

Law and Strategy *and Ethics?*

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ABSTRACT

This article addresses the vital role that business ethics plays together with law and strategy. It places “values-attentive ethics” at the forefront of the developing law and strategy literature, arguing that the values-attentive ethics approach to organizational ethics is preferable to any alternative, particularly to command-and-control oriented approaches. The article further claims that the purview of values-attentive ethics is so closely allied with law as a resource in strategic management, that the combination of law and values-attentive ethics must be recognized together as perhaps the most vital resource in the law and strategy framework.

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INTRODUCTION

Strategy, the planning and undertaking of besting competition, has had its place as a management discipline in business school literature and curricula, as well as in management practice, for decades.¹ The resource-based view of the firm is a well-established approach in that discipline and has recently been updated in light of the ever-increasing pace of change, change that is particularly rapid in business and technology.² Including law in the resource-based view of the firm approach to strategy is a project that has also been underway for a number of years now. Yet, while several in the field have proclaimed law and strategy to be an area rich for development, work in the area has yet to be comprehensively embraced.³ Similarly, foundational work establishing law as both a market and non-market strategic force in a systems theory account of law, business, and society has not yet been broadly recognized.⁴ (Understand my use of “law” in the law and strategy framework to mean the understanding of and ability to engage effectively with law and legal considerations in strategic management.)

This work contributes to still nascent law and strategy scholarship. It is premised on the notion that the area is a rich interdisciplinary territory bridging legal scholarship and business scholarship. It is my hope that this discussion is itself instrumental in working toward better communication about law and business matters among managers, lawyers, and those trained or experienced as both.

1. See generally, Michael E. Porter, *How Competitive Forces Shape Strategy*, HARV. BUS. REV., Mar.-Apr. 1979, at 137; MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* (1980); Richard P. Rumelt, *Towards a Strategic Theory of the Firm*, in *COMPETITIVE STRATEGIC MANAGEMENT* 556–70 (Robert Lamb, ed., 1984), reprinted in NICOLAI J. FOSS, *RESOURCES FIRMS AND STRATEGIES: A READER IN THE RESOURCE-BASED PERSPECTIVE* 131–45 (1997).

2. See generally Jay Barney, *Firm Resources and Sustained Competitive Advantage*, 17 J. MGMT. 99 (1991); see also Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, HARV. BUS. REV., Jan. 2008, at 79; Richard P. Rumelt, *The Perils of Bad Strategy*, MCKINSEY Q., no.1 (2011), at 30; Rita Gunther McGrath, *Transient Advantage: Achieving a Sustainable Competitive Edge is Nearly Impossible These Days. A Playbook for Strategy in a High-Velocity World*, HARV. BUS. REV., June 2013, at 4; RITA GUNTHER MCGRATH, *THE END OF COMPETITIVE ADVANTAGE: HOW TO KEEP YOUR STRATEGY MOVING AS FAST AS YOUR BUSINESS* (2013).

3. See generally Constance E. Bagley, *What's Law Got to do with It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587 (2010) [hereinafter *What's Law*]; Constance E. Bagley, *Strategic Compliance Management*, HBS 9-806-173 (2006); CONSTANCE E. BAGLEY, *MANAGERS AND THE LEGAL ENVIRONMENT* (7th ed. 2013); GEORGE SIEDEL & HELENA HAAPIO, *PROACTIVE LAW FOR MANAGERS: A HIDDEN SOURCE OF COMPETITIVE ADVANTAGE* (2011); George Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L. J. 641 (2010); Robert C. Bird, *Pathways of Legal Strategy*, 14 STAN. J.L. BUS. & FIN. 3 (2008) [hereinafter *Pathways*]; Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61 (2010); Robert C. Bird, *The Many Futures of Legal Strategy*, 47 AM. BUS. L.J. 575 (2010); Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L. J. 727 (2010); Daniel T. Ostas, *Legal Loopholes and Underenforced Laws: Examining the Ethical Dimensions of Corporate Legal Strategy*, 46 AM. BUS. L.J. 487 (2009); David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137 (2016).

4. An approach chiefly set out by Constance E. Bagley in *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378 (2008) [hereinafter *Winning Legally*].

This article fills a gap in addressing the vital role that business ethics plays together with law and strategy. (Note that by “business ethics” I mean principles guiding right decision-making addressing ethical issues in organizational settings.) In it, I focus particularly on introducing and placing “values-attentive ethics” at the forefront of the developing law and strategy framework. Moreover, I argue that the values-attentive ethics approach to organizational ethics is preferable to any alternative approach to ethics, particularly to command-and-control oriented approaches. I ground this argument in social psychology scholarship on ethical behavior in organizations, *infra*, work I refer to as “behavioral ethics research.” I argue that, perhaps unwittingly, existing law and strategy scholarship presumes a linkage of ethics with law as a resource. From there, I expound on the ethics-law linkage in the law and strategy context, claiming that the purview of values-attentive ethics is so closely allied with law as a resource on the resource-based view of the firm, that the combination of law and values-attentive ethics must be recognized together as perhaps the most vital resource in the law and strategy framework. This combined resource, I propose, is instrumental in obtaining the ever-present goal of sustainable competitive advantage over rivals. Secondly, I make a parallel argument that on a systems theory understanding of the firm, values-attentive ethics must be viewed together with law as a market or nonmarket force instrumental in attaining competitive advantage.

In Section I of this work, I introduce and define values-attentive ethics, grounding the concept in behavioral ethics research. Here, I discuss the origins of the values-attentive approach in organizational settings, arguing its superiority to command-and-control approaches to ethics. I note it’s non-rational, intuitionist component and the motivation it offers for aligning personal and organizational values. In Section II, I provide an example of a particular version of values-attentive ethics, Giving Voice to Values⁵ (“GVV”), which is expressly based upon behavioral ethics research. In Section III, I place this work in the context of existing law and strategy scholarship and address the role of lawyers in organizational ethics cultures. In Section IV, I conclude with claims that the combined resource, or force, of values-attentive ethics with law is vital to a firm’s sustainable competitive advantage over rivals.

I. VALUES-ATTENTIVE ETHICS

By values-attentive ethics, I mean an organizational ethics program that (i) is informed by behavioral ethics research, (ii) incorporates and substantially emphasizes organizational values, (iii) regularly follows processes consistent with those values, and (iv) does so with the intention of aligning organizational and individual values to promote self-regulation of those within the organization. Values-attentive ethics is similar to the values orientation concept that Treviño and

5. See MARY GENTILE, GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT’S RIGHT (2010).

Weaver discuss, while importantly noting that values and compliance orientations need not be mutually exclusive.⁶

I want to be explicit that I include in the concept of values-attentive ethics the non-rational elements that may inhere in values. Indeed, this is part of the lesson learned from behavioral ethics research. Who can honestly identify personal values on a solely rational basis? Values come to us, at least in part, through intuition or emotion or other non-rational means that, like our own biases, we understand chiefly on a rational account *ex post*.

A. BEHAVIORAL ETHICS BACKGROUND

Legal scholarship is better informed and more likely to impact management when it draws on related interdisciplinary work. In their 2010 Business Ethics Quarterly article, John Hasnas, Robert Prentice, and Alan Strudler called attention to the interrelatedness of legal and business ethics scholarship in the context of supporting, albeit with caution, the growing interdisciplinary work in the area.⁷ These scholars foresaw both empirical research and theory speaking together as a major component of future work in law and business ethics. Additional calls for recognizing and furthering work on the interrelated fields of ethics, law, and business have come from Timothy Fort.⁸

Concurring with this assessment, I begin with deriving the notion of values-attentive ethics from recent work in behavioral ethics research. Again, behavioral ethics research refers to work in social psychology studying how people actually behave in organizations in the face of ethical issues, *infra*. This research may analyze decisions and behavior either in simulations or in actual workplace settings.⁹ Much of this research calls attention to cognitive biases that may underlie or drive ethical decision-making and escape a rational account of such decision making, *infra*.

It is important to recall here that attention to behavioral ethics in terms of legal scholarship historically grew from the behavioral economics response to the asserted overreliance on claims or assumptions of human and market rationality associated with the law and economics movement.¹⁰ Fundamentally, the concept

6. See Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Cultures: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 317–18 (1999).

7. John Hasnas, Robert Prentice & Alan Strudler, *New Directions in Legal Scholarship: Implications for Business Ethics Research, Theory, and Practice*, 20 BUS. ETHICS Q., 503, 504–07 (2010).

8. Timothy L. Fort & Countess Alexandra, *Catalyst, Obstacle, or Something in between? Dealing with the Law in Building Ethical Corporate Culture*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 14–15 (2015) (promoting the role of law in business ethics).

9. Weaver & Treviño, *supra* note 6; see *infra* note 18.

10. Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998); Cass R. Sunstein, *The Future of Law and Economics: Looking Forward: Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997) (attacking the rationality assumptions of the law and economics movement with a host of biases derived from behavioral ethics research); Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826 (2013); RICHARD A. THALER & CASS R. SUNSTEIN, *NUDGE* (2008).

of values-attentive ethics demands some account of ethics that is not purely rational. The very notion of values requires us to consider what matters to us and what matters to our organizations. This consideration derives not simply from rational explanation, but also, and most likely first, on an intuitive basis. That intuition may well derive from emotion, from empathy, from something human that, even though it may be explained rationally *ex post*, is not purely rational.

