that there is a moral obligation to obey the law, and that almost every legal system enshrines much moral teaching, and that moral considerations have an important influence on the interpretation and development of the law. To insist that there should be no connexion is to misconstrue the rationale of the law, seeing the law as essentially imposed from outside by the arbitrary will of the sovereign, something we cannot afford to disregard but need not in any sense internalise, or make our own. But to see the law as entirely external is to take too limited a view. It is the view of the Bad Man, who is told by his solicitor what he cannot get away with. For most people, however, the law is not just imposed from outside. Although it needs on occasion to be enforced on those who are recalcitrant, it has developed from within society, and could not work unless most people abided by it and cooperated with it voluntarily. It is only in exceptional cases that the bailiffs have to be called in, and although it is important that in such cases they are available to act as a long stop, hardly any judgements could be enforced if nobody would obey them until actually coerced. We need the uncoerced cooperation of witnesses, judges, magistrates and jurymen, if the legal system is to work at all. So, although it is a tautology that people are legally free to do whatever they see fit to do within the limits set by the law, it is very far from a tautology that they are morally, or should be socially, free to do

²⁵ They can—at a cost; see below, ch.14 (Ethecon)

whatever is within the limits set by the law. Society only functions if most people most of the time are guided by the spirit, rather than just the letter, of the law. If people only told the truth when they were under oath in court, and only kept their word when it was set down in a legally enforceable contract, society would break down.

And so would business. The honesty enjoined by business ethics is the honesty understood by ordinary morality, not that whose breach is punishable by law. Even the most external transactions are governed by some moral principles in favour of honesty and against violence.²⁶ If it were only obedience to law that was required, international trade would be impossible, and in particular the paradigm example of exchanging beads for copra would not make sense.²⁷ Commerce can only take place within some shared moral understandings, which, though in some cases minimal, are ineliminable.

Moral scepticism and legal positivism have been bad guides. Business, and life generally, would be impossible if people did not keep their word, and could not be relied upon to refrain from bad actions unless constrained by law. We need to unlearn the specious arguments of the present age—the city operator who pleaded that it was only a gentlemen’s agreement, and so he was not bound by it, or the head of an Oxford College who said that since the undertaking given to the University constituted only a moral obligation, the College was not bound by it. Such contentions show a lamentable lack of understanding of the responsibilities of engaging in the business of the world. If a man is not a man of his word, his words are idle, and negotiations with him are sham.

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Two alternative versions of this section follow:

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Some thinkers will accept the argument of the previous section only in so far as it reports a change in the law. In their view it is the function of the law to indicate the limits of acceptable business practice, and once the law has been laid down, the businessman is free to pursue profits within the limits laid down by law.

²⁶ ch.3 (false), §4 (p.7 of false5).

²⁷ Ch.3, §4.(false5, p.7)

They are influenced by legal positivism and logical positivism, the one insisting on the separation of law from morals, the other engendering a diffused moral scepticism.

The doctrine of the separation of law and morals rest upon a confusion: it is true and important that the law is different from morality, but it does not follow that they have no close connexion. We generally acknowledge that there is a moral obligation to obey the law, and that almost every legal system enshrines much moral teaching, and that moral considerations have an important influence on the interpretation and development of the law. We cannot have law without some commitment to some moral values, and, for reasons that will emerge in Chapter ****,²⁸ the standard required by the law is necessarily a minimal one, well below what is tolerable in social or commercial life.

We are embarrassed by morality. Moral arguments seem to lack cogency. They can always be ignored.²⁹ We suspect them of being merely emotive, attempts to manipulate the attitudes of others in some desired direction, Law, by contrast, is definite and real, a hard external constraint, akin to those of the natural world, and a fit subject of study in the social sciences.

Behind these sceptical arguments lies an individualist yearning for freedom from all internal constraints, so that he can want freely, even if he cannot achieve all his aspirations and must generally conform to external necessity in choosing means to implement his ends. The individualist would like to be free to do what ever he could do, without having to internalise all the clinging inhibitions of moral and social life. Such an outlook is possible for Robinson Crusoe, but not for a businessman engaged in commerce with other people, constantly needing to cooperate, and having to take account of those he is cooperating with, often in situations too complicated to be adequately covered by any law or code.³⁰ He is a decision-maker, and decision-makers have to internalise the considerations that bear on the decisions they are called upon to make. And these considerations very largely concern other people.

