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2021 Villanova Law Review
Norman J. Shachoy Symposium:
Practical Ethics in Corporate Law:
The Science, Instruction and
“Real-World” Application

FOREWORD TO THE 2021 *VILLANOVA LAW REVIEW*
NORMAN J. SHACHOY SYMPOSIUM: *PRACTICAL ETHICS IN*
CORPORATE LAW: THE SCIENCE, INSTRUCTION AND
“REAL-WORLD” APPLICATION

J.S. NELSON*

INTRODUCTION

THE 2021 Norman J. Shachoy Symposium is, as far as we know, the first time that a U.S. law review has dedicated both a live symposium and a follow-up printed issue to the compelling story of why business ethics are important for lawyers.

That is an astonishing statement to be making in the year 2021. Business ethics are a standard subject in business school, but it is a glaring oversight that we do not make studying business ethics common to law-school curricula and what lawyers understand to be the core of their practices. The themes of the 2021 Symposium tie into my forthcoming book with the late Professor Lynn Stout and Oxford University Press entitled *Business Ethics: What Everyone Needs to Know*.¹ For more on these topics beyond the survey below, I send readers to the primary work of the behavioral scientists, as well as to my book.

I. PURPOSE OF THE SYMPOSIUM

As both lawyers and members of society, we all work in business, and with businesses, in some aspect. We are either employees, employers, or otherwise working for, or with, others in organizations to accomplish goals. We may be part of a for-profit business, a non-profit business, or helping to regulate businesses.

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1. J.S. NELSON & LYNN A. STOUT, *BUSINESS ETHICS: WHAT EVERYONE NEEDS TO KNOW* (2022); *see also About the Book*, J.S. NELSON, <https://www.jsnelson.net/book> [<https://perma.cc/J94F-HB45>] (last visited Nov. 15, 2021).

(875)

What is taught in business schools about the basics of how people should act, both individually and in organizations, should then be part of our understanding of ourselves as lawyers and the law. In this regard, despite any gulf that we imagine may divide them, business “management” and the practice of “law” must inform each other.

“Management” is commonly defined as the “process of dealing with or controlling things or people.”² How to control people is the core of agency theory as taught in business schools:³ to align people within an organization and bind them to pursue the organization’s purpose.⁴

The definition of “law,” according to the second entry in *Black’s Law Dictionary*, is:

[a] system of principles and rules of human conduct, being the aggregate of those commandments and principles which are either prescribed or recognized by the governing power in an organized jural society as its will in relation to the conduct of the members of such society, and which it undertakes to maintain and sanction and to use as the criteria of the actions of such members.⁵

Law is our “system of principles and rules of human conduct.”⁶ We, as lawyers, help “maintain and sanction and . . . use [it] as the criteria [for] the actions” of members of society.⁷

Business schools have already recognized business ethics as core to their missions. The very first “guiding principle” of the Association to Advance Collegiate Schools of Business’s (“AACSB”) accreditation standards for business schools is “Ethics and Integrity.”⁸ Business schools must demonstrate their positive social impact, defined as “how a school makes a positive impact on the betterment of society”⁹ A school must have “a portfolio of curricular elements within formal coursework that promote a

2. *Management*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/management> [<https://perma.cc/D9Z7-WLK9>] (last visited Nov. 15, 2021).

3. “Agency theory” is taught in business schools; “agency law” is a related subject taught in law schools.

4. See Michael C. Jensen, *Self-Interest, Altruism, Incentives, and Agency Theory*, 7 J. APPLIED CORP. FIN. 40 (1994); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (conceptualizing a fundamental problem of management as the control of “agents” or workers); Susan P. Shapiro, *Agency Theory*, 31 ANNUAL REV. SOC. 263-84 (2005).

5. *Law*, BLACK’S LAW DICTIONARY, <https://thelawdictionary.org/law/> [<https://perma.cc/M5AB-DCS6>] (last visited July 19, 2021).

