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Regulating virtue

formulating, engendering and enforcing corporate ethical codes

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Amongst the most popular instruments used when attempting to inject ethics into organisational life is the code of ethics (or code of practice—I use the expressions synonymously). In fact, such codes are often the first formal structure to be established when the attempt is made to raise the ethical profile of an organisation. The popularity of codes stems from the fact that they are very adaptable; they are used in all types of regulatory environments, from external regulatory regimes to self-regulatory and enforced self-regulatory regimes. As well, all sorts of organisations—government departments and agencies, universities, along with many professions—have codes of ethics, as do many businesses (Abbott 1983:857). For example, one global study of business organisations found that 76 per cent of respondents had codes (Brooks 1989:120), while over 90 per cent of Fortune 500 firms and almost half of US companies have codes, mission statements or practice statements (Centre for Business Ethics 1992:863–7; Hoffman 1990:630; Murphy 1988:908).

The rapid growth in the number of ethical codes is a phenomenon characteristic of the past two decades. It is largely a result of widely-publicised ethical failures that have affected many people and have caused disquiet within the government and the professional, business and civic community about the behaviour of powerful sectors within the societies concerned. Writing in 1989, L.J. Brooks reported that 60 per cent of codes were less than ten years old. Six years earlier, Cressey and Moore (1983:55) reported that 43 per cent of their sample of codes in the United States ‘were either drafted or revised in 1976, the year following the first nationwide publicity about corporate bribery’, and almost two-thirds were written or revised between 1975 and 1977. Codes of ethics are also popular amongst academic theorists, many of whom consider them to have an important

role to play in institutionalising ethics (see Purcell 1978; Mathews 1988:79; Snoeyenbos and Jewell 1983:129; Ferrell and Gardiner 1991; Weber 1983:534; Hoffman 1990; Maitland 1990:513–14).

Despite the popularity of codes, there is no evidence that they actually improve ethical standards. Violations are frequent, and compliance is a major practical problem (Brooks 1989:123; Snoeyenbos and Jewell 1983:103). The reasons why compliance is a problem are well known and fall into two categories—internal factors and external factors. Internal factors are those features of the code itself that predispose the code's constituents to violate it. The most common internal problem of codes is that they are poorly formulated (Starr 1983:104). They may contain inconsistencies, ambiguities, confusions or provisions that invite non-compliance and the development of cynical attitudes towards the code. For example, the code may be directed only at employees while management may be exempted, or the code may be self-serving and ignore the interests of other stakeholders, as many codes seem to do (Arthur 1987; Cressey and Moore 1983; Mathews 1988; Starr 1983). Thus, codes may lack an integral authority, and organisational actors will thus be encouraged to develop a disposition to ignore them or evade their provisions.

Codes may also possess inadequate external authority. This can be of two sorts. First, the ethical culture of the organisation may be weak. This sort of weakness is manifested in two areas.

- The leaders of the organisation may not fully support the code or affirm the importance of ethics in organisational life. Yet, enthusiastic support for codes, as well as ethics in general, by the leaders of an organisation is crucial to a code's success and, more generally, to the project of injecting ethics into organisational life. Without such support, a code is unlikely to be observed. The problem, however, is that since high-level executives have been frequently implicated in (or are the perpetrators of) much of the ethical misbehaviour that many of the codes have been formulated to correct, their support is unlikely to be forthcoming (Cressey and Moore 1983).
- The code may not have been internalised by its constituency. Often this means that the members of the organisation may not believe that the code embodies values that are important to their activities as members of the organisation. For example, actors may not respect a code because they have not been encouraged to see that the values embodied in the code are important in the daily functioning of the organisation.

Consequently, they will not be disposed to follow it, or, in ethically ambiguous situations, they may defect from it. Internalisation is important for the success of a code since people are more likely to behave in compliance with a norm if they hold the norm themselves. Therefore, such internalisation is essential to maintaining high levels of voluntary compliance.

Second, the code may not be adequately institutionalised. For example, the code may not be part of the organisational infrastructure, the mechanisms that promote the code may not exist or may not be used effectively, or there may be no systematic attempt to use the code, even if the infrastructure exists. Thus, codes may fail because the structure and culture of the organisation is not conducive to ethical action. Actors may be presented with mixed and confusing messages. Ethical ideals and an ambivalent or confusing organisational infrastructure for codes (for example, interpretation and adjudication mechanisms that are poorly coordinated, empowered, or which are not serious or clear about their respective roles) are often reinforced by pious affirmations from management and other organisational leaders within an ongoing organisational climate that is in fact antagonistic to ethics. The lack of institutions such as an ethics committee, an adjudication and interpretation committee, and an appropriate organisational climate are well known problems that undermine the success of ethical codes. This is widely recognised in the literature where it is often noted that such institutions are essential to the success of a code and its successful implementation, and it has been the absence of these bodies (or inactivity on their part) that has been a primary cause of their failure (Barber 1983:145, 151–2; Tomasic and Bottomley 1993:94–6). Surprisingly, while the drafters of codes seem to be aware of the importance of promoting compliance, judging by the fact that many codes include compliance procedures, few codes have compliance institutions, such as ombudsmen, ethics or watchdog committees, or well-developed, systematic and routine compliance programs (Cressey and Moore 1983:71).

