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WINKING THROUGH THE BLINDFOLD: WHAT MOTIVATES THE WHITE-COLOR CRIMINAL?

by

PAUL E. FIORELLI*

Assuming that both Lt. Colonel Oliver North¹ and Lyn Nofziger², violated laws of the United States,³ do we as a society feel that they should receive the same punishment? Probably not, because many people believe that their motives were different. Regardless of whether laws were broken, it seems that Colonel North's motives were to further what he believed to be the best interests of the United States. There was an outpouring of support for this man who placed his country's wellbeing above that of his own.

At the same time the Iran-Contra hearings were being conducted, Lyn Nofziger was indicted for violating the Ethics in Government Act. "The independent counsel, James C. McKay, in a six-count indictment charges Mr. Nofziger — who opened a public relations firm after leaving his Reagan administration post in 1982 — with using his White House ties to lobby the government on behalf of Wedtech and others in violation of federal ethical laws."⁴ To date, there has been little support for Mr. Nofziger, either by the public or by the White House.

One could argue that the American public and press have treated Ollie North better than Lyn Nofziger because they perceived Colonel North's motives to be "more pure." This same feeling holds true in the business world. Employees who break laws in order to benefit their company, rather than themselves, will receive more support and probably lighter penalties if they are caught. ". . . [I]t would be reasonable to hypothesize that executive criminals are treated far less harshly when their corporation is a *party* to the crime than when their corporation is the *victim* of the crime."⁵

Many legal scholars have discussed different facets of white-collar crime. The question of whether the offending individual or the corporation should be punished to deter white-collar crime has been discussed.⁶ There have also

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² Formerly President Reagan's assistant for political affairs.

³ At the time of this article submission, neither Lt. Colonel North, nor Lyn Nofziger had been convicted of any wrongdoings. Since then, Lyn Nofziger has been convicted. This article also does not propose that either person should be convicted of any violation.

⁴ Galen, *Wedtech Scandal Probes Intensifying*, THE NAT'L L.J., Aug. 3, 1987 at 3, col. 4, 13, col. 1.

⁵ Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 AM. CRIM. L. REV. 501, 513 (1980).

⁶ See Coffee, *Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions*, 17 AM. CRIM. L. REV. 419 (1980).

been articles dealing with whether monetary fines,⁷ or prison terms,⁸ act as more effective sanctions. This article will attempt to identify and analyze the motivations and different character traits exhibited by many white-collar criminals and offer some suggestions to attempt to decrease the incidence of white-collar crime.

MOTIVATION

Understanding what motivates white-collar criminals, by analyzing some common traits, offers middle and top managers an opportunity to evaluate themselves and their companies to determine whether they are likely targets for this type of crime. If management is aware of the causes of the problem (i.e. unrealistic demands, misguided loyalty, employee greed, pilferage, etc.), they can develop a strategy to minimize the occurrence of white-collar crime. Top management must do more than give directives and expect results. They need to change the business environment such that employees will be punished for illegal behavior and rewarded for ethical behavior.

Employees committing illegal acts are usually middle managers,⁹ and their motivations "range from altruistic loyalty to the corporate good to outright self-interest."¹⁰ These motivations may be analyzed by looking at several different character traits that many white-collar criminals seem to exhibit. These are not necessarily all inclusive, and some employees may exhibit a blend of some or all of the traits. These character traits, are: (1) altruism, (2) moral confusion based on unrealistic demands, (3) blind ambition, and (4) greed.

THE ALTRUIST

The altruist is the company man,¹¹ a team player. "Many employees, says Mr. Phillips, [co-director of the Los Angeles-based center for Law in the Public Interest] rationalize dishonest illegal behavior by seeing themselves as loyal corporate soldiers."¹² He carries out orders without question. Peter Drucker, one of the pre-eminent scholars in the field of management stated, "Hence executive life not only breeds a parochialism of the imagination comparable to

⁷ See Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980).

⁸ See Crane, *Commentary: The Due Process Consideration in the Imposition of Corporate Liability*, 1 N. ILL. U.L. REV. 39 (1980).

⁹ Getschow, *Overdriven Execs, Some Middle Managers Cut Corners to Achieve High Corporate Goals*, Wall St. J., Nov. 8, 1979 at 34, col.4.; M. CLINARD & P. YEAGER, CORPORATE CRIME 276 (1980).