6. *Id.*

7. *Id.*

8. AACSB, 2020 GUIDING PRINCIPLES AND STANDARDS FOR BUSINESS ACCREDITATION 15 (2020).

9. *Id.* at 57 (interpreting Standard 9: Engagement and Societal Impact).

positive societal impact,”¹⁰ and demonstrate how the rest of its program establishes “positive societal impact through internal and external initiatives and/or activities.”¹¹

Similarly, lawyers, who most directly “maintain” and create “the criteria” for actions of members of our society, need to recognize that, for our society to stay healthy, we must incorporate business ethics into everything that we do.¹² We are primarily responsible for shaping the “system of principles and rules of human conduct.”¹³ At a minimum, we should be ensuring that we make a “positive impact” toward “the betterment of society.”¹⁴

This standard is a basic floor, above which we can exhibit and set the norm for additional aspirational behavior. Lawyers may be surprised at this phrasing: too often, we describe legal compliance as our floor. But we have a duty to do better. We shape society. We shape the very “system of principles and rules of human conduct.”¹⁵ And we have better instincts than we give ourselves credit for. You know what is wrong. Every industry and organization has its issues, and we know them from working inside of them. We are not surprised when they come to light, cause damage, and have to be remedied. As a compliance officer explained: “today’s unethical behavior is tomorrow’s illegal behavior.”¹⁶

So let us use our power and our responsibility for ethical action. We, as lawyers, act in business. We guide businesses. And we should be articulating the ethical actions that we want to see from them.

II. FORMAT OF THE SYMPOSIUM

We designed the format of the 2021 Shachoy Symposium, therefore, to be particularly helpful to lawyers in understanding, and in taking up our mantle of, business ethics. The Symposium starts with developments in the science of what we know about business ethics, and transitions to implementation of those findings in practice. In the first and second sessions, we feature distinguished social scientists who are on the cutting-edge of what we are learning about human behavior, ethical thought, and action. In the third session, Dr. Mary C. Gentile describes the Giving Voice to Values method to act on ethical values to be effective and not get fired. In the fourth session, Professor Doris Brogan moderates a panel of

10. *Id.* at 39.

11. *Id.* at 57 (interpreting Standard 9: Engagement and Societal Impact).

12. *Law*, BLACK’S LAW DICTIONARY, <https://thelawdictionary.org/law/> [<https://perma.cc/M5AB-DCS6>] (last visited July 19, 2021).

13. *Id.*

14. AACSB, *supra* note 8, at 57.

15. *Law*, *supra* note 12.

16. *A View of Compliance in U.K. and U.S. Practice*, COMPLIANCE.NET CONFERENCE (June 29, 2021), <https://www.compliancenet.org/2021> [<https://perma.cc/KW68-LFPX>] (online during coronavirus) (comments from Lawrence Deju-Wiseman, Director—Market Abuse and Financial Services Conduct at PwC).

distinguished practitioners to make the connections from what had been described in the sessions about science to practice as lawyers. I provide some closing remarks at the end of the event.

III. THE BEHAVIORAL SCIENCE PANELS

A. Panel 1—Behavioral Ethics: The Science

Ethics are simultaneously intuitive and counter-intuitive. As some of the best behavioral scientists of our day explain, we often have agreement on what people *should* do. What puzzles us most is *why they do not do it* when they should. Modern behavioral ethics show how influenced we are by the situation and power structures in which we find ourselves.

As Professors Linda K. Treviño, from Pennsylvania State University; Ann Tenbrunsel, from the University of Notre Dame; and Niki den Nieuwenboer, from the University of Kansas, explain in their first session, adults are *not* fully formed ethical beings.¹⁷ We are significantly influenced in our ethical behavior by external factors.¹⁸ This realization from the science also means that ethics can be *managed*.¹⁹ We can create the external factors, through the changes we make in the organizational environment, to create more or less ethical behavior.²⁰

As Professor Tenbrunsel's work highlights, we are also often blind to the ethical content of our behavior.²¹ We tend to believe that we act more ethically than we do. In fact, one of our largest blind spots is, ironically, how honest we believe ourselves to be.²² We are lying to ourselves on that metric more than about almost anything else.

We also tend to—especially as lawyers—have unrealistic expectations of the power of rules and other policy guidelines. In fact, as Professor Treviño's work shows, having a code of conduct has little impact on actual behavior within a company. It becomes “wallpaper.”²³ It must be meaningfully *lived* and communicated as important to those within the organization. Employees know what really happens. And they can tell managers

17. Niki den Nieuwenboer, Ann Tenbrunsel, Linda K. Treviño, & J.S. Nelson, *Panel 1: Behavioral Ethics: The Science*, in *Villanova Law Review Norman J. Shachoy Symposium on Practical Ethics in Corporate Law: The Science, Instruction and “Real-World” Application* (Feb. 19, 2021) [hereinafter Panel 1].

18. *See id.* (Dr. Treviño comments).

19. *See id.* (Dr. Tenbrunsel's comments); *see also* NELSON & STOUT, *supra* note 1, at Chapter 4 (“What Does Science Tell Us About Ethical Behavior”).

