

THE WORLD IS FLAT IN THE TWENTY-FIRST CENTURY: A RESPONSE TO HASNAS

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Abstract: Hasnas is correct that ethicists should pay attention to law and be on guard for perverse effects from regulation and legal interpretations that may encourage or require unethical behavior. He is not correct that the business ethics literature assumes that law and ethics consistently pull in the same direction. Analysis of the relationship between law and ethics requires nuanced, in-depth treatment. An example is provided regarding the well-known case of *United States v. Park*. Ultimately, there is a need for more serious consideration of ethical principles and norms in legal policy making and practice.

I have spent my entire academic career straddling the intersection of law and ethics. As might be expected, I am in basic agreement with Hasnas that ethicists should pay attention to law and be on guard for perverse effects from regulation and legal interpretations, particularly those that may encourage or even require unethical behavior. That said, I object strenuously to the way in which Hasnas has set up his argument. Fortunately, I don't believe that his basic point is dependent upon the way in which he has mistakenly chosen to frame his argument.

I. The Framework for the Hasnas Argument

My primary focus is on part II of the article which argues that there is a flaw in the traditional approach to business ethics. Hasnas argues that the "traditional" approach "assumes that law and ethics *always* [emphasis added] pull in the same direction, and by doing so, reduces the essential challenge of business ethics to determining the point at which the normative demands override the strategic ones." He claims that there is a "long-established convention within business ethics literature of viewing the legal and ethical imperatives as aligned" and viewing "the obligations imposed by law as consistent with those imposed by ethics." He objects to this tradition by stating that it rests upon a false assumption that "criminal law prohibits only morally blameworthy behavior" and that it ignores the reality of current legal standards and enforcement policy.

II. In Fact, the Business Ethics Literature Does Not Assume that Law and Ethics always Pull in the Same Direction

Hasnas does not provide specific statements from the business ethics literature supporting his claim of fallacious assumptions regarding the nature of law and ethics. Instead, in note six, he cites three examples, Christopher Stone's 1975 book, *Where the Law Ends*; Donaldson and Dunfee's *Ties That Bind* (1999); and a 1988 article by Norman Bowie in the *Journal of Business Ethics*. Stone is and has been a law school professor at the USC Law School throughout his career and surely cannot be considered as a primary source representing a tradition in the field of business ethics. I am at a loss to understand how Hasnas justifies his apparent claim that Donaldson, Bowie, and I take such a position in the sources that he cites. Nor could he document such a position in the full scholarly portfolios of the three of us.

In support of his claim that the business ethics tradition assumes that law and ethics pull in the same direction, he cites two pages in *Ties That Bind* that discuss an analysis by Lynn Paine in which she describes a flawed "Convergence View" based on the idea that law and ethics perfectly overlap. Both Paine in the original source and the discussion in *Ties* make clear that the convergence view is a faulty view that is sometimes proffered as a defense or explanation for unethical behavior. *Ties* explicitly rejects the convergence view as a satisfactory basis for understanding business ethics. Considerable detail is given to a discussion of the interaction between law and ethics, an interaction that can only be meaningful if there are significant instances of divergence between legal and ethical standards. *Ties* provides many examples of laws that are at odds with moral standards: slavery (p. 160), apartheid (p. 214), lax environmental standards (p. 214), and Sunday Blue Laws (p. 77). To take just one example, the laws of apartheid were compulsory and if one complied with the law, one would be acting unethically by complying with race-based standards denying basic rights to blacks. Even a cursory understanding of integrative social contracts theory reveals that hypernorms transcend law, and that legitimate, authentic norms may at times be at odds with legal prescriptions.

Hasnas appears to be deriving his claim concerning what he calls the mistaken tradition of business ethics from discussions where authors are seeking to counter the commonly asserted view that "if something is legal, it must be ethical." Such a claim represents a mild form of the convergence view. By stating that view prior to refuting it, writers should not be understood as somehow endorsing some aspect of the convergence view. Similarly, the notion that the law should be open to moral claims and that understandings of morality can help improve the law (Dunfee 1996) should not be interpreted as based on an assumption that law and ethics are *always* congruent.

If this convergence thesis were part of the tradition of business ethics, then one would expect it to be found in the textbooks in the field. A cursory review of a number of textbooks did not produce any statements to the effect that law and

ethics always pull in the same direction. Instead one finds strong statements to the contrary in many leading textbooks; for example:

Not all laws are morally defensible. Laws requiring racial segregation and discrimination are a case in point. To abide by the law in practicing discrimination was, in fact, to act immorally. It is dangerous to equate law with what one is morally, as well as legally, required to do because this denies the possibility of arguing, from a moral point of view, that either a law should be passed or a bad law repealed. (De George 1999: 15)

Regarding Hasnas' claim that the tradition "rests on the false assumption that the criminal law prohibits only morally blameworthy behavior," Beauchamp and Bowie (2004: 4–5) state specifically: "(a) related problem involves the belief that a person found guilty under law is therefore morally guilty. Such statements are not necessarily correct. . . . For example, if . . . a pharmaceutical firm is liable for a drug that has harmed certain patients, it does not follow that any form of moral wrongdoing, culpability, or guilt is associated with the activity." Based on this and other writings by Bowie, it is highly inappropriate to cite him as a source of the mistaken convergence view in the business ethics literature.