Certainly not everyone readily embraces the behaviorist counterpoint to rationality. Some have called for caution in embracing behavioral ethics research.¹¹ Robert Scott has pointed out logical flaws in assuming irrationality where rational decision-making may be subject to bias or decision heuristics.¹² Gregory Mitchell has been quite critical of the propensity that recent behaviorist research has to cast all legal decision-making as tainted with irrationality, calling such work “an assault on the rationality assumption.”¹³

Mitchell argues that behaviorist conclusions about bias and flawed human rationality are oversimplified, asserting that there are:

(1) features of this research that mask individual and situational differences in rational behavior and artificially heighten the apparent frequency of irrational behavior; (2) features unique to the experimental research setting that intentionally and unintentionally increase the likelihood of finding irrational behavior outside the laboratory; and (3) features of this research that diminish its real-world importance and its ability to provide descriptive guidance in the law.¹⁴

Mitchell’s criticism appears to be based on an extreme reading of behaviorist claims. Mitchell responds to a monolithic behaviorist position that “cognitive biases and errors operate uniformly and pervasively in the population,”¹⁵ perhaps overstating claims of such research and presenting all behaviorist research as unified by a comprehensive agenda. Yet, the call for great scrutiny of behaviorist claims of flawed rationality is an important caution to heed.

Notwithstanding the criticism, behavioral ethics research has blossomed.¹⁶ Now, recent work is doing more to bring the understandings of behavioral ethics

11. Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 330–37 (1986) (discussing internal rule-making in rational choice); Gregory Mitchell, *Taking Behavioralism too Seriously? The Unwarranted Pessimism of the New Behavioralism Analysis of Law*, 43 WM. & MARY L. REV. 1907 (2002) (calling for greater scrutiny of behaviorist research and claims and asserting misleading constructs in such research, inflating irrationalist claims).

12. Scott, *supra* note 11, at 349.

13. Mitchell, *supra* note 11, at 1913.

14. *Id.* at 1912.

15. *Id.* at 1922.

16. See generally David de Cremer, David M. Myer & Marshall Schimke, *On Understanding Ethical Behavior and Decision Making: A Behavioral Ethics Approach*, 20 BUS. ETHICS Q. 1 (2011); David Messick, *What Can Psychology Tell Us about Business Ethics?*, 89 J. BUS. ETHICS 73 (2009).

into various fields of legal scholarship.¹⁷ While Prentice and others are focusing, at least in part, on applying the understanding of behavioral moral reasoning to the working lives of lawyers and financial professionals, my focus is to call attention to the role of values-attentive ethics in integrated law and strategy business management. Values-attentive ethics cannot be extricated from the law in law and strategy management whether viewed on a resource-based or systems-based approach, *infra*. This claim is grounded both in an assessment of existing law and strategy scholarship, *infra*, and in a normative claim based on behavioral ethics research.

Ample behavioral ethics scholarship recognizes and demonstrates the now broadly accepted concepts of cognitive biases; including, self-serving bias, group think, confirmation bias, bounded ethicality, ethical fading, framing, and blind spots, among others.¹⁸ Whether these biases are consistent, uniform, and regularly alter otherwise rational decision-making continues to be debatable, but their existence and our ability to recognize them and their impact does not.

Robert Prentice has discussed the application of behavioral economics and behavioral ethics research to business management as well as to public policy making, citing for example, both policy implementation from U.K. Prime Minister David Cameron's Behavioral Insights Team and the promulgation of certain U.S. regulations.¹⁹ Of course, a basic hope of applying behavioral-oriented research is that by fostering awareness of cognitive biases and distorting heuristics we can prevent or curtail them. Indeed, it is derivative of behavioral ethics research that we can shape policies and ethics programs to account for, and perhaps counter, biases and distorting heuristics. Awareness alone may incite proactive ethical behavior. This concept is central to understanding values-attentive ethics. Values-attentive ethics is premised upon the claim that the cognitive and non-cognitive features of ethical decision-making revealed by behavioral ethics research gives us a basis to shape approaches to organizational ethics that account for intuition and biases. It is further premised on the claim that this is done best with approaches to organizational ethics that preference the alignment of personal and organizational values over oppositional enforcement.

17. See generally Robert A. Prentice, *Behavioral Ethics: Can it Help Lawyers (and others) Be Their Best Selves?*, 29 IND. J. L. ETHICS & PUB. POL'Y 35 (2015) (noting examples of behavioral ethics based government policy making and marketing); Robert A. Prentice, *Ethical Decision Making: More Needed Than Good Intentions*, 63 FIN. ANALYSTS J. 17 (2007); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L. J. 1107 (2013); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L. J. 1639 (2015) (focused on partisanship).

18. See, e.g., Prentice, *supra* note 17 (2015); see generally BUSINESS ETHICS: SHAPING AN EMERGING FIELD (David de Cremer & Anne E. Tenbrunsel, eds., 2011); MAX H. BAZERMAN & ANNE E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011); Anne E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self Deception in Unethical Behavior* 17 SOC. JUST. RES. 223 (June 2004); Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974); CHOICES, VALUES, AND FRAMES (David de Cremer & Anne E. Tenbrunsel, eds., 2000).

19. Prentice, *supra* note 17, at 39–41; see also Tom Tyler, *The Psychology of Cooperation: Implications for Public Policy*, in BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY (Eldar Shafir ed. 2012) (System 1 thinking).

B. INTUITIONISM

If behavioral ethics research teaches us anything, it is that an awareness of how we make ethical decisions is crucial to understanding and improving such decisions.²⁰ Much behavioral ethics work speaks to the proposition that often we make ethical decisions first without conscious deliberation and understand our decisions on a rational basis only after having decided intuitively.²¹ Conclusions from this research run counter to the cognitive tradition associated with Kohlberg whereby we would understand most adults to have reached a “conventional” stage of moral development leading them to make rational ethical decisions based on external guidance.²² In essence, with the rise of behavioral ethics research we have been witnessing a turn in academic emphasis toward greater recognition of intuitionist moral decision making. This rise of intuitionism together with, if not in place of, rationalist deliberative models may have real implications for better understanding business ethics and designing approaches to organizational ethics.²³

While James Rest has dissected acting ethically into four rational steps: (1) moral awareness, (2) decision making, (3) moral intent and (4) moral action,²⁴ Khaneman,²⁵ Haidt,²⁶ and others have convinced many of us that many, if not all, ethical decisions are made at least first nonconsciously or pre-rationally.²⁷ Generally, we can call this alternative understanding intuitionist moral decision making. Values-attentive ethics recognizes the prominent role of intuitionism in ethical decision making that behavioral ethics research has demonstrated.

Milton Regan has proposed that intuitionist understandings of moral reasoning may have a direct impact on how we should structure organizational ethics cultures.²⁸ Regan draws heavily on neurocognitive research summarized by Scott Reynolds, arguing that intuitionist moral reasoning may occur as a higher order

20. Prentice, *supra* note 17, at 59; *see generally* DANIEL KHANEMAN, THINKING FAST AND SLOW (Erin Chiminsky ed., 1st ed. 2011).

21. *Id.*

22. Lawrence Kohlberg, *Stage and Sequence: The Cognitive Development Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 347–480 (D.A. Goslin ed., 1969); Gary R. Weaver, Scott J. Reynolds & Michael E. Brown, *Moral Intuition: Connecting Current Knowledge to Future Organizational Research and Practice*, 40 J. OF MGMT. 100, 102 (2014).

23. Gary R. Weaver, Scott J. Reynolds & Michael E. Brown, *Moral Intuition: Connecting Current Knowledge to Future Organizational Research and Practice*, 40 J. OF MGMT. 100, 100, 117–20 (2014).

24. Roger Bergman, *Why Be Moral? A Conceptual Model from Developmental Psychology*, 45 HUM. DEV. 104, 109 (2002) (citing JAMES REST, MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY (1986)).

25. Khaneman, *supra* note 20, at 4, 11–12.

26. Jonathan Haidt, *The Emotional Dog and its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 830 (2001).

27. Weaver, Reynolds, & Brown, *supra* note 23, at 117–20; *see* Scott J. Reynolds, *A Neurocognitive Model of the Ethical Decision-Making Process: Implications for Study and Practice*, 91 J. APPLIED PSYCHOL. 737, 742 (2006).

28. *See generally* Milton C. Regan Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS L.J. 941 (2007).

nonconscious process that, in essence, constitutes both a compression of and coexisting alternative to the cognitive process.²⁹ Regan compares Reynold's neurocognitive model to the four part cognitive process Rest has proposed and writes,

[I]ntuition collapses the four stages...into one. A person simultaneously: (1) perceives that a situation has ethical significance, (2) arrives at a judgment about right and wrong with respect to it, (3) experiences an emotion that motivates her to form an intention to respond in a certain way, and (4) is moved to behave in accordance with that intention.³⁰ The perception of the situation is holistic, not analytic.³¹

Regan expounds on the understanding that our nonconscious moral reasoning has broad implications. It does not mean that we cannot consciously understand moral reasoning. Actually, he argues, it means we need to understand more how this unconscious reasoning involves mechanisms of prototypes that facilitate our intuitionist decision making.³² From that prototype based understanding of automatic or reflexive nonconscious process, he argues, we need to craft organizational ethics programs that account for the role of prototype development in nonconscious systems of ethical decision making.³³ Values-attentive ethics embraces this.

Regan's example of changes in moral attitudes and decisions about sexual harassment over the past few decades (extrapolated from Reynolds³⁴) makes the point that how we inform and structure organizational ethics (to educate as to the effects of, and prohibit acts of, sexual harassment) can alter subsequent intuitionist moral decision making such that unconscious disapproval of sexual harassment becomes a normal moral intuition via changes in prototypes that effect the reflexive process and resultant decision outcome.³⁵ I want to be careful about making any scientific conclusions on this personally, yet recognize plausible implications for ethical decision making and organizational ethics more generally.