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²⁸ In §*.*, (The Law)

²⁹ —at a cost; see below, ch.14 (Ethecon)

³⁰ See further below, ch.*, §*.* (Codes)

Some thinkers will accept the argument of the previous section only in so far as it reports a change in the law. In their view it is the function of the law to indicate the limits of acceptable business practice, and once the law has been laid down, the businessman is free—indeed, obliged—to pursue profits within the limits laid down by law. Thus Milton Friedman says:³¹

In . . . (a free) economy, there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.

It is a view widely held, but mistaken none the less. Often, it is fostered by legal positivism and logical positivism, the one insisting on the separation of law from morals, the other engendering a diffused moral scepticism.

The doctrine of the separation of law and morals rests upon a confusion: it is true and important that the law is different from morality, but it does not follow that they have no close connexion. We generally acknowledge that there is a moral obligation to obey the law, and that almost every legal system enshrines much moral teaching, and that moral considerations have an important influence on the interpretation and development of the law. We cannot have law without some commitment to some moral values, and, for reasons that will emerge in Chapter ****,³² the standard required by the law is necessarily a minimal one, well below what is tolerable in social or commercial life.

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³¹ Milton Friedman, *Capitalism and Freedom*, University of Chicago Press, 1962, p.133; quoted, Elaine Sternberg, *Just Business*, Little, Brown and Company, London, 1994, p.30.

³² In §*.* (The Law)

³³ —at a cost; see below, ch.14 (Ethecon)

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§4.8 Duties

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A businessman has to take many factors into consideration. In §5 of this chapter we identified nine, It is tempting to describe these as duties. Certainly, we could tax a businessman to explain why he had failed to consider his shareholders, his employees, his locality, his country, or the environment, and if he brushed off the question with ‘Why should I? It is none of my business’, his defence would sound hollow. But the word ‘duty’ denotes a stringency of obligation that often does not obtain. The duties of non-violence and of honesty are stringent, but many of the obligations we have identified are *prima facie* only³⁵ and may be overridden by others. A business has to survive, and that may mean sacking not just incompetent, but even a hard-working, though redundant, employee. Faced with the apparently insatiable demands of morality, a businessman may feel inclined to follow Macchiavelli and relegate morality to a private world, as not being applicable to the world of affairs. That is a mistake.³⁶ We can guard against that mistake by talking not of peremptory duties, but of grounds of obligation. I do not always have to keep redundant or incompetent employees in work, but I have some obligations towards them. Certainly if the survival of the firm depends on it, I must take the hard decision.

³⁴ See further below, ch.*, §*.* (Codes)

³⁵ See above, ch.1, §1.2.

³⁶ See below, ch.14.(Ethecon)

But I am not usually in that extremity, and may be able to postpone the sacking, giving warnings in the case of incompetence, and long notice in the case of redundancy. It is not a matter hard-and-fast rules. A businessman is not required to be soft. But neither need he be always ruthless as a matter of course.

Although, fundamentally, the responsible businessman has to weigh considerations rather than follow hard-and-fast rules, hard-and-fast rules are important. In the first place, other people can know them, and know where they stand; and secondly they act as a check on the businessman's own judgement, and act as a safeguard, alerting him if he is ignoring relevant considerations and finding too easily in his own favour.

For this reason we need legal contracts, carefully worked out, covering many eventualities, and specifying mutual obligations with care and in great detail. Contracts are long lasting, and can be invoked many years after they were entered into, by people who were not involved in the original negotiations; they are the ultimate stage of what may be complex negotiations, finally crystallizing them into definitive form. It is right that people should be encouraged to be cautious before entering into them, and that they should not be bound until they have had opportunity to draw back. But, once again, it does not follow that no obligations arise until the contract is finally sealed, or that only those specified in the contract are morally binding. Often legal contracts do not state the real understanding between the parties.³⁷ And although at early stages exploratory talks with no obligations are entirely proper, it is wrong to encourage the other party to go to great trouble and expense and then break off negotiations at the last moment. The English housing market is a case in point. Inevitably there are lengthy and expensive procedures in surveying a prospective purchase and making sure that the title is good; there must be some time between agreeing a price and finalising a contract of sale; but having once agreed a price, the vendor is acting dishonestly in drawing back from completing the sale. It is right, on occasion, to be cautious in giving one's word: but one's word, once given, is a bond.³⁸

³⁷ See below, ch.7 (State), §7.3(Law).