In view of the fact that I agree that there should be more focus on the interaction between business ethics and law, I am comforted by the fact that the flawed way in which Hasnas has framed his essay is not fatal to his admonition of incorporating a legal dimension into ethical analysis. Contrary to his speculation that he may be shunned for his admonition, most of the standard textbooks in business ethics already cover a great deal of law. What is needed is more in-depth analysis of the relationship between law and business ethics. Hasnas provides current, interesting case examples, but they only serve as starting points for a nuanced analysis. In the next section, I describe one case that is often used in business ethics courses to demonstrate the complexities one is likely to encounter when one drills down into the factual context of legal decisions.

III. Need for Contextual In-Depth Treatment of Ethical Principles and Legal Analysis

In order to fully appreciate the interaction between law and ethics it is important that scholars focus on the full context of the issues and avoid sweeping generalizations that may misinform and mislead. There may be some tendency on both sides of the ledger to characterize the other side in terms of generalizations. Thus, an ethicist may tend to describe the law as morally deficient based on superficial assumptions about legal principles and processes. Similarly, a legal scholar may generalize about the practical inadequacies of ethical theories to the detriment of serious ethical analysis.

Hasnas cites a number of cases as either requiring unethical behavior or as diverging from ethical standards. I will use one of these to demonstrate what I mean. Hasnas references *United States v. Park*, 421 U.S. 658 (1975), as illustrative of the

fact that "there is no requirement that one engage in morally blameworthy conduct to be convicted of a criminal offense." This statement is part of a general condemnation of the deficiency of corporate criminal law on moral grounds. However, a closer look at the case and its full context reveals that the issues are far more nuanced and complex than Hasnas implies.

John Park was the CEO of Acme Markets¹ who was convicted as an individual in a jury trial of violating the Federal Food, Drug, and Cosmetic Act. The criminal conviction was based upon repeated citations of rodent infestation at Acme Warehouses in Philadelphia and Baltimore. Hasnas uses the case as an example of the failure of the law to incorporate an appropriate standard of moral blame.

To begin with, we don't know Hasnas' standard for moral blameworthiness. All we know is that he is claiming that there was no moral blame on the part of John Park. In order to fully evaluate that claim we need to consider the facts of the case. The following are particularly salient. Park had received multiple letters from the FDA detailing the violations and stating that he should take action. The problem went on over several years. To correct the problem in Baltimore, Park relied in large part on individuals whom he knew had failed to achieve proper conditions at the Philadelphia warehouse. On the witness stand Park admitted receiving the FDA letters. Park further admitted that "providing sanitary conditions for food offered for sale to the public was something that he was 'responsible for in the entire operation of the company'" (p. 664). The jury was instructed that "the fact that the Defendant is president and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue" (p. 666). Park's conviction was upheld by a United States Supreme Court opinion written by the relatively conservative Warren Burger (liberal Justice Thurgood Marshall was among the dissenters who essentially argued for a negligence standard). Park was sentenced to a fine of \$50 per count.

So should the finger of moral blame be pointed at Park? There appear to be a number of approaches by which one could conclude that Park acted unethically. He had the authority to do something. Human welfare was at issue. He had knowledge of the problem. He apparently did not give the problem priority and made only half-hearted attempts to correct it. Individual consumers have a right to be protected against known dangers in the food supply. Park, as the person with ultimate authority, had the duty to respect that right. The utilitarian case seems strong also. The harms that may occur from unsafe food far outweigh the costs of remedial action (which appeared to be relatively minor changes to doors, etc.). The FDA actions against Acme and the publicity generated by the case probably harmed Acme's reputation and may have caused some losses to shareholders and negatively affected employees. And so on.

Was the legal system developing an unsound rule? Again, we need to have a more detailed argument to support such a claim. Some might object that the small fine was entirely disproportionate to the harm caused and that the legal system was

at fault, not for being too strict, but for being too lenient. The issues of attribution of liability to organizations and individual officers are quite complex and require a consideration of the realities of litigation, particularly in the criminal domain. Hasnas raises legitimate concerns in cases, such as Martha Stewart's, where the prosecution is based on obstruction of justice rather than on the underlying crime which may be unprovable.² Again, we need to understand why conviction based on obstruction of justice is somehow a moral wrong. One may argue that actions striking at the legitimacy of our legal system are serious even if the person obstructing justice is mistaken in their belief that they have actually committed a crime. Think of someone bribing a judge to make sure that they will get a dismissal of any charges that might be brought against them in the future. At the time that they pay the bribe they have not committed an underlying crime. But they have bribed a judge. Obstruction of justice is a crime in and of itself for good reason. Any discussion of the implications of using obstruction of justice claims as an enforcement lever must give due consideration to the fundamental policies underlying legal doctrine in this area.

IV. Conclusion

Hasnas' call for more serious consideration of legal policy and practice in ethical analysis is well-founded. I believe that it will fall upon receptive ears. The converse is also true. There is a need for more serious consideration of ethical principles and norms in development of legal policy and practice. The cases offered by Hasnas are interesting and a good starting point. But, for now, they are just that—a starting point.

Notes

1. This case is particularly meaningful to an author whose family shops weekly at the local Acme.
2. Interestingly, similar issues were raised in the efforts to impeach and disbar President Clinton where the focus was on his responses in legal investigations.

References

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