20. *See* Panel 1, *supra* note 17 (Dr. den Nieuwenboer's comments); *see also* NELSON & STOUT, *supra* note 1, at Chapter 4 (“What Does Science Tell Us About Ethical Behavior”).

21. *See* Panel 1, *supra* note 17 (Dr. Tenbrunsel's comments); *see also, e.g.*, MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* (2012); *see also* NELSON & STOUT, *supra* note 1, at Chapter 8 (“The Costs of Acting Unethically”); *id.* at Chapter 9 (“Major Ethical Traps in Modern Business”).

22. *See* Panel 1, *supra* note 17 (Dr. Tenbrunsel's comments).

23. *See id.* (Dr. Treviño's comments).

who are sincerely interested what is wrong. But they need a “speak-up” culture and psychological safety in order to do so.²⁴ Ethical leadership is important at all levels, but particularly at the supervisory level for employees.²⁵

B. *Panel 2—Lessons Learned from Research*

In their second session, Professors Treviño, Tenbrunsel, and den Nieuwenboer help us make the transition from what the science shows about individual behavior to how we can best manage human behavior in groups.

As Professor den Nieuwenboer explains, “people respond to the pressures that you put them under.”²⁶ It will not work well simply to “hire great people and leave them alone,” as some managers have insisted. Instead, managers have to *manage* their people, those pressures, and the overall environment for ethical behavior to remain the norm.²⁷ As Professor Treviño describes, managing ethics is more like cultivating a garden: organizations cannot merely plant the garden and walk away. They have to tend the garden, maintain its positive culture, and continue to encourage the ethical behaviors that they want to see over time.²⁸

To display ethical leadership, leaders have to both feed and prune plants. Managers tend to be particularly uncomfortable with disciplining employees, but the scientists note that part of parenting is disciplining your children and helping them understand where the boundaries of acceptable behavior are.²⁹ When employees perceive the punishment that they receive to be fair, they can continue to do well in their careers and contribute positively to the organization into the future.³⁰ “Fairness” is a concept that has many components, including many that will seem familiar to us as lawyers concerned about due process. Employees want the opportunity to present other views; to be subject to neutral procedures, transparent rules, and fact-based decisions; and to receive outcomes that appear consistent across people and across time.³¹ But communicating

24. *See id.* (same); *see also* NELSON & STOUT, *supra* note 1, at Chapter 10 (“Special Issues of Ethics in Leadership”); *id.* at Chapter 12 (“Specific Liability Questions and Whistleblowing Options”); *id.* at Chapter 14 (“Designing an Ethical Culture”).

25. *See* Panel 1, *supra* note 17 (Dr. Treviño’s comments); *see also* NELSON & STOUT, *supra* note 1, at Chapter 10 (“Special Issues of Ethics in Leadership”); *id.* at Chapter 13 (“How to Institute Best Practices”).

26. *See* Niki den Nieuwenboer, Ann Tenbrunsel, Linda K. Treviño, & J.S. Nelson, *Panel 2: Lessons Learned from Research*, in *Villanova Law Review Norman J. Shachoy Symposium on Corporate Law: The Science, Instruction and “Real-World” Application* (Feb. 19, 2021) [hereinafter Panel 2] (Dr. den Nieuwenboer’s comments).

27. *See* NELSON & STOUT, *supra* note 1, at Chapter 13 (“How to Institute Best Practices”); *id.* at Chapter 14 (“Designing an Ethical Culture”).

28. *See* Panel 2, *supra* note 26 (Dr. Treviño’s comments).

29. *See id.* (Dr. den Nieuwenboer’s and Dr. Treviño’s comments).

30. *See id.* (Dr. Treviño’s comments).

31. *See id.* (Dr. den Nieuwenboer’s comments).

the *why* of rules also matters. To protect qualities important to the organization, we must explain *why* the rules are the rules, and what we are trying to protect in making sure that they are followed.

In evaluating employees, we must focus on more than outcomes. Organizations must also emphasize the *means* by which employees arrive at goals.³² Ethical behavior is in the process, and ethical processes should be rewarded. Goals may be unrealistic. In fact, they may even create cheating and other unethical behaviors if the consequences of not reaching them are too harsh.³³ It needs to be acceptable within the organization to talk about ethics, and whether a given course of action to reach goals comports with the ethical values of the organization.³⁴

Similarly, we must be conscious of what behaviors we reward through formal and informal systems as simple as who is lauded at organizational functions or asked to lunch. For example, Professor Tenbrunsel tells of a study she conducted in a law firm otherwise steeped in how important the accuracy of timesheets had to be. One of the most important signals for other lawyers, though, came from a top associate routinely given plum assignments making up his or her timesheet for the week in front of them.³⁵