The upshot is that while there is clear evidence that the organisational climate and institutionalisation of codes often have a more profound effect in promoting ethical action than behaviour modification and enforcement, which is usually at the heart of the project of implementing ethical codes, appropriate measures are seldom taken (Cressey and Moore 1983:71). In practical terms, this means that there must be effective and authoritative institutions within the organisation that interpret the code, clarify it, apply it to quandaries, resolve ambiguities and contradictions, communicate it, conduct ethical audits and enforce the code by adjudicating on alleged violations and responding to those found to have violated it.

The internalisation and institutionalisation problems include difficulties with grounding a code's external authority in the behaviour patterns of organisational actors. Clearly these are problems of implementation. How can the promulgator of a code encourage it to be internalised so that it becomes part of the culture of the organisation? How can it be made a part of the fabric of the organisation—a 'cultural artifact'—by establishing it as part of the stable institutions of the organisation? How can this be enforced most effectively?

While there are many suggestions for implementing and enforcing codes, there is surprisingly no discussion of the theory that grounds the formulation of codes or their implementation, nor does there seem to be any discussion of the criteria to be used to distinguish a good code from a bad one. There is, to be sure, an air of '*ad hocery*' in this entire area. It is this lack of a theoretical discussion that I want (at least to start) to make good here. I shall begin by developing an account of the nature of ethical codes. Using this, I shall then discuss the *desiderata* that determine the nature of a well-formed code. These *desiderata* are necessary conditions for the development of a code's internal authority. The nature of the implementation mechanism—a code's external authority—will then be discussed.

A code of ethics is, ideally, a statement of the organisational norms against which the actual or proposed actions of an actor—as a member of an organisation—are evaluated. Codes embody these norms in a variety of different forms as rules, principles, tenets, credos and ideals. They in effect express the criteria for good and bad, right and wrong action, within an organisational setting.

Codes can be used in two ways—reactively and proactively. Reactively, an ethical code may be used as a basis upon which to regulate the behaviour of organisational actors because it provides the criteria for the evaluation of (performed) action. In that way, an ethical code may constitute the basis for discipline and deterrence. Proactively, an ethical code may be used as a standard to resolve ethical quandaries or, more simply, it may serve as a standard to which action must conform. In these ways, it guides the proposed behavior of organisational actors and educates and nurtures their ethical awareness.

Given this analysis of the nature of codes, *prime facie*, there seem to be both similarities to, and differences from, the institution of law that society has. To be sure, codes do differ from the laws of a society in that they are not typically punitive in orientation, nor do they expressly stipulate the result of non-compliance (Cressey and Moore 1983:69). Nevertheless, they do have a number of fundamental similarities to law. Like law, an ethical code operates on a one-way projection of power, from those who create and

enforce the code, to those whom it regulates, guides and educates. And, like the law, a code relies for its success upon the voluntary cooperation of the code's constituency and acceptance by it of the code.

Such cooperation and acceptance will occur and be nurtured only if the code is seen to possess some inherent moral authority and legitimacy. In order that this aura of authority and legitimacy may develop, a code, like the law, must be framed so as to foster voluntary cooperation by the code's constituency. It will do this by taking account of the constituency's capacity to obey, by being, and being seen to be, 'reasonable', by taking into account the views of the constituency during the formulation and periodic reformulation processes and by being adopted through discussion and consent. This occurs in civil society with law, for example, when interested parties are invited to make submissions on a proposed law to a select committee of parliament and through the conduct of regular, free and fair general elections. Therefore, a code—like law—relies upon a projection of influence by its intended constituents, upon the drafters of the code when it is formulated, as well as a sensitivity on the part of the legislators to the needs, desires, aspirations and capacities of the governed.

This points directly to the similarities between codes and law—codes operate in an environment similar to that of law, and serve a similar function. First, they are the private laws of a private state; their efficacy is grounded ultimately upon the consent and support of the governed. On this analysis, a code's makers have a role in the formulation of the code that is analogous to that of the law's makers (Cressey and Moore 1983:67–8). Second, codes have a similar function to the law in society—they embody criteria that are used within the institutional context to guide and evaluate conduct, proactively and persuasively, and sometimes reactively and coercively. They have the capacity to provide the basis for discipline and a foundation upon which one member of the organisation may be empowered to behave in a certain way towards another, when in the ordinary course of events such behaviour would not be permitted. In this way, codes, like the law, may enjoin certain actions and prohibit others. In their general outlook, however, codes embody the values and ideals of the organisation in the same way that the law as a body of practice and knowledge embodies the values and ideals of society.