Regan emphasizes the social or cooperative nature of the human condition as one reason to favor values oriented ethics cultures.³⁶ He notes that on the values-attentive model, an employee aligns values with and embraces values of the

29. *Id.* at 954–56.

30. *Id.* at 951, 955.

31. *Id.* at 955.

32. See Reynolds, *supra* note 27, at 739 (“The prototype. . . is not metaphorical—it is literal. It is a pattern of neural electrochemical units that encapsulates the sensory experience to create a material imprint of the external world. It does not describe ethical decision-making methods; it is a mechanism of ethical decision making.”).

33. Regan, *supra* note 28, at 964–80.

34. Reynolds, *supra* note 27, at 739.

35. Regan, *supra* note 28, at 956–63.

36. *Id.* at 972–73.

organization – a cooperative undertaking; while in a deterrent, or command-and-control, model the employee is likely oppositional to the enforcement of standards set by the organization.³⁷ Regan concludes that “fostering an ethical organizational culture requires a complex strategy” and that part of that strategy should be “elicit[ing] . . . non-conscious moral intuitions.”³⁸ He reasons that, based on this intuitionist understanding, values oriented ethics can motivate ethical behavior.³⁹ Again, values-attentive ethics accepts intuitionism.

It does seem plausible that on the neurocognitive understanding of prototype-based nonconscious ethical decision making, values-based ethics cultures can facilitate the alteration of prototypes and therefore promote ethical decision making. Widely experienced changes in attitudes and ethical views about sexual harassment and increased condemnation of sexual harassment could, indeed, be evidence that prototypes regarding sexual harassment have changed and thus nonconscious ethical decision making on the topic has yielded changed outcomes. What once was ignored, tolerated, or even accepted, has become increasingly intolerable and unacceptable, perhaps largely on the nonconscious level Reynolds explores and Mitchell wants to apply. The implication is that we can intentionally construct ethics programs to alter prototypes to accurately align moral intuitions with present day standards or aspirations.⁴⁰ This insight informs values-attentive ethics.

Consider a very simple example of this concept. In a recent study, Sreedhari Desai found that simply putting an ethics promoting quote in the signature of one’s email worked to dissuade coworkers from asking the signatory to undertake or assist in an unethical act.⁴¹ Being aware of biases can enable us to be ethically proactive, assert our values, and thereby dissuade the commission of ethical breaches.

Even so, Diana Robertson’s prudent caution in her approach to drawing conclusions from neuroscience research in business ethics is instructive.⁴² Robertson and coauthors caution, “[w]e recognize that realistically neuroscience can perhaps bring us one step closer to understanding questions of moral responsibility, autonomy, intent, and free will, but neuroscience findings cannot in and of themselves answer these questions. Instead the contribution of neuroscience to these debates warrants considerable further discussion and research.”⁴³ Thus, the impact of hormones, gender, stress, age, and other factors may be shown to

37. *Id.*

38. *Id.* at 985.

39. *Id.*

40. Reynolds, *supra* note 27, at 745.

41. Scott Berinato interview with Sreedhari Desai, *To Stop Bad Behavior, Display a Virtuous Quote*, HARV. BUS. REV., Jan.–Feb. 2016, at 2.

42. Diana C. Robertson, Christian Voegtlin & Thomas Maak, *Business Ethics: The Promise of Neuroscience*, 144 J. BUS. ETHICS 679 (2016) [hereinafter *Promise*]; Wi Hoon Jung, et al., *Moral competence and brain connectivity: a resting-state fMRI study*, 141 NEUROIMAGE 408 (2016).

43. *Promise*, *supra* note 42, at 18.

impact brain function in either or both conscious or intuitive ethical decision making, but we cannot jump to deterministic conclusions from this work. It must be balanced with argument, both normative and interpretive of empirical information gathered in controlled experiments and anecdotally. Again, I make no claim to having training as a social psychologist justifying my authoritative interpretation of this research, but find ample reason to consider it fully in further understanding how ethical decisions are made in the hope of better informing organizations and individuals seeking to promote ethical behavior in organizations and to curtail ethical breaches. This research provides important support for values-attentive ethics. Fundamentally, it recognizes nonrational ethical decision making. Consequently, it supports the demonstrated benefit of employee-employer aligned values in particular contrast to oppositional command-and-control oriented ethics approaches.

C. VALUES ALIGNMENT

Behavioral ethics research, looking at the effectiveness of values-based ethics approaches versus compliance-based ethics approaches, appears consistent and convincing in finding that values-based cultures generally yield better outcomes.⁴⁴ Organizations characterized by personal-organizational aligned values have been consistently shown to outperform those characterized by oppositional compliance-based approaches that require employer surveillance and enforcement of employees.⁴⁵

In studying organizational ethics cultures, Weaver and Treviño have found that where employees perceive their employer's ethics approach to have a values orientation, a positive association exists with eight outcomes.⁴⁶ Those outcomes are: reduced unethical behavior, ethical advice seeking, awareness of ethical issues, perceptions of better decision making, commitment to the organization, integrity, and willingness to deliver bad news.⁴⁷ These researchers anonymously surveyed a random sample of 2,000 of over 17,000 employees of a financial services company, yielding a 21% response rate.⁴⁸ "In every case [they] found that a values orientation displays greater explanatory capacity, suggesting that it is the more important influence on measured outcomes."⁴⁹ In the financial services company looked at in the study, Weaver and Treviño concluded, "a values orientation appears to add distinctive and desirable outcomes . . . not achieved by a

44. Weaver & Treviño, *supra* note 6, at 329 (1999). See also Joel Gehman, Linda K. Treviño & Raghu Garud, *Values Work: A Process Study of the Emergence and Performance of Organizational Values Practices*, 56 ACAD. OF MGMT. J. 84 (2013); Lynne Sharpe Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106; David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781 (2007).

45. Weaver & Treviño, *supra* note 6, at 329 (1999).

46. *Id.*

47. *Id.*

48. *Id.* at 324.

49. *Id.* at 329.

focus on . . . compliance. Moreover, a values orientation has a larger unique impact on the outcomes.”⁵⁰

More recent research looking at German accounting professionals, found that more informally controlled ethical climates improved awareness of ethical issues.⁵¹ The “informal controls” that Weißenberger and Goebels speak of, in contrast to formal controls, at least roughly align with values oriented versus compliance oriented approaches.⁵² Note that ethical climate and ethical culture are terms that for many scholars should be clearly differentiated. The former refers more to organizational personality and decision making criteria and behaviors; the latter often includes formal compliance oriented program management. Treviño, in particular, would differentiate ethical climate to mean “the perceptions of organizational practices and procedures having ethical content” and ethical culture to mean “the part of organizational culture including formal and informal organizational systems affecting employee [un]ethical conduct.”⁵³ For the purpose of this article, however, I may use the terms interchangeably and conflate them to mean the overall ethical characteristics of an organization, including any formal or informal ethics program and any identifiable patterns or ethical norms, inclusive of perceptions.

Research by Tom Tyler further indicates that ethical cultures grounded in values are more successful than compliance-based organizational ethical cultures.⁵⁴ In addition to the specific variables discussed in the cited research, I use “more successful” to mean more effective at attracting and retaining a workforce whose personal values are aligned with stated organizational values and more likely to avoid or reduce ethical problems and bad ethical decisions that may lead to scandals.

Tyler’s work offers perhaps the most direct assessment of a number of substantive behavioral studies indicating that values-based approaches to organizational ethics, or “self-regulatory” ethics, is superior in effectiveness to compliance-based or “command-and-control” ethics.⁵⁵ Tyler asserts that though ethics

50. *Id.* at 330.

51. Barbara E. Weißenberger & Sebastian Goebel, *The Relationship Between Informal Controls, Ethical Work Climates, and Organizational Performance*, 141 J. Bus. Ethics 505, 519 (2015).

52. *Id.*

53. Weaver & Treviño, *supra* note 6.

54. See generally Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 BROOKLYN L. REV. 1287 (2005) [hereinafter Tyler, *Promoting Employee Policy Adherence*]; TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS (2011); TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT (2000); Tom R. Tyler & Steven L. Blader, *Can Business Effectively Regulate Employee Conduct?*, 48 ACAD. MGMT. J. 1143 (2005); Weaver & Treviño, *supra*, note 6.

55. Tom R. Tyler, *Reducing Corporate Criminality: The Role of Values*, 51 AM. CRIM. L. REV. 267 (2014) [hereinafter Tyler, *Reducing Corporate Criminality: The Role of Values*]; Tyler, *Promoting Employee Policy Adherence*, *supra* note 54; Tom R. Tyler, *Why people cooperate with organizations: An identity-based perspective*, 21 RES. ORG. BEHAV., 201–46 (1999); SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS

scandals may appear to concern singular ethical breaches, they actually involve wide varieties of organizational issues.⁵⁶ From an express perspective grounded in “law and legal institutions,” he notes that the goal of both law and corporate ethics cultures is to motivate corporate leaders and employees to follow the law.⁵⁷ Tyler’s focus calls attention to worker self-motivation versus external regulation.⁵⁸ “The self-regulatory model represents an alternative approach to employee rule following. The model emphasizes the role that employees’ ethical values play in motivating rule following and, in particular, those ethical values that are related to and developed in the course of interactions with their work organization.”⁵⁹

Tyler notes that he is concerned with “organizationally-based ethical judgments”⁶⁰ to determine the characteristics of work environments . . . that may shape employee rule following.”⁶¹ In this endeavor, he looks at both the “perceived legitimacy of organizational rules and authority” and the “congruence of those rules with an employee’s moral values.”⁶²

It is important to understand the concept of legitimacy used in Tyler’s work. “Legitimacy” is the belief that those in power deserve to rule and make decisions influencing the lives of everyone, and the perception that those in power “ought to be obeyed.”⁶³ It is also important to understand Tyler’s reliance on prior work buttressing the claim that perceptions of procedural fairness are key in developing cooperative employee behavior.⁶⁴ Also, to fully grasp the quality of values alignment, we should understand the nuance in Tyler’s work. He differentiates “compliance” from “voluntary deference”—the former meaning adherence under surveillance, the latter meaning willing acceptance and rule following even when not monitored.⁶⁵ The opposite of voluntary deference is rule breaking, or deviance.⁶⁶ Deviance, or ethical noncompliance, is thought to be generally widespread in organizations, not limited to isolated, well known scandals.⁶⁷ Deviance may range from simple office pilfering (which in the aggregate can be quite costly) to scandalous sexual misconduct or market rattling financial misrepresentations. Thus, values alignment will be more likely to result where oppositional

(J. Darley, David Messick & Tom R. Tyler eds., 2001).