In thinking about weeding the garden to encourage ethical behavior, it is not enough merely to discard the “bad apples.” As Professor Treviño’s research has demonstrated, “bad apples” may come from “bad barrels,”³⁶ that implicate the management of the orchard. As Professor den Nieuwenboer elaborates, firing “bad apples” may make those managing the organization feel better—managers can tell themselves that they have gotten “rid of” the problem in the form of the person immediately presenting it—but issues in the management of the orchard return when the next person in the fired employee’s position is faced with the same pressures, incentives, and signals that created the initial “bad apple’s” behavior.³⁷ The issue of ethical violations is for the organization itself.³⁸ It needs to examine itself, the signal that it sends, and how it enforces those signals to deal with the roots of situations.³⁹

32. *See id.* (Dr. Treviño’s comments).

33. *See id.* (Dr. den Nieuwenboer’s comments); NELSON & STOUT, *supra* note 1, at Chapter 13 (“How to Institute Best Practices”); *id.* at Chapter 14 (“Designing an Ethical Culture”).

34. *See* Panel 2, *supra* note 26 (Dr. Treviño’s comments); NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”).

35. *See* Panel 2, *supra* note 26 (Dr. Tenbrunsel’s comments).

36. *See id.* (comments from all three panelists); *see also* Linda Klebe Treviño & Stuart A. Youngblood, *Bad Apples in Bad Barrels: A Causal Analysis of Ethical Decision-Making Behavior*, 75 J. APPLIED PSYCHOL. 4, 378–85 (1990).

37. *See* Panel 2, *supra* note 26 (Dr. den Nieuwenboer’s comments).

38. *See id.* (Dr. den Nieuwenboer’s comments).

39. *See* NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”).

Who should be in charge of the garden that helps to grow ethical behavior? The behavioral scientists describe work in the leadership space that suggests we need to be worried about the truth of how candidates for leadership positions present themselves. We do not want to be selecting leaders interested in power for the sake of power itself, and these are the people who most often volunteer.⁴⁰ Instead, we need to tap those less likely to volunteer, but who are still willing to serve and who have the skills that we need.⁴¹ We should then be reviewing leaders with “360 degree” feedback, which considers the conditions of those working underneath them, and not solely the input of superiors who the managers may be able to flatter.⁴²

Finally, there must be psychological safety for employees, and the cultivation of a “speak-up” culture for those who tell the truth, even if that truth is not easy for the organization to hear.⁴³ Such reports are the early warning system for organizations that may face later serious liability for the behavior happening inside them.⁴⁴ Employees need to feel that the organization “has your back,”⁴⁵ and that it will protect them into the future—Professor Tenbrunsel provides the example of an organization publishing the stories of successful top executives at the company who all blew the whistle early in their careers, and went on to do well.⁴⁶ Other companies go to extensive lengths to protect the anonymity of whistleblowers, and create extensive tracking and monitoring systems to protect the careers of people who report.⁴⁷

Employees are watching. Boeing’s internal site that described how it handled reports of wrongdoing to protect whistleblowers and act on their concerns received some 60,000 hits in its first month.⁴⁸ To feel safe, employees need to be convinced that it is worth the personal risks for them to report, and that their reports will be properly handled and acted upon.⁴⁹

40. See Panel 2, *supra* note 26 (Dr. Tenbrunsel’s comments).

41. See *id.* (Dr. Tenbrunsel’s comments).

42. See *id.* (Dr. Treviño’s comments); see also NELSON & STOUT, *supra* note 1, at Chapter 10 (“Special Issues of Ethics in Leadership”).

43. See Panel 2, *supra* note 26 (Dr. Treviño’s comments); see also NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”).

44. See NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”).

45. See Panel 2, *supra* note 26 (Dr. Treviño’s comments); see also NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”).

46. See Panel 2, *supra* note 26 (Dr. Tenbrunsel’s comments).

47. See *id.* (Dr. Tenbrunsel’s comments).

48. See *id.* (Dr. Treviño’s comments).

49. See NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”) (providing top reasons why employees do not report misconduct, and how to better handle reports).

IV. DR. GENTILE'S FEATURED SPEECH

Cultivating employee reports and safety to speak up are then key to cultivating a healthy ethical culture. But what happens when employees do not feel entirely safe saying what needs to be said? We may not always find ourselves inside of organizations that work hard enough to cultivate ethical behavior, and we may need to speak up about our values to effect changes without getting fired.⁵⁰

Indeed, not all organizations—or any organizations—are perfect. How do we keep ethical people within less-than-perfect organizations to change those organizations from within?