These similarities to law are important. Just as there can be well or poorly-drafted laws, there can be well or poorly-drafted codes of ethics, and it seems that given the extensive similarities, codes (like laws) may be well-drafted or poorly-drafted for the same sorts of reasons. The question then is what criteria should be used to distinguish well-drafted from poorly-drafted laws? One influential account of such criteria has been given by Lon Fuller. According to Fuller (1969:96), these criteria 'are like the natural

laws of carpentry, or at least those laws respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it'. Just as the natural laws of carpentry—the rules that a carpenter must obey in order to attain his purpose—are determined by the purpose he has, the natural laws or criteria governing the nature of well-drafted law—the rules that a lawmaker must obey in order to attain her purpose—are determined by the purpose she has in making laws.

This leads to another question. Do the criteria that a law must meet in order to be considered well-drafted also apply to codes of ethics? Clearly they must. The activity of lawmaking is, according to Fuller (1969:106, 122), 'the enterprise of subjecting human conduct to the governance of rules'. The activity of code-making is similar, since the aim is to regulate human conduct by using criteria for right and wrong conduct.

Moreover, according to Fuller (1969:205), the purpose of law is to provide a 'firm base-line for human interaction' in order to secure the good life. In order that they fulfil this purpose (that is, are effective), laws must be such that they are capable of being obeyed and of guiding action, and laws that do this are considered well-drafted. Codes share the same purpose. They are designed to provide a baseline against which behaviour can be evaluated and regulated and consequently to promote the flourishing of the organisation. This in turn promotes the wellbeing of the stakeholders. In order for this purpose to be fulfilled, codes must, like the law and individual laws, be capable of being obeyed and guiding action, and (like laws) codes that do this are well-drafted. Since the activity and the purpose of the law and codes are identical and the contexts of their operation analogous, it is reasonable to conclude that the properties the law must have in order to be capable of attaining its purpose must also be possessed by ethical codes.

What properties does a well-drafted law (or, as I have been arguing, a code of ethics) possess? Fuller's (1969:39, 46–91) answer to this question consists of eight necessary criteria

- there must be rules or laws that ground evaluation of action rather than *ad hoc* evaluation
- laws must be publicised
- laws cannot be made retroactively
- laws must be understandable
- laws should not be contradictory
- laws must be within the power of the citizens to obey them
- laws must maintain a degree of stability through time
- laws as announced must be in agreement with their actual administration.

Fuller claims that a total failure in any one of these eight *desiderata* does not simply result in a 'bad legal system'. He claims that it 'results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be some kind of contract' (Fuller 1969:38). Fuller's point is that what makes a putative legal system a genuine legal system is its capacity to fulfil the purpose that legal systems have in societies. The proximate purpose of the legal system is to 'subject human conduct to the governance of rules' in order to procure the ultimate purpose of promoting human wellbeing. A total failure in any one of these *desiderata* will result in a lack of general rules that can be used to regulate human conduct; consequently, the proximate and ultimate purposes will be prevented from being realised. In virtue of this, the system will fail to be a legal system. Similarly, a putative code of ethics would fail to be a 'code of ethics', since it would fail to embody (in a useful manner), the norms of the organisation that are used to guide, regulate and evaluate action in order to promote the flourishing and wellbeing of the organisation's stakeholders. It would be unable to fulfil its purpose and would, for this reason, fail to be a code of ethics.

Fuller's justification for each of the *desiderata* is based upon the capacities that human agents possess: that actors are rational, that there must be a point to action, that actors require guarantees that the laws will not be used against them capriciously or whimsically and certainty as to outcomes.

Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he acted, or was unintelligible or was contradicted by another rule of the same system, or commanded the impossible, or changed every minute. It may not be impossible for a man to obey a rule that is disregarded by those charged with its administration, but at some point obedience becomes futile—as futile, in fact, as casting a vote that will never be counted (Fuller 1969:39).

Such reasons apply also to codes of ethics, since the nature of human agency within organisations is substantially similar, and the role of a code of ethics in civil society is analogous to that of the law.

Are there only eight *desiderata*? It would seem not. Actors must be able to trust the code, have confidence in it and see that it is not an instrument of repression, but one of protection, which promotes the good of the organisation and its stakeholders. Fuller's eight *desiderata* fail to do this completely, since by themselves they fail to deliver adequately the wellbeing of the code's stakeholders and the subjective sense of security that is essential if a code is to be capable of being effectively implemented and adhered to. They fail to provide grounds upon which to base trust in the code.

Such trust is based ultimately upon an agreement between the organisation's governors and governed, and the capacity of the governed to be certain that the agreement is being honoured. In other words, a culture of trust must be cultivated (see Brien 1998). Fuller's eight *desiderata* do not, however, provide an adequate means whereby the code's constituents can see that the agreement legitimising the code is being honoured. To be sure, the moral and rational basis of a code is the same as it is for law. Like the law, a code rests upon a contract between the code-makers and the code's constituents. The contract embodies the interlocking responsibilities of the governors of the (corporate) state and its citizens. These responsibilities arise from the same source, an offer which must be made by the organisation's governors if the code is to be effective: 'These are the rules we ask you to follow. If you will obey them, you have our promise that they are the rules we will apply to your conduct.' (Fuller 1969:216–17). Once accepted, the code attains legitimacy and the contract at the basis of the code's legitimacy embodies a bond of reciprocity; a person, in virtue of being a member of the organisation with this code, has an obligation to obey the code and the organisation's governors have an obligation to abide by the rules they have made.