¹⁰ M. CLINARD & P. YEAGER, CORPORATE CRIME 66 (1980).

¹¹ The masculine gender is used throughout the article in a general sense. This is not meant as a slight to female executives. It merely reflects the fact that most middle managers are men, and to date, very few women have been convicted of white-collar crimes. With the increase of women in middle and top management, it is likely that in the near future women will be exposed to the same temptations as their male counterparts, to commit white-collar crimes.

¹² Stricharchuk, *Business Crack Down on Workers Who Cheat to Help the Company*, Wall St. J., June 11, 1986 at 25, col.4.
<http://id1986.ch25.uakr.edu/akronlawreview/vol21/iss3/3>

the 'military mind', but places a considerable premium on it."¹³ The good soldier is not an automaton. He has spent his entire life developing his personal ethical standards. These standards are tested when he believes that he must commit an illegal act in order to benefit his company. All too often the individual's ethical standards become overshadowed by the perceived "good of the corporation." "Mr. Phillips believes that cheating is so rampant in some companies that it's an intrinsic part of the work environment."¹⁴ What is it within the corporate environment that can change basically good people into white-collar criminals? The answer may lie in the process of becoming a middle manager.

Top management normally promote people like themselves. "In every large-scale organization there is a natural tendency to discourage initiative and to put a premium on conformity."¹⁵ This conformity is nurtured through the process of industrial initiation:

Through both the tribal and the industrial initiation new members are indoctrinated into their social roles; they learn new languages; they share new values with other group members; they assume new identities; they develop new associates and new loyalties; and they internalize new emotional responses. Thus, through initiation, social institutions shape new members into the institutional mold. Cloning not being possible, initiations are the way older members and leaders can replicate themselves.¹⁶

During this initiation process, the corporation becomes a surrogate family for the employee. The employee has difficulty establishing contacts with his community due to frequent transfers.¹⁷ His family life may suffer because of the long hours demanded by his job.¹⁸ Many, if not most, of his social contacts are with fellow employees.¹⁹ Given this scenario, it is not surprising that the employee develops a deep sense of loyalty to the corporation. This loyalty may be so great that the employee may have a difficult time refusing a request to break the law. Even if the employee does not receive a direct request from superiors, he may develop a plan on his own initiative to benefit the company, his surrogate family.

The altruist's motives may not always be as pure as they seem. The motives may be a hybrid between company and self-interest. "Likewise, a corporate official may benefit personally from an illegal act committed for the corpora-

¹³P. DRUCKER, *THE CONCEPT OF THE CORPORATION* 81 (1972); M. CLINARD & P. YEAGER, *CORPORATE CRIME* 66 (1980).

¹⁴Stricharchuk, *supra* note 12, at 25, col.4.

¹⁵P. DRUCKER, *THE CONCEPT OF THE CORPORATION* 40 (1972).

¹⁶D. MARGOLIS, *THE MANAGERS* 45-46 (1979).

¹⁷*Id.* at 48-58.

¹⁸*Id.* at 58-66.

¹⁹M. CLINARD & P. YEAGER, *supra* note 10, at 66.

tion by receiving indirect remuneration in the form of job security, a promotion, a salary increase, or bonus."²⁰ He may own stock or stock options in the company. If the company is profitable, he receives at least the indirect benefits of continued employment and an increase in his own net worth, vis-a-vis the increase in the value of his stock. This constant push towards profit may be either self motivated or demanded by top management.

THE PRESSURE COOKER

When top management sets unrealistic goals, the middle manager only has a few choices. He can seem inadequate by not accomplishing the goal,²¹ or perhaps even a "corporate whiner" by complaining that the goals are too high. It is unlikely that this corporate "nay-sayer" will advance as quickly as a counterpart with a "can-do" attitude. "If a company sets unrealistic performance goals, managers may be tempted to cheat in order to meet them."²² Unfortunately, sometimes a manager believes that the only way to meet the target is to cut corners and break the law.