Developed by Dr. Mary C. Gentile based on behavioral science, Giving Voice to Values (“GVV”) is an entire program, adopted in over 1,000 organizations, that helps people rehearse, practice, and pre-script what they want to say in a safe place before saying it in their organizational context.⁵¹ It helps to give people confidence to act on their values, and it helps them to shape their messages to play to their strengths and to be most effective in having an ethical impact. The paralysis of inaction otherwise allows unethical behavior to grow unchecked.

Dr. Gentile’s work also helps people to understand that ethical conflicts are *normal*.⁵² They are an inevitable part of living and working in the world, especially in business. And we as lawyers should know that “law is a business.”⁵³

In fact, as lawyers, we may have to deal with ethical conflicts more often than other professions. We study professional legal ethics in law school, but those are only the tip of the iceberg of what we see every day.⁵⁴ We have far less professional training to deal with the “corporate and organizational pressures” to which we are constantly subject.⁵⁵ These pres-

50. See *id.* at Chapter 5 (“Legal Foundations of Business Ethics”); *id.* at Chapter 7 (“The Corporation as an Ethical ‘Person’ in Modern Society”); *id.* at Chapter 8 (“The Costs of Acting Unethically”); *id.* at Chapter 2 (“The Benefits of Acting Ethically”); *id.* at Chapter 15 (“How to Respond to Investigations and Protect Your Reputation”).

51. See Mary C. Gentile, *Featured Speaker*, in *Villanova Law Review Norman J. Shachoy Symposium on Corporate Law: The Science, Instruction and “Real-World” Application* (Feb. 19, 2021) [hereinafter *Featured Speaker*]; MARY C. GENTILE, *GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT’S RIGHT* (2012); IBIS Initiatives, *Giving Voice to Values*, U. OF VA., <https://www.darden.virginia.edu/ibis/initiatives/gvv> [<https://perma.cc/67SG-AXKY>] (last visited Nov. 19, 2021); Ethics Unwrapped, *Giving Voice to Values (Videos)*, U. OF TEX., <https://ethicsunwrapped.utexas.edu/series/giving-voice-to-values> [<https://perma.cc/7GQQ-BTGH>], last visited Nov. 19, 2021); see also NELSON & STOUT, *supra* note 1, at Chapter 9 (“Major Ethical Traps in Business”) (providing overview of the Giving Voice to Values method and suggestions for implementation).

52. See *Featured Speaker*, *supra* note 51; GENTILE, *supra* note 51; NELSON & STOUT, *supra* note 1, at Chapter 9 (“Major Ethical Traps in Business”).

53. *Featured Speaker*, *supra* note 51.

54. See *id.*

55. See *id.*

tures are pervasive, constant, and impact us through a wide variety of social and other contexts.⁵⁶ We work in businesses and for businesses; we are at the center of so many issues around us as employees, employers, regulators, advocates, and in all of our capacities.

Then, especially for us as lawyers, the most important take-aways from GVV are that:

1. We have more *choices* to act on our values than we may think that we do;⁵⁷ and
2. To be in a place of action to ask *how* we can act on our values, we should be rehearsing ways to have our values effectively heard and have impact.⁵⁸

GVV helps to bridge the gap that the science has been identifying between what we know we *should* do, and what we actually do.⁵⁹ We should not “dumb” ourselves down when we encounter values conflicts.⁶⁰ Especially as lawyers, we have skills of persuasion and influence to change ideas and behavior. We need to be harnessing our skills to have the impacts that we want to have on ethical decisions.

We have the emotional reactions that we need: what we need to rehearse is our “moral muscle memory” to *act* on our values when we find ourselves in uncomfortable situations.⁶¹ In the language of psychology, we should be “acting our way into thinking,” not “thinking our way into acting.”⁶²

Lawyers are particularly good at reasoning and rationalizing. It’s what we’re trained to do. But here we need to use our skills as advocates for moral outcomes. We can be strategic. We can be tactical. And we need to be employing our skills for the *right* ethical outcomes.⁶³ That reframing can be uncomfortable for lawyers, but we need to own it, use it, and be good at it. We have the skills. We have the access. We are in positions to influence organizations and to be able to raise ethical issues. We should both be comfortable with raising ethical issues, and we should see it as central to our role and value to do so.