To be effective, however, contracts must be nurtured by appropriate institutions and practices (something that Fuller seems merely to assume). That is, unless the constituents can see that it is being honoured, the code, like the law, will be ineffective. It will not be trusted and it will not attain the purpose set for it. To be effective, a code must have a form that promotes trust, that does not discourage voluntary compliance but rather promotes it, and which provides a means whereby the constituents can see and be assured that the contract that is the foundation of the code is being honoured. For these reasons codes must offer their constituents clear guarantees as to their application and use. These guarantees provide clear grounds upon which to trust the code and trust that it will not be used against them without justification. Ultimately, such guarantees provide a basis upon which to evaluate whether the contract is being honoured and a criterion for continued compliance and acceptance. To Fuller's eight *desiderata* must be added: due process, procedural justice, and substantive morality and justice. In other words, the code must contain explicit provisions stating that

- the implementation and enforcement will be carried out in a particular, known and settled way, rather than secretly or haphazardly
- the code will be applied to all members of the organisation, from the CEO down

- the code and its use rests upon legitimate authority, typically the consent of the governed
- people will be treated in accordance with their culpability, in the case of wrongdoing, or praiseworthiness in the case of exemplary service.

However, this is not all. Two further conditions concern the nature that the provisions themselves should have. The provisions must be general. However, provisions can be general in two quite different senses, both of which are important here—provisions must be general in the sense that they must refer to types or classes of actions, and provisions must be general in the sense that laws must not be directed at one individual but at classes of individuals. Why should the provisions of a code be general in any of these senses? Provisions directed at individuals, rather than individuals occupying a certain role, will smack of victimisation. And even if such a provision is initially benign, it may provide a precedent upon which an organisation may base future victimisation of individuals. It is best to avoid mention of individuals altogether and talk instead of ‘role duties’ and ideals.

Moreover, provisions should be directed at classes of actions since it is impossible to construct a workable code that will specify in advance all the vagaries and nuances of human action. Provisions must refer to general rules or principles in order to remain a code of ethics, rather than a code of directions, as one might find in an instruction manual.

Codes should be general so that the organisation’s governors will not have to expend enormous energy formulating precise ordinances, and monitoring and enforcing compliance with individual ordinances. It is more sensible to have general rules or principles aimed at all, bolstered by organisational ideals where possible, and to leave the observance, interpretation and implementation to the commonsense of individuals, stepping in only when justified—in much the same way that the law does.

In addition to these extra *desiderata*, codes must be seen to address real issues and not be merely another mechanism for social control. A code which did that would destroy the trust between the organisation’s governors and citizens. This would not only erode support for the code, but would also weaken the morale of the organisation. Therefore, there must be a point to having the code and any particular precept in it.

Moreover, the precepts of the code must not be outside the capacity of the organisation to implement. Just as a law that is never enforced because the state lacks the capacity to do so, or because it is too complex, quickly becomes a sham, so too a code or any provision in it. So, like a law, a code and its provisions must be practical and useable from the point of view of the code-maker.

Finally, there is a general requirement that any guide to behaviour must actually improve matters. If the ultimate purpose of a code is to promote the wellbeing of the organisation, and in that way its stakeholders, a code that fails to do so lacks moral justification. Hence, a code or an individual provision must not leave an organisation worse off than it would be if it did not have the code or the individual ordinance.

These *desiderata* work together to constitute an ideal against which any code (or element of a code) can be evaluated as 'well-drafted'. They determine whether a code will have an effective and credible internal authority—one of the areas that must be strong if a code is to succeed. Given that an organisation has developed a well-drafted code, how does it then go about implementing it so as to promote compliance—that is, how does it develop an effective and credible external authority?

No matter how well formulated a code may be, compliance will not result naturally or from haphazard efforts which implement the code in an uncoordinated manner. Effective compliance requires a compliance mechanism, that is, a structured approach that takes into account the capacities and features of the code's constituency. It is well known that an effective compliance mechanism would contain various elements—or institutions—that implement, interpret and enforce the code. It would operate within a sympathetic organisational culture. It would enjoy unequivocal support from the management and leadership of the organisation. As well, the code would be developed and promoted in such a way as to encourage 'ownership' of it by the organisational community. However, the question remains: what structure would the compliance mechanism have? To answer this, we must look at the nature and foundation of compliance.