56. Tyler, *Promoting Employee Policy Adherence*, *supra* note 54, at 1289.

57. *Id.*

58. *Id.*

59. *Id.* at 1290.

60. *Id.*

61. *Id.*

62. *Id.*

63. Tyler, *Reducing Corporate Criminality: The Role of Values*, *supra* note 55, at 268–69.

64. *Id.*

65. Tyler, *Promoting Employee Policy Adherence*, *supra* note 54, at 1293.

66. *Id.*

67. Tyler & Blader, *supra* note 54, at 1143.

surveillance is not employed and voluntary deference is achieved, resulting in less deviance.

In part, the downside to compliance-based or “command-and-control” based ethics cultures is their facial reliance on incentives and sanctions, both seen to be replete with problems, including significant financial and social cost.⁶⁸ Perhaps most prominently, the social costs can include positioning the organization as adversarial to, and mistrusting of, the employee.⁶⁹ Moreover, Tyler has worked to make the broader case that deterrence, the perception that punishment will come from rule violation (or ethical breach), is far less effective than self-motivated adherence in the societal context of law and legal authority.⁷⁰ This same logic applies to ethics cultures internal to organizations.

A central message to take away from Tyler’s voluminous work is that the “[e]thical values that encourage people to support [an] organization, shape behavior when those people believe that the rules of their organization are legitimate, are fairly followed, and/or that the values defining the organization are more congruent with their own moral values.”⁷¹ So the self-regulatory model, and so too values-attentive ethics, relies on the inculcation of values that align with personal values. Through the self-motivation of shared or aligned values, more sustainable ethical behavior is more likely to result in a well-functioning organization that is less prone to ethical breaches. This is perhaps the core of values-attentive ethics, values alignment.

Tyler writes that his and related “findings suggest that companies benefit by fostering ethical values in their employees that support rule following.”⁷² Consistent with the point that a values-attentive ethics program does not exclude compliance elements, Tyler concludes that appealing to employees’ values is a logical way to induce self-motivated employee conformance with rules—such as those found in codes of conduct.⁷³ So a values-attentive ethical culture may include compliance features, but may not be dominated by them.

Tyler’s work forces us to recognize that the importance of fair procedure in ethics program management cannot be overstated.⁷⁴ It is in seeing employee participation in investigatory processes, operational objectivity, and programmatic attempts to control bias that employees accept and inculcate organizational

68. Tyler, *Promoting Employee Policy Adherence*, *supra* note 54, at 1294.

69. *Id.*

70. Tyler, *Reducing Corporate Criminality: The Role of Values*, *supra* note 55, at 270–76.

71. Tyler, *Promoting Employee Policy Adherence*, *supra* note 54, at 1298.

72. *Id.* at 1300.

73. *Id.*

74. Indeed, separate works speak to the vital impact of management treatment of employees more generally. For examples of discussions of the treatment of employees as stakeholders, see Michelle Westermann-Beyalho et al., *The Influence of Institutional Logics on Corporate Responsibility Toward Employees*, 53 BUS. & SOC’Y 714 (2014); Michelle Westermann-Beyalho, *The Influence of Institutional Logics on Corporate Responsibility Toward Employees* (2010).

values and thus, successfully self-regulate.⁷⁵

Tyler ultimately concludes that to stop ethics scandals we should “emphasize the ability of appropriate work cultures to motivate employees to act based upon their feelings of responsibility and obligation to both company codes of conduct and to their own personal feelings of morality.”⁷⁶ Values matter. Moreover, attention to values in the workplace clearly appears instrumental in fostering self-motivated ethical behavior. Again, recall that I frame this discussion of Tyler’s work as grounding for values-attentive ethics approaches in organizations. In turn, I am arguing that values-attentive ethics is inescapably bound up with law in law and strategy firm management.

Tyler’s work is broadly consistent with additional behavioral ethics research by Treviño, Weaver, Gibson, and Toffler.⁷⁷ The gist of Treviño, Weaver, Gibson, and Toffler’s work is summed up:

A firm’s approach to ethics and legal compliance management has an enormous impact on employees’ attitudes and behaviors. . . . [W]e found that specific characteristics of the formal ethics or compliance program matter less than broader perceptions of the program’s orientation toward values and ethical aspirations. What helps the most are consistency between policies and actions as well as dimensions of the organization’s ethical culture such as ethical leadership, fair treatment of employees, and open discussion of ethics in the organization. On the other hand, what hurts the most is an ethical culture that emphasizes self-interest and unquestioning obedience to authority, and the perception that the ethics or compliance program exists only to protect top management from blame.⁷⁸

From the structure, write-ups, and conclusions of Treviño, Weaver, Gibson, and Toffler’s studies we can see that the underlying conception of an organizational ethics program entails instilling legal as well as ethical awareness and consideration.⁷⁹ “[I]f employees are aware of relevant *ethical and legal issues*, they will more likely ask the right question and ultimately do the right thing when faced with a dilemma.”⁸⁰ Treviño, Weaver, Gibson, and Toffler also concur with Tyler in concluding from their research that a central feature of a working ethics program is “value congruence – the extent to which employees feel a sense of belonging and connection with the organization.”⁸¹ Treviño, Weaver, Gibson, and Toffler’s studied six firms including at least 10,000 employees and found:

75. Tyler, *Promoting Employee Policy Adherence*, *supra* note 54, at 1309.

76. *Id.* at 1312.

77. See generally Linda Klebe Treviño, Gary R. Weaver, David G. Gibson & Barbara Ley Toffler, *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131 (1999); see also Weaver & Treviño, *supra* note 6.

78. Treviño, Weaver, Gibson, Toffler, *supra* note 77, at 131–32.

79. *Id.*

80. *Id.* at 133 (emphasis added).

81. See Paine, *supra* note 44, 107–12 (discussing supportive concepts in her management by integrity).

[I]n these six companies, if employees perceived a values-based program, each of the seven outcomes studied was significantly more positive and the relationships were quite strong. Unethical/illegal behavior was lower, awareness of ethical/legal issues was higher, and employees were more likely to look for advice within the firm, to be willing to deliver bad news to management, and to report ethical violations. They were also more committed to the organization and more likely to believe that decision making was better because of the ethics/compliance program.⁸²

Again, as Treviño, Weaver, Gibson, and Toffler note, values oriented and compliance-oriented ethics cultures need not be mutually exclusive. It is entirely plausible to combine elements of both. Yet, in a values-attentive culture, which behavioral ethics research shows to be the most effective, the compliance component must be asubordinate.

In applying intuitionist moral understanding, Weaver, Reynolds, and Brown have considered whether ethics training should move from a more predominantly cognitive deliberative based model of rational moral decision making to the project of long-term habit development.⁸³ This is consistent with Reynolds' prototype analysis, *supra*. Based on this behavioral ethics research (inclusive of intuitionist understandings), there can be little reasonable doubt that a values-attentive ethics approach (not values *exclusive*) is preferable to a compliance-dominant approach. Individual-organizational values alignment and employee self-regulation trumps oppositional, enforced compliance.

To reiterate, another take away from the Treviño, Weaver, Gibson, and Toffler study, consistent with Tyler's conclusions, is that the follow-through of managing an ethics program is essential to its success.⁸⁴ This is to say, again, that operational procedure and perceived procedural justice or fairness in running an ethics program matters greatly.

This research informs the development of values-attentive ethical approaches including GVV. Again, it justifies the claim that ethics approaches fostering an awareness and alignment of personal and organizational values are superior to oppositional command-and-control approaches.

II. GIVING VOICE TO VALUES

One approach to business ethics education and training that draws heavily on behavioral ethics research and embodies values-attentiveness is the Giving Voice to Values program ("GVV"). GVV is now a well-established approach to ethics that focuses on acting on values, post ethical decision making. Expressly based on "current research in social psychology,"⁸⁵ the GVV approach is consistent

82. Treviño, Weaver, Gibson, & Toffler, *supra* note 77, at 138.

83. Weaver, Reynolds & Brown, *supra* note 23, at 117–20.

84. Treviño, Weaver, Gibson & Toffler, *supra* note 77, at 141–42.

85. Gentile, *supra* note 5, at xv.

with an intuitionist understanding of ethical decision making. With GVV, emphasis is not placed on the theoretical underpinnings of ethical judgment, but rather on carrying out responses to ethical issues and dilemmas encountered in the organizational workplace.