V. PRACTITIONER’S PANEL—HOW BEHAVIORAL ETHICS MANIFESTS IN THE CORPORATE “REAL WORLD:” THE PRACTITIONER PERSPECTIVE

The last panel of the day helped us understand how practicing lawyers are integrating business ethics discussions and concepts into their everyday lives and work. Professor Doris Brogan moderated the panel of

56. *See id.*

57. *See id.*

58. *See id.*

59. *See infra* Part III.A (describing the behavioral science panels).

60. Featured Speaker, *supra* note 51.

61. *See id.*

62. *Id.* (describing findings in the field of positive deviance).

63. *See id.*

practitioners who included Mr. Brian H. Benjet, Partner, DLA Piper & Adjunct Professor of Corporate Compliance at Villanova Law; Ms. Precious Murchison Gittens, Senior Director of Compliance Investigations, Fresenius Medical Care North America; Mr. Lawrence Oliver, Chief Counsel, Investigations, The Boeing Company; and Ms. Nancy Peterson, Senior VP/Deputy General Counsel and Chief Compliance Officer, Allied Universal Security Services.

Many years of experience were behind the practitioners' comments, including Mr. Oliver's observation that there is "nothing like a[n ethical] lesson learned when it's your lesson—[it's] more sobering than when it's your neighbor's lesson or your competitor's lesson."⁶⁴ But these are also "opportunities to get folks' attention and operate internally throughout the organization."⁶⁵ As Mr. Benjet advocates, "never let a good crisis go to waste."⁶⁶ Lawyers can use these opportunities to investigate, listen, and fix deeper organizational issues.

According to the practitioners, ethical and compliance issues commonly originate from three sources. First, the problem may be lack of investigation and/or prioritization of the organization's ethics and compliance program.⁶⁷ Second, there may be a disconnect between the aspirations of the program and the organization's actual "tone from the top," "tone from the middle," or other parts of its culture.⁶⁸ Third, its "paper" ethics and compliance program may not be well suited and properly adapted to the organization's risks.⁶⁹ If the rules being promulgated are not meaningful to the employees, they will not invest in following them.⁷⁰ In these circumstances, the organization is also not likely to "really adopt" or "own" the program and enforce its components, as the Department of Justice wants organizations to do.⁷¹ For more details on the Department of Justice and other guidance that the panelists mentioned, see Chapter 13 of my book with Professor Stout in which we walk through the most current standards and cite to additional sources.⁷²

To fix many of these adoption and enforcement problems, the practitioners advocate focusing on training and communication directly to engage employees.⁷³ These efforts have benefits that flow in both directions:

64. Brian H. Benjet, Precious Murchison Gittens, Lawrence Oliver, Nancy Peterson, & Doris DeTosto Brogan, *Panel 3: How Behavioral Ethics Manifests in the Corporate "Real World": The Practitioner Perspective*, in *Villanova Law Review Symposium: Practical Ethics in Corporate Law: The Science, Instruction and "Real-World" Application* (Feb. 19, 2021) [hereinafter Panel 3].

65. *Id.* (Mr. Oliver's comments).

66. *Id.* (quoting his mentor).

67. *See id.* (Mr. Benjet's comments).

68. *See id.* (same).

69. *See id.* (same).

70. *See id.* (same).

71. *Id.*

72. *See* NELSON & STOUT, *supra* note 1.

73. *See* Panel 3, *supra* note 64 (Mr. Benjet's comments).

the organization has opportunities to clarify its expectations for ethical conduct, and it can open channels to hear from employees about their issues and concerns.⁷⁴ As Ms. Peterson describes, lawyers working with organizations must “go where the employees *are*.”⁷⁵ They have to “weave” ethics and compliance “into conversations” happening throughout the organization so that those concepts do not remain separate from the rest of the organization, but become “part of behaviors of the organization as a business unit.”⁷⁶ There should be “shared ownership” of ethics and compliance ideals.⁷⁷ As Mr. Benjet summarizes, you certainly do not want to hear that “legal is making us do it, and [the mandate we are receiving] makes no sense.”⁷⁸

Similarly, understanding the business is vital for us as lawyers in developing effective ethics and compliance programs. Ms. Gittens highlights that the methodology of “coming up with the risk profile *is* risk management.”⁷⁹ Lawyers must understand their organizations’ business, business lines, regulatory environment, lessons learned from previous experiences, and available data.⁸⁰ But this process is, as Ms. Peterson says, “not one and done.”⁸¹ You “have to keep doing it,” and update your work.⁸² As the behavioral scientists described, “it’s a garden: you have to keep tending it.”⁸³ To keep ethics and compliance healthy within the organization, we “have to have that mentality [of continuing to tend the garden] as well.”⁸⁴

Part of the tending required is enforcement of the organization’s ethics and compliance program, consistently, and uniformly across all levels of the organization. This requirement can be uncomfortable for lawyers in organizations, but “employees, particularly at the lower levels, have to be persuaded that we mean what we say.”⁸⁵ “You have to demonstrate your sincerity and your commitment to the process.”⁸⁶ Accordingly, “[w]hen [the need for disciplinary action] lands on someone at a high, more visible level, you have to let the chips fall the way you would with anyone else.”⁸⁷

74. *See id.*

75. *Id.*

76. *Id.* (Ms. Peterson’s comments).