As a matter of stipulation, I shall define 'compliance' in the following way: an actor A is acting in compliance with a standard X if, and only if, that actor knowingly, consciously and deliberately selects and performs an action precisely because it conforms (reflects, honours, instantiates) with standard X. Under this analysis, a compliance mechanism would be a group of settled institutions that work together to motivate the selection and performance of the appropriate act-option. How can actors be motivated to select the appropriate option? Acts of compliance rest primarily upon two, often mixed, motives. An actor may be motivated to comply because she believes some standard is right and ought to be obeyed, or she may be motivated to comply out of fear of the consequences for failing to do so. Since the motivational sources of compliance are, by and large, limited to these sorts of motivation, a successful compliance mechanism will consist of measures that create in actors one or another, or some mixture of both. How can these two types of motivation be developed?

These motives rest upon certain beliefs—belief in the rightness of values or belief that certain unwanted consequences will follow certain actions. In the former case, the aim of the compliance mechanism is to encourage the actor to internalise the code—that is, to have the actor develop a strong belief that the code of ethics embodies values that are (in an organisational context) good and right and which ought to be obeyed. Such values are engendered in each actor, become part of their belief system and become part of the organisational culture.

Compliance produced through the fear of the consequences also rests upon beliefs—the actor believing that non-compliance will be discovered and that certain unwanted consequences will follow. This is a deterrence theory—actors are deterred from wrongdoing by the likelihood of discovery and fear of the consequences. There is no change in the actor's beliefs about the merits of the code, whether it is right or wrong, good or bad. The code exists and actors must comply or face the consequences. Thus, actors are coerced into complying. The coercive approach attempts to enforce the code through credible sanctions and by inducing actors to believe that discovery will be highly likely.

Creating compliance-inducing motivation on this analysis rests upon beliefs generated by two different sorts of mechanism—engendering mechanisms based upon persuasion, discussion, affirmation and demonstration; and enforcement mechanisms based upon surveillance, coercion, threats and sanctions, leading to deterrence. What is the relationship between these two approaches? Is one preferable to the other?

Enforcement is a very blunt instrument, but it seems to be the approach favoured by some of the most influential writers and business leaders. For example, they speak of 'vigorous', 'savage' or 'routine' enforcement, '(credible) sanctions' and codes imitating the deterrence (and even retributive) nature of the criminal law.

Such an approach is mistaken. Empirical evidence from the study of the regulation of business suggests that persuasion and trust (reinforced by firm action only if persuasion and trust fail) are more effective and less costly regulatory approaches than enforcement through the use of surveillance and sanctions alone (Fisse and Braithwaite 1993). There are good reasons to infer that such findings would be replicated within any organisation, since agents are similar in all organisations, and similar sorts of relationships and causes of unethical behavior are at work. For example, most agents prefer to be trusted, given responsibilities, and left to act autonomously, rather than work under intense supervision and surveillance. They prefer to be assessed by known, reasonable and transparent procedures. Further, in business corporations as well as other organisations, the regulator

and the regulated are individual people within whose responsibility wrongdoing and rightdoing reside. Corporate wrongdoers often face a tradeoff between corporate goals, customs, mores and ethics (which are often perceived not to be paramount corporate goals), while organisational wrongdoers face a similar trade-off between organisational goals, customs, mores and ethics.

Additionally, the effectiveness of any enforcement program relies upon adequate levels of detection of code violators. Few organisations possess the capacity to marshal resources for the high levels of surveillance and detection necessary to make an enforcement program credible. It is simply too costly, and in many different ways: in the use of time, financial and material resources; in the maintenance of an extensive and formal adjudication system and other institutions that ensure due process in what is effectively a private justice system; distractions from the purpose of the organisation, and employee goodwill and trust, since the organisation may become like a mini police-state (Cressey and Moore 1983:70–1). The very act of enforcement may lead to a cure far worse than the disease.

In general, the enforcement approach assumes that the members of an organisation cannot be trusted. It also fails to respect individuals, their autonomy and integrity, and their capacity to assume personal responsibility for actions they perform. Respecting these things has been identified as a major factor in an organisation having a strong ethical culture (Pastin 1986:221–5; Peters and Waterman 1982:55–88 cited in Newton 1986:253; Kotter and Heskett 1992:60–7). The enforcement approach, relying upon the blunt use of power, fails to affirm, promote and encourage the engendering of the very values at the heart of a strong ethical culture—the feature of an organisation that is essential if a code of ethics is to be successful (Ayres and Braithwaite (1992b:49). Used alone, enforcement fails to develop the motivation base for reliable compliance and is ultimately self-defeating.

Moreover, the enforcement approach is focused upon decontextualised individuals. It addresses only the violation and the possibility of repetition, while ignoring the causes of non-compliance, such as a poor ethical culture, an unsupportive organisational culture, and alienation from the organisational community and its values (Cressey and Moore 1983:68). However, an ethics program that makes pious pronouncements about the importance of ethics but does nothing to remove the causes of unethical behaviour is simply not credible and therefore unlikely to serve a regulatory role. Further, since it is concerned with results only, there is the possibility that it will license victimisation, the use of ‘scapegoats’ and impose solutions that are inappropriate and perceived to be so.