³⁸ This might be the place to enter MRG's counter: *promettere e mantenere eda paurosi*.

§4.9 Codes

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Much as agreements can be formalised in legal contracts, practices can be articulated in codes, and given normative force. Again, there are advantages and disadvantages. Codes are more definite, easier to communicate, more open to criticism, more open to collective alteration, than practices.

Codes are more definite. Justice, as we have seen, is indeterminate.³⁹ It needs to be filled out in particular contexts, with particular understandings, particular expectations, particular conventions. We need to know what the Romans do if we are to act justly in Rome; and if different Romans do differently, we may be at a loss, until some definitive statement of practice has been made, so that everybody knows where he stands.

Codes are more communicable. A manager's practice may be excellent, but the people he deals with and his successors may not fully understand it or know where they stand. Many modern firms now make a statement of their principles (a "mission statement"), and though such statements are often unclear or platitudinous, they do give employees and others something to base their argument on if they disagree with a management decision.⁴⁰ The first legal code in ancient Athens was demanded not only so that citizens could know where they stood, but so that they had some basis on which to argue with the magistrates and contest their decisions.⁴¹

Codes are more open to criticism. A code can be criticized on general grounds, whereas the particular decisions taken in practical situations often involve too many factors for trenchant criticism to be feasible. It is difficult to characterize a particular decision correctly. Is it a case of hauling a slacker over the coals and telling him to pull his socks up, or is it a case of victimising a person with problems who is trying his best and who needs encouragement not criticism? A code is explicit in what it lays down, and it is clear what is to be criticized or defended.

Codes are more open to collective alteration. Where individual firms are often unable to bring about a needed change of practice by their individual example, because they are in a Prisoners'

³⁹ See above, ch.2, §2.5 (Justice)

⁴⁰ See below, ch.6, §6.5.(whistle)

⁴¹ Plutarch, *Life of Solon* CHECK

Dilemma, an industry-wide or nation-wide change of code may be effective in instituting a better practice. Many employers in the nineteenth century found their own employment practices repugnant, but could not afford to pay better wages, or not to send women down mines or boys up chimneys, so long as their competitors were doing so. They were glad to be compelled to do what they knew to be right. Quite often a code, whether enforced by law or by public opinion, can alter a widespread practice where individual initiatives would be ineffective, and might be financially disastrous.

But codes have defects too. Their generality precludes their taking into account all the relevant considerations, so that they are liable on the one hand to rule out perfectly reasonable practices and on the other to permit unfair or dishonest ones. Often they waffle in a high-sounding way without giving guidance on the decisions where guidance is needed. They may encourage hypocrisy, with lip-service being given to unexceptionable precepts which are largely ignored in practice. They are no substitute for responsible decision-making. Codes are external, and in danger of remaining so. If the decision-maker is responsible and mature, he may find it helpful to have a code to guide him, and in that case will internalise it: but often the mere fact of there being a code will lead him to abrogate responsibility, and instead of trying to take the right decision, reckon that it is enough to take one that accords with the code. Instead of asking himself the question 'Is it right?', he may ask 'Can I make out that it is allowed by the rules?'. We should, therefore, moderate our enthusiasm for codes. In many cases they are not called for, and do no good. Even where they are called for, there are stringent limits on what they may enjoin. But in suitable circumstances they can crystallize the best practice and encourage people to follow it, and in that sense they can contribute to defining what kind of considerations should be brought into play when we try to decide what our duties should be.

§4.10 Sanctionsdisk I21 Sanctio2.tex splchckd⁴²

Codes may be promulgated but not obeyed. In some cases it may be because the code did not articulate adequately existing practice, and it is simply a matter of articulating more adequately the approved practice. But businessmen, like other men, sometimes depart from good practice, contravene the code, or break the law. And if they can continue to do this with impunity, they establish a new practice, and the code falls into disrepute and the law becomes a dead letter.