The work of teaching with GVV or implementing GVV in an organizational ethics program is to practice acting on one's values in a workplace where an ethical issue or dilemma has arisen. This practice is done principally by taking on the role of a protagonist in a GVV case study and scripting an action plan to carry out the ethical decision one would make as the protagonist.⁸⁶ GVV involves strategic thinking to implement such action in the workplace and is premised on practice and preparation for that acting on values. It is pedagogically structured to add action to ethical awareness and analysis.⁸⁷ In business school education, it is intended to move ethics curricula from a historical emphasis on theory and analysis toward a present focus on ethical awareness and practicing the action of doing the right thing.⁸⁸

The GVV approach begins with a number of assumptions, including (i) we have values, (ii) we want to act on them, and (iii) practicing doing so will make actually doing so in the workplace easier.⁸⁹ This use of a values nomenclature over an ethics nomenclature signals an informed decision by Gentile not to use "ethics" terminology because "ethics is often seen as rule-based and externally imposed."⁹⁰ Gentile explains:

in the study of ethics, the emphasis is typically on models of ethical reasoning, such as deontology or duty based ethics, utilitarian or consequentialist ethics, virtue ethics and so on [D]iscussions of the application of ethical reasoning often focus on scenarios where the various models will lead us to different, conflicting decisions about what is "right".⁹¹

This is not where GVV is at work. Rather, GVV is at work in determining, planning, and taking action based on ones' values once an ethical decision is made, at least internally. Again, this conception is consistent with an intuitionist understanding of ethical decision making, whereby we understand that many ethical decisions may be made without any conscious rational process, and may only be understood rationally when consciously explained to ourselves *ex post*.

So with GVV, a conscious choice to use values terminology is informed by the personal, internal nature of values as opposed to the external, imposed sensibility

86. See, e.g., Thomas M. Madden, *Apologizing at Community Hospital A and B*, (2013), <http://store.darden.virginia.edu/giving-voice-to-values> [<https://perma.cc/H2KZ-VH88>] (last visited Feb 21, 2019).

87. Mary C. Gentile, *Giving Voice to Values: A Pedagogy for Behavioral Ethics*, 41(4) J. OF MNGMNT. ED. 469, 474 (2017).

88. *Id.*

89. Gentile, *supra* note 5, at 1–46.

90. *Id.* at 25.

91. *Id.*

associated with “ethics.” Moreover, this values-based system, drawing on behavioral ethics literature and very intentionally incorporating psychological research, turned to empowering individual action motivated by values. This intention was driven by the notion that the more people in workplaces speak up and act on their values the better off our workplaces, indeed our world, will be.

Part of the perspective GVV fosters is a broadening of one’s personal version of professional purpose or success to include meeting personal (and perhaps aligned organizational) values, moving beyond narrow financial based definitions of success.⁹² This, of course, presupposes a need for some meaningful understanding or self-awareness of which values really matter to us. Drawing on behavioral research, Gentile notes, we are often “unaware that we have been influenced by our organizational context.”⁹³ As noted in the earlier discussion of behavioral ethics research and values-attentive ethical cultures, much of what researchers indicate is that awareness alone is a major advance toward curbing unethical behavior. So awareness can work in several ways. Gentile points out, “[t]he trick here is to learn from research that demonstrates how difficult it is to buck the organizational system when it comes to speaking up in opposition to prevailing practices or to a supervisor’s directive, but at the same time, not to be discouraged by it.”⁹⁴ She continues, “[t]he more we understand how we are influenced by our context, the better our ability to use these same organizational pressures to support values-based voice rather than to suppress it.”⁹⁵ Of course, GVV then adds to awareness the practice of acting on doing the right thing.

Gentile refers to Jonathan Haidt’s work to support the claim that “our actions are often directed by our emotions and instincts more than reason” and that “achieving peace of mind requires us to develop a way of making sense of those actions . . . after the fact.”⁹⁶ As noted, *supra*, values-attentive ethics is informed by and attempts to account for intuitionist understandings of ethical decision making. GVV is an example of this. In fact, Gentile’s conception of GVV is premised on harnessing the kind of intuitionist and emotive decision making that Haidt’s work has elucidated:

[L]et’s ask whether it is possible that the emotions that lead us to want to act on our values and want to see ourselves as the kind of individuals who do so could become just as strong as, or even stronger than, those that lead us to default to organizational pressures? Doesn’t it then seem possible that we might strengthen these emotions if we could practice developing and delivering persuasive scripts for voicing our values *before* the fact, thereby making

92. *Id.* at 86–107.

93. *Id.* at 140–141.

94. *Id.* at 143.

95. *Id.* at 143–44.

96. *Id.* at 171 (quoting JONATHAN HAIDT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM 145–49 (2006)).

the option of doing so feel more real?⁹⁷

A key to engaging in GVV is to anticipate “reasons and rationalizations” that support unethical behavior and prohibit us from speaking up or acting on our values.⁹⁸ In undertaking the work of scripting a protagonist’s response to an ethical issue or dilemma presented in a GVV case, a student or trainee addresses reasons and rationalizations and plots a course over, around, or through them. Gentile notes that “[pre]scripting is both a cognitive exercise as well as a behavioral and emotional one.”⁹⁹ This expressive and forward thinking process is at the core of the values-attentive ethics approach embodied in GVV.

Drawing on work by Andrew Molinsky and Joshua Margolis, Gentile calls attention to the commonplace inaccuracy of our assumptions about ourselves and others in the context of ethical decision making in organizations.¹⁰⁰ Importantly, she highlights that, in viewing negative consequences, we often assume others are bad while we view ourselves as victims of circumstance.¹⁰¹ The practice of scripting in GVV provides a means of anticipating and questioning such assumptions often to overcome the blockage they may present to acting on our values. Indeed, many assumptions may constitute or bring about negative rationalizations that work to talk ourselves out of doing the right thing.

Perhaps this is the essential first step of any successful ethics approach—to broaden one’s perspective to make us aware of inaccurate assumptions and to enable us to clear our viewpoints or conscious cognitive processes so that they are more objective and less prone to inaccuracy or bias.

In teaching with GVV for a number of years, I have found that students with more life experience engage in the GVV approach with greater ease. Those who have not faced much adversity in an organizational context may find GVV cases and scripting difficult to delve into, lacking the sense of gravity that workplace ethical issues and dilemmas can bring. Yet, GVV’s deep grounding in the behavioral ethics research that so convincingly emphasizes the effectiveness of values-attentive ethics supports the GVV approach as an exemplary means of educating and training students and employees on ethics. Indeed, GVV is now a widely adopted and adapted program for doing just that. The approach builds with experience.

An example of GVV in a workplace organization can be found with Lockheed Martin. In a conversation with Gentile about GVV in practice, she states:

Lockheed Martin has been using GVV the longest and . . . has started to collect data via some embedded questions in their regular employee survey. Lockheed has shared some interesting findings with me . . . for example,

97. Gentile, *supra* note 5, at 173.

98. *Id.*

99. *Id.* at 173.

100. *Id.* at 216.

101. *Id.*

(i) that indeed [Lockheed Martin employees] do raise values issues more [often] after [participating in] . . . [Lockheed Martin's] GVV programming; (ii) that [Lockheed Martin employees] bring issues to the ethics officers but since GVV, rather than dumping the issue in the ethics officer's lap, the employees say that they want to manage it themselves and are asking for a chance to rehearse and pre-script (very GVV) and Lockheed Martin sees this as more culture change evidence; and finally (iii) that when [Lockheed Martin] employees actually do REPORT an issue, there are tending to be fewer false positives (that is, they are using the ethics officers' time more efficiently, more effectively, and benefiting more from their expertise).¹⁰²

Lockheed Martin's internal assessment of GVV has yet to be fully vetted and formalized. In a conversation with Lockheed Martin's executive in charge of ethics and compliance training, quantitative conclusions could not yet be ascertained.¹⁰³ Since implementing the program in 2011, Lockheed Martin has emphasized GVV derived scenario based training with video examples of employees encountering ethical issues and portrayals of positive and negative means of responding to those issues.¹⁰⁴ The positive examples embody GVV concepts.

Lockheed Martin's program emphasizes four principles from GVV: (i) framing or reframing ethical issues, (ii) asking questions, (iii) gathering related data, and (iv) talking to colleagues about such issues.¹⁰⁵ The head of ethics training at Lockheed Martin has indicated that since the company implemented GVV training, "employee language around ethics has changed" and that "talk is more focused around *action* in response to ethical issues," rather than around describing such issues.¹⁰⁶

GVV, as seen in the Lockheed Martin example, offers a way to implement a values-attentive approach to organizational ethics through education and training. It is based on behavioral ethics research and provides both a methodology for addressing ethical issues that makes participants aware of cognitive biases and a skill set to recognize and overcome those biases through practice.