Since such an approach maintains alienation from the ethical culture of the organisation (because it uses power to deter and is unconcerned with what an actor believes is valuable), it fails to promote organisational 'citizenship', inclusion and ownership of the values that drive the organisation. Essentially, such an approach fails to foster organisational virtue. This has unwanted consequences—people who are alienated from their community, who feel that they have no investment in it, and who have not developed and cultivated organisational virtue, are more likely to offend when the opportunity presents itself (this, it is worth pointing out, is as true of society in general as it is of organisations, where the analogue for organisational virtue is civic virtue, and the analogue for code-compliance is lawfulness or law abidingness).

Finally, if the enforcement strategy is to succeed, the penalties for violations must be set at a level that is credible; that is, at a level that deters the majority of potential miscreants. In the majority of cases—if not all—this level is likely to be higher than the level that seems appropriate given the intrinsic wrongness of the violation. Thus, an effective enforcement strategy would violate one of the principles of retributive justice, namely, that a person should be punished only in proportion to the gravity of the wrongdoing. Such a principle is important for the citizens of any community, since it plays an important role in grounding their confidence in the system. In addition, the level may be so high that it paralyses decisionmaking within the organisation—actors become fearful of acting lest they breach the code. This engenders a 'better do nothing than risk everything' policy.

These problems are all paradoxes of deterrent-orientated enforcement programs. Should they arise, they lead to cynicism about, and disenchantment with, the compliance mechanism amongst the members of the organisation. That such paradoxes would arise is highly likely, given the nature of the system and because the sanction levels must be high if the system is to be credible and deter would-be wrongdoers.

The alternative to enforcing a code of ethics is engendering one. This approach is attractive for a number of reasons. It tends to produce ethically reliable actors. Most agents prefer, other things being equal, to do what they believe to be right and good—that is, to act in a way that seems ethical to them. Engendering involves getting actors to believe in something, or believe that it is right. If the code of ethics has been engendered, it will be perceived to be an ethical reference point, and actors will believe that it embodies relevant ethical values. They will be disposed, other things being equal, to ensure that their acts comply with it. Since the code means something to the actors because it has been engendered, the rate of compliance will be higher.

There are many ways to foster such beliefs. They may be promoted through demonstration, such as by the upper-echelon managers and leaders of the organisation behaving ethically. They may be affirmed through ethics education programs within the organisation which explain the code and the values in it, or by creating institutions that encourage ethical action—for example, employee involvement in the formulation and administration of the code, as well as ethics ‘hotlines’ or advisers who will clarify, interpret, or apply the code and resolve a quandary, or provide ethics counselling. All of these measures serve to educate the code’s constituents, persuade them of its merits, and generally foster belief in the code and, in that way, promote ethical motivation.

Moreover, engendering ethics involves fostering values and traits of character—such as autonomy and integrity—that are at the heart of a strong ethical culture and organisational virtue. This is likely to be a more effective regulatory approach than enforcement since it is more likely to result in higher rates of compliance. The reason is simply that people prefer to act in ways that accord with their values, and people are more likely to do what they want to do (which in this case is to act ethically) than what they have been coerced to do. Consequently, there are sound motivational reasons to select engendering programs over enforcement programs.

Apart from the motivational advantages that engendering offers, such an approach avoids many of the costs associated with enforcement. Unlike the enforcement strategy, it does not require as much intrusive surveillance or monitoring of actors, with the consequent loss of employee goodwill and trust. Engendering mechanisms address causes (since to fail to do so would undermine the credibility of the mechanism). Consequently, an engendering approach addresses matters of concern or potential concern, specific problems, and so on. It is for this reason that it provides a more honest way for actors to interact with each other, since reasons are given, the motivation underlying decisions and directives is clear, and problems are dealt with. This encourages confidence in the system and the organisation, fosters citizenship (a reduction of alienation) and ultimately compliance with organisational norms. It fosters organisational virtue.

Furthermore, in the special case of miscreants, the engendering process reincorporates them into the life of the organisation, offering them a chance of ‘redemption’ and forgiveness (that is, an actor’s wrongdoing is not held against her). They have the opportunity of once again exercising full membership of the organisation. This process strengthens and repairs the relationships between actors, and tailors the response to violation of the code to the causes of the wrongdoing and the needs and situation of the perpetrator. This has the effect of reducing alienation from the life of the

organisation on the part of all organisational citizens. They can develop a sense of involvement and ownership in the process of ethical action. This can be heightened if they are incorporated into the process of developing and administering the code. This in turn fosters compliance since actors are reluctant to destroy those things in which they have a personal investment or which they value.

Finally, engendering ethics is a more ethically-sound approach than enforcement. Unlike enforcement strategies, which treat actors as self-interested players and a means to an end, engendering ethics assumes that actors are rational (since it attempts to persuade them), that they are autonomous and deserving of respect for no other reason than they are rational human beings. Such moral defences of engendering should not be discounted. Actors evaluate in moral terms what they do to others and how they are treated themselves. A program that seems ethically suspect will not obtain and maintain the support of a group of people. The capacity of such a program to promote compliance will be diminished.