If an action contravenes a code that does not have the force of law, what reason is there for not doing it? In many cases the knowledge that it would contravene the code is sufficient dissuasive. Many businesses promulgate their own codes and would not wish to appear hypocritical. Even when the code is not one of their own devising, but has been formulated by the trade or industry as a whole, businesses have voluntarily adhered to it, and accept its recommendations, or at least do not want to appear not to. Images and reputations are important. Many businessmen have an image of themselves as responsible members of society, and if a code highlights some action as one difficult to justify, they will focus attention on it, and not do it by inadvertence; and even if they are not themselves imbued with a sense of responsibility, they remain uneasily aware that a bad reputation is bad for business.

The line between morality and prudence is blurred,⁴³ and, contrary to Kant's teaching,⁴⁴ it is good that the still small voice of conscience should be reinforced by the louder precepts of social and commercial prudence. At one time the City of London was dominated by wearers of old-school ties. It was much condemned by egalitarians, but it had one great advantage, that each man's behaviour was subject to long-term and inescapable scrutiny by his social peers. A man who was dishonest in his youth would be known to be untrustworthy; and if anyone in later life were tempted to engage in sharp practice, he would know that all his friends and acquaintances would get to know of it, and would adjust their view of him accordingly. With these considerations taken into account, the game was not worth the candle, and the City's reputation for

⁴³ See further below, ch.14. (EtheEcon)

⁴⁴ See glossary

integrity was high. There was, admittedly, an element of exclusiveness, and it may well have been the case that some people in the City were not as bright as those who have since been able to gain admittance. But, with the loss of this sanction, there is widespread concern in the City that its reputation for straight, competent and honest dealing has suffered in recent years, as the Guinness, Maxwell and Lloyds affairs have come to light.

More generally, we need to set against Adam Smith's observation that when members of a trade gather together, they conspire against the public interest, the countervailing consideration that their informal judgements and exchanges of information constitute a powerful sanction against wrong-doing. Tried in the law courts or the popular press, I may well get away with it, because not enough is known, not enough is understood, and attention is too fleeting. Tried by the opinion of my peers, I cannot expect to be able to throw wool in their eyes, nor to escape the adverse effects of their censure. We may need to counter collective selfishness and rigid exclusiveness, but should not lightly dispense with the collective scrutiny of individual actions and social sanctions against misbehaviour.

In many cases a guild system is inappropriate. Other means may be devised to publicise breaches of a code, and to bring pressure to bear on those who flout its provisions. The Consumers Association's publication *Which?* has been influential. Few manufacturers like to be Not Recommended, and few can be sure that their sales would not suffer in consequence. *Which?* has always excluded advertisements. Journals that take advertisements, as trade journals invariably do, have a powerful financial incentive not to publish unsavoury truths about their advertisers' wares. Until readers are prepared to pay more to secure unfiltered information and unbiased judgements, the press is an inadequate guardian of good business behaviour, though the BBC has a good record in fearlessly exposing business rackets and abuses.⁴⁵

Government agencies can bring pressure to bear. In some cases they may be entrusted with inquisitorial powers to discover abuses, and can always publish their findings in official reports. It may be necessary, in order to end the current practice of late payment,

⁴⁵ Dick says that this is a bit hard on Channel 4, the occasional programme on ITV, and the many efforts of respectable newspapers like the *Guardian* and the *Independent*, let alone the disreputable ones like the *Sunday Times*.

to give the Office of Fair Trading authority to demand from firms suspected of late payment details of invoices and payments, and publish warnings to suppliers not to deliver goods until money has been received.⁴⁶ But that may not be enough. Some governments use government contracts to bring additional pressure to bear, but there are costs in restricting the number of firms allowed to tender, and where a bad practice is pervasive, there might be no takers for the contract at all. Legislation authorising the agency to take recalcitrant offenders to court is the final sanction, inexpedient if invoked too often, but sometimes necessary as a last resort.

⁴⁶ See [1994]ch.4, §5, p.7 of duties4; [This now is in new ch.7, §Suppliers; probably re-work whole argument there in draft 3.]