III. THE LAW AND STRATEGY CONTEXT

A. ETHICS IN LAW AND STRATEGY SCHOLARSHIP

Work in law and strategy has focused chiefly on recognizing law as a resource within the resource based view of the firm or on situating law as either a market or nonmarket force under a systems theory view of the firm.¹⁰⁷ On either account,

102. Telephone Interview with Mary Gentile (June 1, 2018).

103. Telephone Interview with Blair Marks (June 27, 2018).

104. *Id.*

105. *Id.*

106. *Id.*

107. See, e.g., *Pathways*, *supra* note 3; Bagley, *What's Law*, *supra* note 3, at 591 (Bagley's systems approach is a construct intended to combine market and nonmarket roles of law and to see the role of law both external to the firm and as an internal firm resource); George J. Siedel, *Six Forces and the Legal Environment*

such work proposes law as a source of competitive advantage.¹⁰⁸ Examining these accounts will show us that the linkage of ethics with law in any discussion involving strategy is unavoidable and enable us to move that discussion forward. Section I has established values-attentive ethics as the preferred approach to organizational ethics based upon behavioral ethics research. Section II has held up GVV as an example of a values-attentive ethics approach. In this Section III, I will argue that on the resource based view of the firm, the resource of law cannot be addressed without, at the same time, addressing ethics. Similarly, I will note the parallel argument that on a systems theory approach, law as either a market or nonmarket force cannot be considered without ethics. Having presented values-attentive ethics as the preferred approach to organizational ethics, I argue that implementing the resource (or force) of law in strategic management must include with it implementation of values-attentive ethics. To place this argument in the context of existing work in law and strategy, I turn primarily to the work of Robert Bird and Constance Bagley.

Robert Bird has offered a useful heuristic of categorizing firm approaches or “pathways” of integration of law with strategy.¹⁰⁹ Grounded in a resource based view of the firm, Bird’s pathways offer a continuum of stages indicating the various manners in which firms do not or do integrate law with strategy. The highest stage on Bird’s continuum is *transformation*, where a firm achieves competitive advantage over rivals by integrating law as a resource in strategic management such that law is considered fully equal to other management considerations, and management is able to sustain that advantage.¹¹⁰ In his use of the term ‘sustainable,’ Bird applies Barney’s notion that sustainability is not just a function of duration, but of resistance to imitation or substitution linked to the necessary attributes of a resource’s ability to create competitive advantage.¹¹¹ Those resource attributes are being valuable, rare, inimitable, and non-substitutable.¹¹²

of Business: The Relative Value of Business Law Among Business School Core Courses, 37 AM. BUS. L.J. 717, 720–25 (2000); GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE (2002); G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL (2004); David P. Baron, *Integrated Strategy: Market and Non-Market Components*, 37 CAL. MGMT. REV. 47 (1995).

108. See, e.g., *Pathways*, *supra* note 3; Bagley, *What’s Law*, *supra* note 3, at 591 (Bagley’s systems approach is a construct intended to combine market and nonmarket roles of law and to see the role of law both external to the firm and as an internal firm resource); George J. Siedel, *Six Forces and the Legal Environment of Business: The Relative Value of Business Law Among Business School Core Courses*, 37 AM. BUS. L.J. 717, 720–25 (2000); GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE (2002); G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL (2004); David P. Baron, *Integrated Strategy: Market and Non-Market Components*, 37 CAL. MGMT. REV. 47 (1995).

109. *Pathways*, *supra* note 3, at 10–38.

110. *Id.*

111. Barney, *supra* note 2, at 102–12.

112. *Id.*

Bird's continuum begins with *avoidance*¹¹³ where law is treated as a barrier to be circumvented.¹¹⁴ It moves to *compliance*,¹¹⁵ where law is engaged with as a check against wrongdoing and a means of cost control. Next, to *prevention*¹¹⁶ where legal strategy emerges and a values-based culture may bring at least a fleeting competitive advantage. Then, to *advantage*¹¹⁷ where the resource of law rises to the level of any other resource in proactive strategic management. Finally, the continuum reaches the highest stage, or fifth pathway, transformation, where the competitive advantage achieved via engagement with law is, indeed, sustained.¹¹⁸

In defining the third of five pathways, prevention, Bird makes explicit mention of values.¹¹⁹ “[P]revention behavior is not simply to avoid current violations, but to inculcate the organization with values and practices that will prevent future problems.”¹²⁰ This, too, is the first stage where operational effectiveness is eclipsed by competitive advantage. Bird's discussion of values in his prevention stage has broad implications. Not coincidentally, this third stage is where Bird first sees that “legally-based strategy begins to emerge.”¹²¹ “A truly effective prevention program encourages a culture where ‘correct’ legal decisions become instinctive.”¹²² This is calling attention to a combining of values-attentive ethics with law as a joint resource.

The Home Depot example Bird employs to exemplify the application of prevention level law and strategy is, in fact, an example of implementing values-attentive ethics.¹²³ Home Depot's management training for and utilization of its Job Preferences Process to prevent sex discrimination in hiring demonstrates and inculcates organizational values.¹²⁴ Bird characterizes this example as one of culture change.¹²⁵ The legal problem solved through Home Depot's new hiring protocol simultaneously implemented a version of values-attentive ethics.¹²⁶ The Jobs Preferences Process tackled both a legal and ethical issue requiring values

113. *Pathways*, *supra* note 3 at 12–17.

114. Note that while Bird resists seeing his five pathways as a normative continuum or scale with an inherent implication of worse to better, the pathways are characterized by incremental differentiation and together can be well understood as a continuum.

115. *Id.* at 17–23.

116. *Id.* at 23–26.

117. *Id.* at 26–31.

118. *Pathways*, *supra* note 3, at 31–38.

119. *Id.* at 23–26.

120. *Id.* at 23.

121. *Id.*

122. *Id.*

123. *Id.* at 23–26.

124. *Id.* at 24 (describing how the Home Depot Job Preferences Process included training for managers and the integration of computer telephone based databases into the hiring protocols of the company—creating a clear record of internal employees interested in promotion to higher-level positions—in order to eliminate sex discrimination in a culture that had at least allegedly failed to promote women in a manner co-equal to men).

125. *Id.* at 25–26.

126. *Id.*

alignment. This shows us that in the basic discussion of law as a resource in strategic management, Bird finds law connected to values-attentive ethics.

Indeed, much of Bird's conception of law and strategy is, in fact, an assessment of how a firm addresses ethics. His second stage, compliance, is, on its face and in its substance, a reference to legalistic codes of ethics. This approach calls to mind early, positivist attempts at meeting requirements of the Federal Sentencing Guidelines for Organization,¹²⁷ as well as Sarbanes-Oxley.¹²⁸ Such compliance-based approaches to ethics are generally top down and lack integration with other strategic firm resources. They are often draconian and easily imitated. They are what Tyler calls "command-and-control."¹²⁹ As discussed *supra*, command-and-control cultures have been convincingly shown to be less effective than values-based cultures.¹³⁰

Another useful contribution to the previously lacking recognition of law's role in strategy is Constance Bagley's concept of *legal astuteness*.¹³¹ In discussing her legal astuteness concept as a resource, she tells us its success depends on whether legal astuteness is sustainable. Bagley's discussion offers further analysis applying Barney's value, rarity, inimitability, and non-substitutability resource attributes necessary for competitive advantage.¹³²

For a resource to have value, for Barney, is for it to improve efficiency or effectiveness.¹³³ Using Barney's rubric, Bagley sees law's value in its application resulting in escaped costs, risks, and problems that may arise for a firm if that firm is managed without legal astuteness; that is, without making legally informed business decisions.¹³⁴

Bagley's legal astuteness is comprised of four components: "(1) a set of value laden attitudes about the importance of law to firm success, (2) a proactive approach to regulation, (3) the ability to exercise informed judgment when managing the legal aspects of business, and (4) context-specific knowledge of the law and the appropriate use of legal tools."¹³⁵

Bagley's first component is itself explicitly loading values (on the ethics related meaning) into the very conception of law. "Law not only enforces the social consensus on moral values but also affects the development of moral expectations, and it helps determine what roles managers play, why they play

127. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016).

128. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

129. Tyler, *Promoting Employee Policy Adherence*, *supra* note 54, at 1293.

130. *Id.* at 1295-96.

131. *Winning Legally*, *supra* note 4.

132. Barney, *supra* note 2.

133. *Id.* at 106.

134. *What's Law*, *supra* note 3, at 607-08. We should be mindful, of course, that these meanings of value are entirely different from the meaning of value or values in the realm of ethics, which marks concepts of integrity, honesty, transparency, and so forth.

135. *Winning Legally*, *supra* note 4, at 379.

them, and whether they have played them well.”¹³⁶ She emphasizes, “legally astute teams embrace the rule of law and recognize the moral aspects of strategic choice.”¹³⁷ We cannot overstate the significance of this intentional phraseology. The very construct of legal astuteness is expressly and foundationally dependent upon moral or ethical reasoning.

In her discussion of the third component of legal astuteness, judgment, Bagley points to the import of wisdom in decision making or advising and calls attention to the complications of cognitive biases that may affect moral judgment.¹³⁸ Though she does not lay it out in her discussion of judgment, this is where values-attentive ethics is perhaps most intertwined with law in scholarship. In making judgments on the edge of black letter law and advising clients as a lawyer (in-house or outside), a manager, or both (as part of managing a firm), one cannot tear apart legal considerations from ethics. Moreover, as argued *supra*, behavioral ethics research shows us that such judgments are best served by the alignment of values in a values-attentive ethical culture.

Bagley gives additional attention to the role of “society” outside the firm as part of her systems theory concept of legal astuteness and asserts that the firm exogenous non-market context belongs at top of mind for managers together with law.¹³⁹ This again lends credence to the notion that legal astuteness fully includes a role for values-attentive ethics in conjunction with law.¹⁴⁰ Bagley’s legal astuteness would appear to be compatible with the notion of a values-attentive ethics program or culture in an integrated law and strategy framework because it accommodates broad nonmarket and market forces as well as an internal resource role of law that recognizes an ethical component.¹⁴¹

Bagley also gives attention to compliance as an important component of the impact that combined law and ethics management brings to the value chain.¹⁴² Bagley’s very discussion of her project of integrating law and strategy gives witness to the inextricably linked nature of law and ethics and the combined resource or force that they constitute in both the internal and external contexts of firm management.