Employee's acquiescence to act illegally can be accelerated by their pessimistic view of the business world. Many middle managers rationalize their actions by believing that violations are common practice.²³ The employee may ask himself the question, "As long as everyone else is doing it, why shouldn't I?" In fact he may even feel that his career and even his company is being placed at a competitive disadvantage for acting too ethically. "Thus, if we cannot deter the corporation adequately, we cannot expect it to impose sanctions against individual officials; rather, it (the corporation) may discipline the official who is 'excessively' scrupulous."²⁴ The employee fears that he may be branded a troublemaker and lose his job if he is too conservative.

Some managers believed that their superiors at least tacitly approved their illegal acts. They believed that upper management knew that the only way to make the target was for the middle managers to compromise their personal ethics or even break the law. "They had to know that we were speeding up the line, . . . but they never asked questions, so while we knew what we were doing was wrong ethically, we figured it must have been okay in the eyes of the company."²⁵ Top management does not want to know of the illegal activity, they

²⁰ *Id.* at 19.

²¹ *Id.* at 276. This feeling of inadequacy can be devastating for a person who has always considered himself professional and hardworking.

²² Stricharchuk, *supra* note 12, at 25, col.4.

²³ M. CLINARD & P. YEAGER, *supra* note 10, at 67. The middle manager is torn by seeing others advance with unethical or even illegal activity. Their view of the business world becomes tainted because wrongdoers are not caught or punished.

²⁴ Coffee, *Making the Punishment Fit the Corporation*, 1 N. ILL. U.L. REV. 3, 13 (1980). Employees may believe that they will be viewed as too cautious which could ultimately impact their career advancement with the company.

²⁵ Getschow, *Overdriven Execs, Some Middle Managers Cut Corners to Achieve High Corporate Goals*, Wall St. J., Nov. 8, 1979 at 34, col. 4.

merely want results.²⁶ This tacit approval is reinforced when violators are complimented or promoted for achieving the goals. This “winking through the blind-fold,” creates an atmosphere of “do whatever it takes, just don’t tell me about it.”

Middle managers who “do whatever it takes, without telling their superiors” are one reason why upper management is rarely convicted for white-collar crimes. Typically, top executives plan policy and middle managers translate this into corporate action.²⁷ This creates a diffuse, decentralized, almost bureaucratic structure.²⁸ The organizational structure makes it difficult to assign guilt to one decisionmaker:

There is also a problem in determining who was the actual decisionmaker responsible for the illegal activity. Since corporations have been decentralized and power is diffused, who is responsible? “The low level engineer who designs the unsafe gas tank, the chief engineer who approves it, or the president who never heard of the problem but who insisted from afar that underlings who wished to advance within the corporate hierarchy demonstrate an ability to cut costs dramatically?”²⁹

Since intent is a necessary element in almost all white-collar crimes, many top managers have been able to escape criminal liability by hiding behind the layers of middle managers.³⁰ Their position is also bolstered because many judges and juries are unwilling to sentence white-collar criminals to jail. “First, there is the problem of nullification. Juries and judges have a distressing habit of acquitting flesh and blood defendants whereas they would convict a bloodless corporation.”³¹

The middle manager is caught between the proverbial rock and a hard place. He can appease management by meeting the target, regardless of laws, or refuse and appear incompetent.³² He is not afforded the same protection against firing that unionized production workers have and he probably was not involved in the decisionmaking process which established the unrealistic goals.³³ “A certain amount of tension is desirable,” explains Paul Lawrence, professor of

²⁶ Crane, *Commentary: The Due Process Consideration in the Imposition of Corporate Liability*, 1 N. ILL. U.L. REV. 39, 44 (1980); Braithwaite, *Challenging Just Deserts*, 73 J. CRIM. L. & CRIMINOLOGY 723, 725-726, n. 17 (1982).

²⁷ M. CLINARD & P. YEAGER, *supra* note 10, at 279. But it is the middle manager who risks the criminal conviction, by complying with the implied directives of upper management.

²⁸ *Id.*

²⁹ Coffee, *supra* note 24, at 13.

³⁰ M. CLINARD & P. YEAGER, *supra* note 10, at 281, *but see*, United States v. Park, 421 U.S. 658, (1975), where a C.E.O. was convicted not because he knew of the violation, but because he was in a position of responsibility to oversee that the Federal Food, Drug and Cosmetic Act violation [adulterated food] did not occur.