Such an approach does not abandon entirely some level of enforcement through the use of coercive programs. In any community there will be wilful wrongdoers displaying all levels of culpability, from trivial offenders against organisational norms to egregious actors who play the system but who never believe in it—so-called ‘organisational sociopaths’. Enforcement should focus only on those actors who cannot be reformed through engendering programs alone. The type of response to an actor’s particular wrongdoing should be determined by her level of culpability and capacity for reform. For some code violators, it may mean a period of supervised work and education about the values of the organisation; for others, a warning or demotion; for yet others, some combination of these.

This approach keeps coercive programs in the background, as an avenue of last resort to be used only against wanton and negligent actors. The organisation does not develop the thorough, far-reaching and intrusive programs to detect wrongdoers that enforcement programs assume. This approach uses targeted audits aimed at known weak spots and reported problem areas, rather than constant, general surveillance. The organisation encourages reporting and disclosure—that is, proactive behaviour on the part of corporate citizens. Once wrongdoing is discovered, however, the coercive programs become an option, if warranted—that is, if education and reform fail. This sends a clear message to organisational citizens, that they are trusted but that their actions are subject to assessment, as in civil society.

Such a system operates on a similar basis to ordinary, non-organisational life—something with which actors are comfortable and familiar. Such familiarity encourages support. In this way, the autonomy of the individual

is promoted and respected, while the organisation demonstrates clearly that it possesses the capacity and the willingness to deal with egregious miscreants. Actors know that only wilful wrongdoing will attract institutional sanctions and that inexperience, ignorance and mistakes will not be held against them. Such a system further promotes the engendering of the code, and compliance with it, since it reinforces the grounds upon which such engendering occurs. For example, it appears to be a reasonable and fair system. As such, it fosters feelings of security and trust, rather than feelings of vulnerability.

From this, it is clear that the aim of any compliance mechanism should not initially be merely to deter. Deterrence rests on nothing more than a threat and is power at its crudest and most unimaginative. It obtains its credibility from the capacity of the powerful agent to induce the vulnerable agent to believe that she is willing and able to use her power. Such flaunting of power breeds resentment, mistrust and fear. A more imaginative use of power is to use the threat of deterrence and coercion as a last resort in a program of ethical education. The threat of power (albeit veiled) focuses attention on wrongdoers; having done that, education can begin. The problem, of course, is finding a balance between enforcement programs and engendering programs. This will be determined largely by the local conditions, such as the nature of the organisation, the state of its ethical and organisational culture, and the behaviour of its citizens.

In the model sketched here, engendering the values of the organisation is the first option and enforcement is a last resort. In all events, the compliance mechanism should be internal to the organisation. There is good reason for this. It is cheaper, tailored to the needs and circumstances of the organisation, and, because it comes from within the organisation, the members feel that

Figure 4.1 Code of ethics compliance mechanism

Source: Derived from Ayres and Braithwaite (1992a:45). See also Ayres and Braithwaite (1992b:35ff) and Fisse and Braithwaite (1993:142ff).

they own it. Furthermore, studies have shown that keeping discipline within the organisation may in fact promote compliance (Fisse and Braithwaite 1993:170).

What emerges is a compliance mechanism that consists of an ordering of compliance programs based upon the level of coercion involved. Engendering programs and enforcement programs are organised so as to form a unified, progressive compliance mechanism. It begins with engendering programs such as education, affirmation, persuasion, information, counselling, and so on, which involve no coercion. It then moves to programs designed less to engender and more to deter and educate from a position of power, each with increasing levels of coercion, moving finally to pure deterrence. The levels should not be seen as exclusive, and practices from one level may be mixed with those from another. This code of ethics compliance mechanism is illustrated in Figure 4.1.

The amount of effort invested in engendering ethics decreases as one ascends the triangle, while the amount of coercion increases. At the top of the pyramid only the most blatant, obvious and egregious actors are dealt with—those who are unable to be convinced of the relevance of organisational norms. Often they will be re-offenders for whom the best engendering efforts were unable to nurture allegiance. They effectively become a self-selecting group that does not require the expenditure of vast amounts of resources to detect. As a result, the organisation has to expend fewer resources in dealing with them and is exposed to fewer of the risks and costs associated with surveillance and punitive enforcement measures. There is, for the organisation, an economy of effort.

Resources can be reallocated and the organisation can use proactive programs, such as targeted ethical audits (which can often be quite effective since internal auditors often know 'where the bodies are buried') to identify problem areas, to provide opportunity for confession, and to encourage actors to seek help, guidance and the clarification of ethics policies. As a result, actors will not be caught in a web of perpetuating unethical behavior, but will have clear exits, and fewer cases will go so far as to require the most drastic coercive responses—the sorts of responses that may easily use enormous resources compared to the returns generated, and which often end up being resolved in the civil courts. Throughout this process, the coercive level of the response must be limited by the culpability of the actor and the seriousness of the offence, rather than by the harshness required to attain some desired level of deterrence. In this way, the enforcement paradoxes will be avoided, but the lessons that can be learned from deterrence programs will be communicated to the citizens of the organisation, without the costs.