77. *Id.* (Mr. Benjet’s comments); *see also id.* (The organization should not merely be “receiving the compliance program, but [involved in] designing, building, and testing the [ethics and] compliance program.”).

78. *Id.* (Mr. Benjet’s comments).

79. *Id.* (Ms. Peterson’s comments).

80. *See id.* (Ms. Gittens’s comments).

81. *Id.* (Ms. Peterson’s comments).

82. *Id.* (same).

83. *Id.* (same); *see* Panel 2, *supra* note 26, (Professor Treviño’s comments); *infra* Part III.B.

84. Panel 3, *supra* note 64 (Ms. Peterson’s comments).

85. *Id.* (Mr. Oliver’s comments).

86. *Id.*

87. *Id.*

“Folks are paying attention,” and they are particularly sensitive to hypocrisy.⁸⁸ A hypocritical result helps to create a negative cycle.⁸⁹ “If someone at a high level gets a slap on the wrist, or a pass for doing something that would result in more severe punishment at lower levels[,] . . . [e]mployees . . . [pay] attention.”⁹⁰ But a result that is perceived as “fair”⁹¹ helps to create a virtuous cycle in which employees will “feel better about their environment. They will feel better about raising concerns and making complaints.”⁹² These pieces of feedback provide the “measure of the health of the organization,”⁹³ and its continued success in addressing ethics and compliance issues, before they become larger and more damaging.

As no organization is perfect, no organization’s ethics and compliance program will be perfect.⁹⁴ As Ms. Gittens describes, what lawyers need to help create and maintain is an *effective* compliance program, and “to deal with misconduct” properly “when you find it.”⁹⁵ “Different people are motivated and driven for different reasons by different things: . . . sometimes good people will do bad things; sometimes bad people will do good things.”⁹⁶ But, among the most dangerous conditions for ethics and compliance violations is when people who engage in misconduct are “motivated by ego—their own sense of importance, their own sense of self-esteem.”⁹⁷ As comports with the research on leadership,⁹⁸ “[f]ear of failure, or of not being successful, particularly for people who are ego-driven and who have been successful . . . can really make [them] do things that you wouldn’t think that [they] would do.”⁹⁹

The practitioners make a distinction between people engaged in wrongdoing because they are seeking benefits immediately for themselves, and those engaged in wrongdoing because they think that their actions

88. *Id.*

89. See NELSON & STOUT, *supra* note 1, at Chapter 13 (“How to Institute Best Practices”) (providing data); see also *id.* at Chapter 14 (“Designing an Ethical Culture”) (same).

90. Panel 3, *supra* note 64 (Mr. Oliver’s comments).

91. See Panel 2, *supra* note 26 (Dr. den Nieuwenboer’s comments); *infra* at Part III.B; see also NELSON & STOUT, *supra* note 1, at Chapter 13 (“How to Institute Best Practices”) (providing data to support this approach).

92. Panel 3, *supra* note 64 (Mr. Oliver’s comments); see also NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”) (providing data to support this approach).

93. Panel 3, *supra* note 64 (Mr. Oliver’s comments); see also NELSON & STOUT, *supra* note 1, at Chapter 14 (“Designing an Ethical Culture”) (providing data to support this approach).

94. See Panel 3, *supra* note 64 (Ms. Gittens’s comments).

95. *Id.*

96. *Id.* (Ms. Gittens’s comments).

97. *Id.* (same).

98. See NELSON & STOUT, *supra* note 1, at Chapter 10 (“Special Issues of Ethics in Leadership”) (describing research on the perils of success for ethical behavior).