³¹ Coffee, *supra* note 24, at 13. Defense attorneys also describe their clients as pillars of the community, thus making it even more difficult for juries to convict.

³² M. CLINARD & P. YEAGER, *supra* note 10, at 276.

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³³ Getschow, *supra* note 23, at 1, col.6.

organizational behavior at the Harvard Business School. 'But at many companies the pressures to perform are so intense and the goals so unreasonable that some middle managers feel the only way out is to bend the rule, even if it means compromising personal ethics.'"³⁴ One suggestion to help relieve this temptation is to set more realistic goals:

Gerald C. McDonough, Chairman and chief executive of Leaseway Transportation Corp., says one key to minimizing cheating is setting goals that employees can meet without having to "resort to less than ethical standards." He says Leaseway, a Cleveland-based trucking concern has annual reviews to make sure managers don't set goals that are out of line. Mr. McDonough adds that Leaseway's policies are made known to suppliers and customers, who are encouraged to report suspected cheating.³⁵

Middle managers responsible for implementing policy should have more input into establishing the policy.³⁶ They are in the best position to know whether the goals are reasonable and can be obtained through legitimate business efforts.

Organizational crime is defined as white-collar crime committed to benefit the company.³⁷ This type of crime, which arguably benefits the company in the short run, is difficult to detect. With its established internal controls, the corporation is in the best position to discover these violations.³⁸ But, "[B]ecause organizational crimes are committed to further corporate goals of accumulation of power and wealth, they are seldom reported by those most likely to be aware of their occurrence."³⁹ Absent effective deterrents, there is no economic incentive to punish an unethical employee who is directly benefitting the corporation.

BLIND AMBITION

Occasionally the manager is more concerned with his immediate career path, than the company's long term wellbeing. In fact he may act in a way that is contrary to the company's best interest:

Hence a scientist in a pharmaceutical company might unlawfully conceal rat studies showing lack of safety for a product which he or she has discovered . . . the revelation that his or her discovery is a failure would certainly cost a promotion. Hence, the rational cost-benefit assessment

³⁴ *Id.*

³⁵ Stricharchuk, *supra* note 12, at 25, col.4.

³⁶ Getschow, *supra* note 25, at 34, col. 4. This involvement must be more than just token representation. Middle managers must feel free to contradict their supervisors for setting unrealistic goals, and the superiors should give strong deference to their recommendations.

³⁷ M. CLINARD & P. YEAGER, *supra* note 10, at 17-18.

³⁸ Comment, *Occupational Disqualification of Corporate Executive: An Innovative Condition of Probation*, 73 J. CRIM. L. & CRIMINOLOGY 604, 606-07 (1982).

³⁹ *Id.* The corporation is less likely to complain when they have received a benefit from the employee's illegal activity, than when they are the target of the illegal activity.

for the individual is to perpetrate the illegality, while the rational choice for the corporation is to be honest.⁴⁰

Within a given company, it might be “silently understood” that only people who significantly contribute to increasing profits or decreasing costs are promoted or receive the highest merit raises.⁴¹ The “cutthroat” may take shortcuts to enhance his own career, but at the same time exposes the company to unnecessary risks.⁴² Of course, if the idea that the “boy wonder” developed causes a major scandal, he may be disciplined or even fired.

Irrespective of the threat of discipline, the temptation to cut corners is great. The inherent rewards seem vast compared to the relatively low risk of detection and ultimate discipline:

But for the middle level official, the question is not whether the behavior is too risky to be in the interest of the corporation from a cost-benefit standpoint. Rather, it is which risk is greater — the criminal conviction of the company, or the dismissal for failure to meet targets set by an unsympathetically demanding senior management. Because the conviction of the corporation effects him only indirectly, it can seldom exceed the penalty that dismissal or demotion means to the career-minded middle manager. Caught between ‘the devil and the deep blue sea,’ the middle level manager then faces a very different opportunity set of potential costs and benefits than does the corporate entity itself.⁴³

Corporations may help protect against this situation by establishing a strong company Code of Ethics. One advantage to a standardized code of ethics is that if a manager wants to refuse a questionable activity, it is perhaps easier to point to a specific violation of the code, rather than refuse outright.⁴⁴ The major disadvantage to corporate code of ethics deals with the question of effectiveness. Whereas the code of ethics may “look good on paper,” this must be backed up by deeds of top level management. Employees will only follow the Code of Ethics if they see top management living by its credo, and violators being swiftly and severely punished.⁴⁵ Companies cannot continue to “wink through the blindfolds” and expect their employees to act ethically and legally.