This strategy seeks to educate all and redeem those who can be redeemed, while providing a mechanism to incapacitate the most dangerous offenders. It rests upon the assumptions that agents are rational actors who are capable of choosing and weighing reasons, that most of them care about ethical concerns and that they desire to 'do the right thing'. Such a mechanism promotes and fosters the engendering of ethics in the organisation since it nurtures the ethically confused or ignorant as well as the virtuous; it reforms the ethically wayward; it deters the ethically uncommitted and venal actor. Ultimately, it may be used to incapacitate the ethical rogue. It does all these things while minimising enforcement costs and redirecting resources into the most important part of any organisation—its people.

This structure sends the message to the members of the organisation that they are valued and trusted by the organisation as individuals, and not merely as recipients of coercive treatment. This is reinforced by the fact that at all stages, agents are respected as autonomous, rational and responsible for their own decisions. In this way, this structure promotes participation in the life of the organisation and a reduction of alienation from it and organisational goals. It enfranchises (and re-enfranchises) them as members of the organisational community; as well, it promotes confidence and trust in the overall compliance system, further promoting the engendering of ethical attitudes. This is particularly important. Trust encourages ethical action and ethical action further encourages trust, in a self-reinforcing circle (Braithwaite 1993; Brien 1998). This structure provides the foundation for that trust and, in that way, grounds the trust necessary for actors to internalise the code and live by it.

Finally, embodied in the structure of this mechanism (as opposed to being merely stated in the code) are three guarantees that actors in vulnerable positions value highly and which underpin the credibility of any ethics program. First, this system embodies a due process. There is a definite, known, public and agreed-upon process that must be worked through, and a progression through a system of steadily escalating responses towards actors who violate the code. They know that organisational power cannot be wielded capriciously, that they do not live at the whim of their superiors, and that the possibility of victimisation—one of the criticisms of codes—is minimised. This further engenders trust in the organisation and the ethics program, and fosters ethical action.

Second, there is procedural justice. In other words, the due process and the substantive elements of the code are applied to all institutional actors alike. This is because without procedural justice there would be no guarantee that the compliance mechanism would be applied to all similar cases. This would tend to encourage cynicism about the mechanism and the motives

of its proponents, thus weakening support for it. If it is not to be self-defeating, the compliance process must assume and utilise procedural justice.

Third, there is substantive justice or fairness. It would be unfair to hold accountable a person who violates the code accidentally, through ignorance, or because of pressure from her superiors, if she cannot access appropriate mechanisms that allow her to ignore such pressure with impunity. On the compliance mechanism developed here, an actor's individual circumstances are taken into account, the causes of a violation are determined and an appropriate response is developed. Again, so that it is not self-defeating the compliance process must assume and deliver substantive justice or fairness.

Moreover, opportunities are given whereby actors can seek assistance and guidance, as well as be given it before violations occur. This accords with received opinion of what counts as fair and just. Such received opinion is important. Fairness and justice (along with reasonableness) are principles that actors prize highly in all sorts of circumstances. No system can long maintain the support of citizens and be as successful as it has the capacity to be unless it makes some effort to abide by at least the principles of fairness and justice. Organisations as mini-communities are no different in this respect from general society (Kotter and Heskett 1992:52; Pastin 1986:222). Such principles serve as criteria that actors use to evaluate the organisation, and in grounding any commitment to the organisation and appropriation or internalisation of organisational values. For this reason, if a compliance mechanism is to be successful, it and its constituent elements must operate on the basis of substantive justice and fairness.

This chapter has examined the theory that underlies ethical codes and which grounds the development of a code's internal and external authority—the features which determine whether a code will be successful or not. I have attempted to set out the *desiderata* that an ethical code must satisfy in order to be well formed, and so be capable of fulfilling the purpose that was intended for it. I have also attempted to set out the structure of the compliance mechanism that well formed codes must use in order to be effective. This structure, along with the *desiderata*, is determined by the role that codes of ethics play in organisational life—to guide human conduct, raise the ethical profile of an organisation, and in that way promote the wellbeing of stakeholders.

It is surprising that more research has not been done on the theory underlying ethical codes. Over the past few years the citizens of the Western democracies have shown an increased intolerance of those who, holding various sorts of positions of power, abuse the trust placed in them. Such intolerance has been directed not only at legislators, but also at the paradigm professions, such as law and medicine, and professionals, such as business

people, public servants and even university lecturers and school teachers. 'Accountability' has become the 'buzz-word' of the 1990s. Apart from various pieces of legislation, ethical codes are often an integral part of the attempt to ensure accountability and exert some measure of control by the community over people who live largely without constraint. Such codes, however, need to be well formulated and adequately implemented. The theory expounded here provides a basis for assessing codes and their implementation mechanisms. It remains to be seen whether this approach to reining-in the power of influential sectional interests will be successful.

Notes

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