99. Panel 3, *supra* note 64 (Ms. Gittens’s comments).

will benefit the organization and their own careers at the organization.¹⁰⁰ As Mr. Oliver says about employees engaged in wrongdoing because they believe it is for the benefit of the organization, “you can usually reach those people to help them understand the risk that they are creating” for the organization and others.¹⁰¹

But even people operating for the benefit of the organization can create tremendous damage. Harkening back to the behavioral science research,¹⁰² the practitioners describe as particularly insidious the need to counter messages to employees that they should “cut corners to make [goals] happen because this is what leadership expects.”¹⁰³ Mr. Benjet calls this the “wink and nod” reaction to when “leadership has unreasonable expectations” in setting and enforcing “performance metrics,” “compensation metrics,” and other incentives.¹⁰⁴

The last topic that the practitioners cover is one that I have also written on, and that I expect to become the basis of my next book.¹⁰⁵ There are few practical limits on organizations’ surveillance of employees in the workplace, and this can have uncomfortable ramifications for the power dynamics of the employer-employee relationship. As Ms. Gittens relates, “the fact is that a company can do a lot more by way of surveilling an individual employee than the government can.”¹⁰⁶ Many of the boundaries between employees’ work and home lives are increasingly “blurred now because people are working remotely.”¹⁰⁷ As Mr. Oliver admits in the context of investigations, “going through someone’s email can be very fertile ground for relevant evidence,” and “people can be extremely candid in emails and instant messages,” even when warned that the organization may read those communications.¹⁰⁸

Organizations’ expansive acquisition of data on every part of employees’ lives is a disturbing trend, especially as compliance departments increasingly embrace artificial intelligence and more powerful—though demonstrably biased—algorithms in their hiring, firing, and evaluation processes. The practitioners merely see the Department of Justice guidance as “pretty clear” that they are “incentivized to cooperate with the government,”¹⁰⁹ and that “tech and data are a huge opportunity for pro-

100. *See id.* (Mr. Oliver’s comments); *id.* (Mr. Benjet’s comments).

101. *Id.*

102. *See* Panel 2, *supra* note 26 (Dr. den Nieuwenboer’s comments); *infra* Part III.B; NELSON & STOUT, *supra* note 1, at Chapter 13 (“How to Institute Best Practices”); *id.* at Chapter 14 (“Designing an Ethical Culture”).

103. Panel 3, *supra* note 64 (Mr. Benjet’s comments).

104. *Id.* (same).

105. J.S. Nelson, *Management Culture and Surveillance*, 43 SEATTLE U. L. REV. 631 (2020); J.S. NELSON, *AUTONOMY-THREATENING WORKPLACE SURVEILLANCE* (forthcoming).

106. Panel 3, *supra* note 64.

107. *Id.* (Ms. Gittens’s comments).

108. *Id.* (Mr. Oliver’s comments).

109. *Id.* (Mr. Benjet’s comments).

grams.”¹¹⁰ As with all of our topics in this Symposium, there is more to discuss here.

CONCLUSION

This Symposium is the first of its kind, and it has broken important new ground. The students of the *Villanova Law Review* should be particularly proud of what they have accomplished in making this Symposium happen. They have owned and driven this exploration of business ethics, and what those ethics should mean to lawyers. The students are actively thinking about the ethical climates in which they want to work, and to which they want to contribute. They will shape the future of our society, and the conditions in which we will live.

But they need the rest of us too. To paraphrase Eleanor Roosevelt, where else will the most fundamental changes begin in how we treat each other and expect ethical behavior from each other?¹¹¹ Such changes ripple out from each one of us, “[i]n small places, close to home—so close and so small they cannot be seen on any maps of the world. Yet they are the world of the individual person . . .”¹¹² Without those changes in each of us, we “shall look in vain for progress in the larger world.”¹¹³

We, as lawyers, have magnified power to set those standards and make those changes. We “maintain” and create “the criteria” for actions of members of our society.¹¹⁴ So let us continue to learn more about how to make those changes. And let us, as businesspeople join us in wanting to, use our knowledge to make a “positive impact on the betterment of society.”¹¹⁵ That is the mission and calling of this Symposium, for us now, and always, going forward.

110. *Id.* (Ms. Peterson’s comments).

111. See Eleanor Roosevelt, Speech on the Tenth Anniversary of the Universal Declaration of Human Rights, United Nations, New York, 1958.

112. *Quotes about Youth + Social Change*, FREECHILD INST. FOR YOUTH AND SOC. CHANGE, <https://freechild.org/2016/01/28/quotes-about-youth-changing-the-world/> [<https://perma.cc/M75J-34XE>] (last visited July 23, 2021) (internal quotation marks omitted) (quoting Eleanor Roosevelt).

113. *Id.* (internal quotation marks omitted).

114. *Law*, *supra* note 12.

115. AACSB, *supra* note 8, at 57 (interpreting Standard 9: Engagement and Societal Impact).