THE HEDONIST

“The Wall Street scandals produce a new definition of Yuppies — ‘young, indictable professionals.’”⁴⁶ This “corporate hedonist” is the greedy employee

⁴⁰ Braithwaite, *Challenging Just Desert*, 73 J. CRIM. L. & CRIMINOLOGY 723, 728 (1982).

⁴¹ Coffee, *supra* note 24, at 13.

⁴² Braithwaite, *supra* note 40, at 728.

⁴³ Coffee, *supra* note 24, at 11.

⁴⁴ M. CLINARD & P. YEAGER, *supra* note 10, at 304.

⁴⁵ *Id.* at 302-03.

⁴⁶ Wall St. J., Nov. 38, 1986, at 1, col. 5.

who commits a crime against the company. This is the person whom Clinard and Yeager define as an occupational criminal.⁴⁷ These crimes are normally considered more common crimes, rather than white-collar crimes.⁴⁸ Typically they involve embezzlement, fraud, or employee theft, whereby an employee steals money from a company with lax internal controls. Sometimes this can only be discovered by a formal audit, and even that does not guarantee detection. There is increased pressure on accounting firms to revise their auditing standards to try to detect this type of fraud.⁴⁹

If the common crime is detected, the company will probably act swiftly to discipline the employee. Swift action does not necessarily mean prosecution. The company is often too embarrassed and does not want its shareholders, customers, and creditors to know about their lack of control.⁵⁰ Publicity could cause them to lose goodwill, or even be exposed to a shareholder's derivative action for negligence.⁵¹

Many times the company merely wants to "get rid of the problem" by firing the employee. The Wall Street Journal reported on a manager who had been fired for embezzling from six different companies.⁵² Each time his employer discovered the embezzlement it failed to prosecute the employee. The embezzler promised to repay the stolen money, and each employer seemed satisfied with the employee's contrition.⁵³ The problem was compounded by the fact that some hiring employers failed to check references and some firing employers allegedly did not fully disclose information about the employee's termination.⁵⁴ Employers must be more diligent in the hiring process, and they should seek prosecution of occupational criminals. Refusing to prosecute after a promise of restitution, merely shuffles the problem from one employer to another.

CONCLUSION

White-collar criminals commit crimes for many different reasons. Their motivations include: trying to benefit the company, succumbing to pressures to perform, immediate career advancement, and greed. Once management becomes more aware of why employees commit white-collar crimes, they can implement corrective actions to prevent them. Possible solutions to decreasing

⁴⁷M. CLINARD & P. YEAGER, *supra* note 10, at 18.

⁴⁸Comment, *Occupational Disqualification of Corporate Executive: An Innovative Condition of Probation*, 73 J. CRIM. L. & CRIMINOLOGY 604, 605-06 (1982).

⁴⁹Wall St. J., Dec. 11, 1986, at 1, col. 5.

⁵⁰Burrough, *The Embezzler, David L. Miller Stole From His Employers and Isn't In Prison*, Wall St. J., Sep. 19, 1986 at 1. col.1.

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

white-collar crime include, but are not necessarily limited to: (1) establishing a formal Code of Ethics and having all employees follow it strictly, (2) involving middle managers in the decisionmaking process in order to establish realistic goals which are obtainable without violating laws, (3) top management has to start asking how goals are met, not merely accepting the results, and (4) terminating and cooperating in the prosecution of employees who are not looking after the company's best interest, either because they are more concerned with their own immediate career advancement or merely to satisfy their own greed.

Top management has several alternatives in dealing with white-collar crime. They can ignore it and allow judges, and legislators to determine the appropriate sanctions, or they can attempt to limit this type of activity by modifying the business environment. If corporations choose to address the problem, they can no longer accept the benefits of the illegal activity and "Wink through the blind-folds" until the employee is caught. The business environment can be changed if employers place a premium on ethical and legal activity by their employees.