136. *Id.* (citing Nesteruk, *A New Role for Legal Scholarship in Business Ethics*, 36 AM. BUS. L.J. 515–30 (1999)).

137. *Winning Legally*, *supra* note 4, at 380.

138. *Id.* at 382.

139. *See id.* at 381–82.

140. *What’s Law*, *supra* note 3, at 589–593 (discussing Baron).

141. *Id.* at 628. On another front, Bagley further discusses the (nonmarket) societal context of corporations in terms of relationships with constituents and contemplates corporations as social change agents. *Id.* Indeed, Bagley states in her own project, that “[t]he model of law and strategy set forth in this paper should enhance managers’ ability to craft a truly integrated strategy for creating and capturing value for the firm while meeting the firm’s responsibilities to society by enhancing managers’ ability to keep societal and legal considerations ‘top of mind.’” *Id.* This emphasis on the corporate social responsibility aspect of ethics incorporated into legal astuteness is not Bagley’s exclusive consideration of ethics. *See id.*

142. *Id.* at 607–09.

In separate work, when Bagley and colleagues interviewed second year MBA students, the interviewers found that those students believed that managers' knowledge of law may lead to greater "ethical and legally compliant behavior."¹⁴³ The framing of the study's interview questions linked law and ethics, with one question explicitly tying unethical behavior to more likely illegal behavior.¹⁴⁴ In addition, the responses of the subjects to their interview questions showed consistent recognition of a strong linkage between law and ethics.¹⁴⁵ Any consideration of a law and strategy management paradigm appears to necessarily include ethics and ethical consideration bound up with law.

Both Bird's pathway analysis and Bagley's legal astuteness concept have gone far toward bringing law into the discussion of strategy, contributing to a more complete understanding of strategy. This work at integrating law and strategy has focused on defining law as a resource and substantiating law as a nonmarket and market force. It has both explicitly and implicitly entailed recognition that ethics cannot be carved out from a full understanding of the role of law in strategy. Both Bird's pathways and Bagley's legal astuteness accommodate, if not demand, a deeper exploration of the ethics and law connection in the context of strategy. Work by other scholars in the law and strategy field further substantiates the claim that ethics is necessarily involved in discussions of law and strategy.

Additional work in law and strategy has continued to demonstrate the necessity of linked ethical consideration. David Orozco has addressed the practice of strategic legal bullying—arguing that the tactical use of strike suits—bringing frivolous litigation—is harmful and should be contained, linking ethical judgment with strategic legal action.¹⁴⁶ Daniel Ostas has noted firms' incentive to shape the law to their own advantage, disregarding consequences to the common good and taking economic advantage of loopholes, primarily available through "underenforced law."¹⁴⁷ Don Mayer has entered the loophole discussion, emphasizing the unlikely positive ethical outcomes of firm decisions made solely in a firm's economic self-interest.¹⁴⁸

Ostas brings in the ethical component in judging whether it is ethically defensible for a firm to make legal decisions based upon its own economic interest. He questions the ethical nature of condoning efficient breach, for example, noting that viewing law as a cost is ethically different than viewing

143. Constance E. Bagley, Gavin Clarkson & Rachel M. Power, *Deep Links: Does Knowledge of the Law Change Managers' Perceptions of the Role of Law and Ethics in Business?*, 47 HOUS. L. REV. 259, 265 (2010).

144. *Id.* at 267.

145. *Id.* at 268.

146. Orozco, *supra* note 3, at 183.

147. Ostas, *supra* note 3, at 489–91. Ostas defines "underenforced law" as law that is cost effective to violate given a firm's legal strategy and defines "legal loophole" as imperfectly written law that lends itself to literal interpretation that is not conforming to definitive interpretation of that law. *Id.*

148. Don Mayer, *Legal Loopholes, Business Ethics, and Corporate Legal Strategy: A Reply to Professor Ostas*, 48 AM. BUS. L.J. 713 (2011).

law as a prohibition.¹⁴⁹ For Ostas, an ethical component seems to arise only as a result of the inadequate enforcement of law – where penalties for legal violation are not enough to dissuade firms from violating law and paying fines or resultant costs. The ethical decision only arises if the decision is not clear in a cost calculation. Ostas leaves it up to an executive to act as either a “practical advocate” or an “ideal judge” in making legal decisions which may or may not have an ethical component, ultimately advocating for good faith adherence to law in recognition of law’s underlying purpose – an apparent ethical judgment.¹⁵⁰ However qualified, Ostas clearly does contemplate some ethical component bound up with law and/or the decision whether to comply with law. Again, an ethical component is inescapable in a thorough discussion of law with strategy.¹⁵¹

Recognizing the inherent connection of ethics (particularly, values-attentive ethics) with law in the law and strategy framework is, of course, simply descriptive. Beyond the descriptive, however, the connection of values-attentive ethics and law makes good sense. Certainly, it is a rare instance not to include ethics and compliance oversight in today’s in-house counsel’s purview.¹⁵² The interviews Bagley and colleagues have conducted further bear out that managers’ or future managers’ very conception of law includes consideration of ethics. So too, the competitive advantage that Bird sees emerging in the prevention pathway is inextricably linked with consideration of, if not a developed program of, values-attentive ethics.

Some have noted that ethical breaches and crises point to the need not for more ethics education and training, but for more attention to law.¹⁵³ My argument is that the two cannot be bifurcated. Virtually any managerial decision involving law necessarily entails consideration of values-attentive ethics. Strategic management decision making in business rarely comes without consideration of law, and consideration of law entails consideration of ethics, simply in whether to comply with the spirit or substance of the law, as well as in more complete assessment of substantive ethical implications.

Whether viewing law as an internal resource on the resource based view of the firm or as an external market or nonmarket force on the systems approach, ethics in law and strategy management is so closely allied with law as to render the two

149. Ostas, *supra* note 3, at 497.

150. Ostas, *supra* note 3, at 515–18.

151. Telephone Interview with Blair Marks, *supra* note 103. G. Richard Shell and others have told tales of historic firm successes resulting at least in part from the relational based manipulation of law and regulation through lobbying and other forms of influence used instrumentally to achieve competitive advantage over rivals. *Id.* Much of this work looks to the external actions of the firm as directed and carried out by its management and attorneys, including in-house counsel. *Id.* Implicit in such accounts is the consideration of whether and where ethical judgment enters into the tactical use of law in strategic management seeking competitive advantage. Is anything permissible? Anything other than frivolous strike suits?

152. See discussion *infra* pp. 27–33.

153. Robert Prentice, *An Ethics Lesson for Business Schools*, N.Y. TIMES, Aug. 20, 2002, at A19; see also Fort & Alexandra, *supra* note 8, at 32.

interdependent. Recognizing the interdependence of ethics with law as a strategic resource and means of attaining competitive advantage requires us to further recognize the supremacy of values-attentive ethics approaches based upon behavioral ethics research.

B. LAWYERS, LAW, AND ETHICS

Perhaps ironically, it is in the operation of organizational ethics programs that lawyers take prominence. Lawyers, both in-house and in private practice, are frequently at the forefront of managing ethics programs and, thus, of shaping approaches to organizational ethics. It is the commonplace task of in-house counsel to oversee not just legal matters, but ethics and compliance programs, together with related complaints and investigations. The very purview of the in-house counsel (often echoed in the outside counsel role) covers the interconnected aspect of ethics with law and strategy management and often also includes a vital component of educating others within the firm on legal matters, ethics, and compliance matters.¹⁵⁴

Treviño, Weaver, Gibson, and Toffler have pondered whether lawyers are best suited to overseeing and running organizational ethics cultures.¹⁵⁵ Yet, their work, and Tyler's work in behavioral ethics research, addresses ethics programs and ethical culture together with law and legal issues, again demonstrating the interdependence of law and ethics, *supra*. Indeed, it is difficult to imagine or actually find ethics programs or ethical cultures that do not at some level concern themselves with legal compliance. Oddly, at the same time that researchers are recognizing and framing their studies to include law and ethics together in assessing ethical cultures, some have called into question whether lawyers should be tasked with oversight of ethics programs and related ethical culture.

Treviño, Weaver, Gibson, and Toffler ground their skepticism of the suitability of lawyers to such roles in a concern that:

[L]awyers are trained to protect the organization from legal problems. Therefore, their education and background best prepare them to develop a legal compliance approach, not a values approach. This background also contributes to a narrow legalistic interpretation of organizational problems when broader ethical culture deficits may be causing those problems. Finally, lawyers may be less likely to recommend an approach that is oriented toward caring for employees, customers, and the community.¹⁵⁶

While I recognize that the researchers' claims may be accurate as to many attorneys, I am hopeful that the law and strategy context of this paper and its content offer counterweights to such real or perceived deficiencies in attorneys.

154. KPMG, THROUGH THE LOOKING GLASS: GENERAL COUNSEL REPORT (2016).

155. Treviño, Weaver, Gibson & Toffler, *supra* note 77, at 146.

156. *Id.*

Many attorneys are now jointly trained in law and business and an increasing number are able to communicate and counsel organizations internally or externally as part of a management team in which law is a regular component of business decision making.¹⁵⁷ As I will argue further, ethics is inescapably bound up with law in the management decision making process. Indeed, law and strategy management promotes anything but narrow, legalistic lawyering. It is all about seeing the business as a whole and integrating values-attentive ethics and law with other resources in strategic management.

