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## Gatekeepers, Cultural Captives, or Knaves? Corporate Lawyers Through Different Lenses

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# GATEKEEPERS, CULTURAL CAPTIVES, OR KNAVES? CORPORATE LAWYERS THROUGH DIFFERENT LENSES

*Donald C. Langevoort\**

## I. INTRODUCTION: REMEMBERING CLARK CLIFFORD

Decades ago, I read an interview with Clark Clifford, the revered Washington lawyer who was facing widely-publicized charges that he knowingly aided a corporate client (a foreign banking institution) in violating federal regulatory disclosure laws.<sup>1</sup> Clifford ended the interview by acknowledging that any reasonable person hearing the facts would come away with only two possible interpretations: either Clifford was thoroughly venal or incredibly stupid. By most all accounts he was neither, and thus was asking the reader to reach deeper for a more sympathetic understanding of his behavior.

This was a time when the ugly domestic savings and loan scandals of the 1980s were just winding down. Observers were famously asking “where were the lawyers?” to demand more serious legal and disciplinary sanctions against the so-called gatekeepers who enabled (or closed their eyes to) so much shameless financial wrongdoing.<sup>2</sup> As a corporate/securities scholar, I was fascinated by the gatekeeper question and, having

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\* Thomas Aquinas Reynolds Professor of Law, Georgetown University Law Center. My thanks to the participants at the Stein Colloquium for their comments and the stimulating conversation.

<sup>1</sup> David E. Rosenbaum, *A Charm for Plebian and Patrician*, N.Y. Times C-5 (July 30, 1992).

<sup>2</sup> See *Lincoln Sav. & Loan v. Wall*, 743 F. Supp. 991, 920 (D.D.C. 1990)(Sporkin, J.). The term “gatekeeper” had caught on in academic analysis to describe the admixture of legal and reputational threats that would cause influential persons (particularly investment bankers, auditors and lawyers) to refuse to allow clients and others to violate the law by withholding essential services. See Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Liability Strategy*, 2 J. L. Econ. & Org. 53 (1986).

been at the SEC before academia, instinctively weighed in on the arguments largely on the pro-enforcement side. But I was also taken by Clifford's lament. At the time I was doing research on the application of social and cognitive psychology to various topics in business and finance, from which I eventually surmised that there might be good psychological explanations for why a lawyer like Clifford could be so close to a client's situation that he could miss wrongdoing risks that would seem plain from a greater distance. So in 1993 I published a law review article that examined the state of mind standards under the federal securities laws for professional aiding and abetting (the most common charge against lawyers), making the claim that highly-engaged lawyers may not always have the level of actual awareness necessary for liability in light of then-contemporary psychological research, circumstantial evidence of complicity notwithstanding.<sup>3</sup>

To my knowledge, this was the first article to apply social cognition research to the professional responsibilities of corporate lawyers.<sup>4</sup> For a decade, at least, a handful of legal scholars had been mining what was coming to be known as behavioral economics for tractable insights on judgment and decision making to apply to various other legal subjects,<sup>5</sup> so my move in this direction was not entirely pioneering. But the corporate field posed unique challenges for a user of these materials. After years of passive-aggressive disregard, there was now massive resistance from orthodox law and economics

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<sup>3</sup> Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Client Fraud*, 46 Vand. L. Rev. 75 (1993). I was still pro-enforcement, and so this inference was by way of calling for reform with a more sophisticated approach to intentionality. I extended the argument shortly thereafter in Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 Brook. L. Rev. 629 (1997)(focusing on group-level biases)..

<sup>4</sup> There was already an influential literature in the "law and society" movement looking at the beliefs and behaviors of corporate lawyers by sociologists and cultural anthropologists, including Robert Nelson's monumental work *PARTNERS WITH POWER* (1988). See pp. --- infra.