In related research, Weaver and Treviño note that the “prominence of legal staff in most corporate ethics cultures . . . is understandable, given the pressures of the United States Sentencing Commission’s guidelines” but they question whether the role of legal staff might bring about perception of a greater compliance orientation.¹⁵⁸ Notwithstanding this arguable presumption linking lawyers and compliance, lawyers need not favor command-and-control oriented approaches to ethics. Even if lawyers are tasked with compliance oversight, they can do so within a predominantly values-attentive ethics approach.

This look at the role of lawyers in organizational ethics raises a real concern underlying and motivating law and strategy scholarship. Lawyers and business managers must communicate with and understand one another well, for their disciplines are interdependent. I will address the role of lawyers in law and strategy management further in Section III, *infra*. Here, I want to emphasize the role of lawyers as itself an ethical issue impacting the structure of ethics programs.

Consideration of the role of lawyers raises a host of issues that may involve the lawyer’s code of professional responsibility¹⁵⁹ and a range of differing world views on how and about what lawyers should counsel clients. Deborah Rhode has taken a strong normative position that lawyers should counsel clients on moral judgment.¹⁶⁰

Lawyers should counsel clients to comply with the purposes and letter of the law, and with core principles of honesty, fairness, and social responsibility that are central to effective legal processes. This is certainly not an obligation that is even in principle, let alone practice. Yet it is crucial to maintaining a just society, committed to the rule of law, and a profession worthy of regulatory autonomy and public respect.¹⁶¹

Rhode relies on “[a] wide array of research evidence [that] documents the role of cognitive biases in distorting individual judgment on health, safety, and financial matters that may pose ethical concerns” in pointing out the pitfalls to which

157. KPMG, *supra* note 154, at 9.

158. Weaver & Treviño, *supra* note 6, at 331.

159. See, e.g., MODEL RULES OF PROF’L CONDUCT (2016).

160. Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1319 (2006).

161. *Id.* at 1319.

business clients unwittingly succumb.¹⁶² She calls attention to the same genre of issues that we have considered in behavioral ethics research; such as self-serving bias and cognitive dissonance, with the apparent intention of claiming that lawyers can bring objectivity to clients in the milieu of such biases and clarify clients' judgment via legal counseling.¹⁶³ Rhode argues, "the ultimate justification for an ethical dimension to legal counseling is that there is no alternative; often, no one besides a lawyer is in a position to identify and prevent actions that pose significant threats to the public welfare."¹⁶⁴

As Rhode notes, "[i]n some sense, *all* counseling is moral counseling. Fiduciary obligations to clients pose responsibilities on lawyers to suspend their own interests. In this respect, the counseling process has an ethical dimension even when it has no explicitly ethical content."¹⁶⁵ Rhode calls attention to the lack of directives in lawyer's codes of professional responsibility to require ethical or moral dimensions, remarking that such codes typically only expressly *permit* a lawyer to consider a moral or ethical dimension in counseling a client and include an express duty to report violations to proper authorities.¹⁶⁶ Rhode calls for much more than this, "[h]onesty, trust, and fairness are collective goods; neither legal nor market systems can function effectively if lawyers assume no social responsibility for the consequences of their counseling role."¹⁶⁷ Rhode wants lawyers to rise to a higher standard than the codes require. She sees a strong ethical component in the very nature of the legal profession—lawyer as counselor.

Again, in Rhode's conception of legal counseling we can see the inescapable intertwining of ethics with law. Her project is to require of lawyers not just a moral or ethical component in considering the nature of a client's actions or choices while counseling the client, but the still broader obligation to consider societal good. This is a high standard to set for lawyers and one that Rhode wants both those inside and outside the profession to endorse.

Certainly this expansion of lawyers' ethical awareness and moral counseling should contribute to greater ethical awareness both inside and outside organizations and should consequently impact the ethics programs they manage.

Such awareness is particularly suited to law and strategy management and to the interconnectedness of ethics with law in management decision making. (Of course, it may raise myriad conflict issues when considered in conjunction with the professional code directive obligating lawyers to zealously represent their client's interests.)

This nexus of law, strategy, and ethics is where Bagley aims her concept of legal astuteness, *supra*. This is where a firm characterized as at Bird's

162. *Id.* at 1321–25.

163. *Id.*

164. *Id.* at 1325.

165. *Id.* at 1329.

166. *Id.* (emphasis added).

167. *Id.* at 1330.

transformational pathway would overcome the disparate, divisive mindsets of managers seeing lawyers as confined in their thinking to legal compliance and where lawyers would overcome seeing managers as incapable of accurately considering law in making business decisions, *supra*. Well managed firms optimize competitive advantage by integrating law and strategy successfully. An unavoidable correlate of law and strategy management is ethical culture. Values-attentive ethics is necessarily involved with law and is, on a law and strategy management approach, instrumental in contributing to sustaining a competitive advantage over rivals. Lawyers' training and disciplines are vital in the management of ethics programs and ethical cultures in large part because of the broadly recognized allied nature of law and ethics.

Existing law and strategy scholarship has addressed ethics issues vis a vis the role of the in-house counsel. Bagley and others have looked at the role of chief legal officer and argued that "counsel and managers can be more effective drivers of both compliant corporate behavior and the creation of sustainable value when they work together as strategic partners."¹⁶⁸ The context in which Bagley frames this discussion recalls the long history of cycles of ethics scandals and market crises – each followed by legislation aimed at curing or preventing the preceding debacle. Other scholars, including Michael Metzger, Robert Prentice, and Milton Regan have given attention to the ethical dimension of lawyering at least in part in reaction to the catastrophic scandals of Enron, WorldCom, and others.¹⁶⁹

Bagley and her coauthors charge that the role of lawyers in legally astute law and strategy management "requires both managers and counsel to accept responsibility for ensuring that the firm's economic success is predicated on integrity, honesty, and compliance with not just the letter of the law but its spirit and societal norms as well."¹⁷⁰ She continues, "legally astute top management teams . . . embrace their responsibilities as guardians of the firm's financial, human, legal, and ethical capital"¹⁷¹ as she calls for the practice of "strategic compliance management."¹⁷²

The role of lawyers as managers, advisors, and overseers of ethical programs and compliance is a difficult one. Yet the core challenges presented in these multiple roles are the same challenges faced in integrating law and strategy in top level firm management generally. That is, success in these roles requires non-lawyers and lawyers alike to communicate regularly about legal and ethical

168. Constance E. Bagley, Mark Roellig & Gianmarco Massameno, *Who Let the Lawyer Out? Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 U. PA. J. BUS. L. 419, 430–31 (2016).

169. See, e.g., Michael B. Metzger, *Bridging the Gaps: Cognitive Constraints on Corporate Control & Ethics Education*, 16 U. FLA. J.L. & PUB. POL'Y 413 (2005); Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417 (2003); Milton C. Regan, *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007).

170. Bagley, Roellig & Massameno, *supra* note 168, at 431.

171. *Id.*

172. *Id.*

concerns in a manner accepting that law and ethics are integral to business management decisions and are recognized as so connected that to treat them as distinct would be to forgo a vital opportunity for competitive advantage.

Recognizing that the dimensions and consequences of ethical and legal considerations can be determinative of business survival and success places an expectation on not just lawyers, but all managers to act with knowing concern for ethical and legal ramifications in virtually all significant business decisions. Achieving this heightened level of awareness is achieving transformational law and strategy management and managing with legal astuteness. Achieving this in the most sustainably competitively advantageous way requires us to see the import of ethics in business management for the imperative that it is, to embrace values-attentive ethics as a proven better approach to ethics, and to admit that ethics simply cannot be stripped out of legal considerations in strategic management decision making.

IV. CONCLUSION

In this work, I have sought to address a gap in the growing but still nascent field of law and strategy. I have responded to the law and strategy call for greater attention to ethics and have attempted both to draw out the very significant role that ethics is already playing in the law and strategy discussion and to expand that discussion more explicitly in the direction of values-attentive ethics.

In this project, I consider substantial behavioral ethics research that gives us a descriptive understanding of how people may be limited in the objectivity and accuracy of their ethical decision making. This leads me to advocate for ethical cultures and firm cultures that effectively build and operate ethics programs and ethical cultures that are values-attentive. Research and argument show that such programs and cultures, informed by behavioral ethics research, function better than alternatives, better than compliance or command-and-control approaches. I note that the GVV program offers one robust example of this values-attentive approach.

This project should make it clearer that concern with ethics is inseparable from concern with law as a resource in strategic management. Indeed, reason and existing scholarship demonstrate that claiming that law as a resource or as a market or non-market force can be understood without attention to ethics is most likely implausible. Management decisions involve considerations of law and law requires considerations of ethics.

Though normative and practical ethics are often perceived as incompatible or even in conflict, my claim here involves both. The two need not be in conflict and need not be mutually exclusive.¹⁷³ I am making a normative claim that values-attentive ethics programs are preferable over compliance or command-and-control programs for reasons largely based on behavioral ethics research. In relying

173. See generally Thomas Donaldson, *When Integration Fails: The Logic of Prescription and Description in Business Ethics*, 4 BUS. ETHICS Q. 157 (1994) (in support of the possibility of compatible normative and practical ethics).

on behavioral ethics research, I have focused on practical qualities of ethics programs that further justify normative support.

The broader point of this work is to recognize the indispensable role that ethics plays in understanding law as a resource in strategic management while shedding light on the role of lawyers with or as managers in this endeavor.

Work in law and strategy has made headway in demonstrating the utility and nature of law in strategic management. The role of lawyers and managers has grown increasingly connected and the value of legal understanding and the awareness of law as becoming indispensable in managing to sustain competitive advantage over rivals has been better recognized as a result. Yet, the role of ethics in the law and strategy field has yet to be tackled head on. This work is an attempt to do just that.