<sup>5</sup> In 1998 I published a literature review of this early work, which had already grown in prominence and quantity. Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship—A Literature Review*, 51 Vand. L. Rev. 1499 (1998).

scholars arguing that the heuristics, biases and other cognitive traits that were being identified with such fanfare had no purchase in competitive marketplace settings that bountifully rewarded rationality and harshly punished flawed thinking.<sup>6</sup> That would presumably include corporate lawyers, contrary to what I was claiming. That was just one of the difficulties in making an argument like mine. Other commentators—convinced of widespread lawyer mendacity in the scandals—seemed to want no part of psychological excuses for enabling client wrongdoing. Don't be naïve, they were saying. It was all just about unchecked greed and envious lawyers who wanted in on the action. The legal system was the weak point, not the human psyche.<sup>7</sup>

Fast forward to today, where work in psychology and behavioral economics is regularly invoked by scholars writing about lawyers' professional responsibility, corporate and otherwise.<sup>8</sup> To adherents, at least, there seem to be many possibilities for adaptive biases to affect marketplace behavior and the actions of economic elites without being washed out by the detergent of market discipline and efficiency. Behavioral ethics has now become an academic sub-discipline of its own.<sup>9</sup>

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<sup>6</sup> See Roberta Romano, *A Comment on Information Overload, Cognitive Illusions and their Implications for Public Policy*, 59 S. Cal. L. Rev. 313 (1986). Richard Posner later elaborated on this theme. Richard Posner, *Rational Choice, Behavioral Economics and the Law*, 50 Stan. L. Rev. 1551 (1998).

<sup>7</sup> Less than a decade later, the massive Enron scandal (with lawyers again allegedly involved) brought the issue back to both public and scholarly attention. See Milton C. Regan Jr., *Teaching Enron*, 74 Fordham L. Rev. 1139 (2005). This was a focal point in drawing more scholarly attention to lawyers' behavior.

<sup>8</sup> E.g., PAUL BREST & LINDA H. KRIEGER, *PROBLEM SOLVING, DECISION MAKING AND PROFESSIONAL JUDGMENT* (2010); Paula Schaefer, *Behavioral Legal Ethics for Corporate Counsel*, 69 Case W. Res. L. Rev. 1 (2019); Jennifer Robbennolt, *Behavioral Ethics Meets Legal Ethics*, 11 Ann. Rev. L. & Soc. Sci. 75 (2015); Andrew Perlman, *A Behavioral Theory of Legal Ethics*, 90 Ind. L.J. 1639 (2015); Catherine O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Perspective*, 15 Nev. L.J. 671 (2015); Jennifer Robbennolt & Jean Sternlight, *Behavioral Legal Ethics*, 45 Ariz. St. L.J. 1107 (2013); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 St. Louis L. Rev. 971 (2007); Sung Hui Kim, *Gatekeepers Inside Out*, 21 Geo. J. Legal Ethics 411 (2008).

<sup>9</sup> E.g., Max Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 Ann. Rev. L & Soc. Sci. 85 (2012); Robbennolt, *supra*.

For all this progress, however, I am not sure that the particular questions about lawyers that bothered me long ago have been well answered. In my writing on the subject, I still hold to the view that various cognitive (and cultural) biases lead many lawyers—including, and maybe even especially, elite ones—to deflect, normalize and rationalize actions that are either illegal or unethical without compromising their internal self-image as good, responsible people and good, responsible lawyers.<sup>10</sup> The unifying theme is the extraordinary pervasiveness of self-deception and hypocrisy in professional and other high-status lives. That said, I am still sensitive to the claim that the point of view I take—in the now popular genre of “good people do bad things”—is naïve. Maybe what I attribute to moral blind spots is more often a conscious and thus blameworthy form of giving in to pressure and temptation, maybe even sociopathic.<sup>11</sup>

This lingering unease was pricked by a recent pair of articles by two British researchers, Steven Vaughan and Emma Oakley, who spoke with a number of elite London-based solicitors about the role of ethics in high-end corporate practice.<sup>12</sup> While no one, of course, said they would ever enable unlawful behavior by a client (and might even draw the line at extremely troubling but lawful client behavior), they seemed otherwise completely

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<sup>10</sup> For my book-length treatment of this ideas as they play out in business and finance generally, see DONALD C. LANGEVOORT, *SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET AND THE DILEMMAS OF INVESTOR PROTECTION* (2016); on in house lawyers in particular, see Donald C. Langevoort, *Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis*, 2012 Wisc. L. Rev. 495 (2012).

<sup>11</sup> I was also jolted reading an article by a research team including Linda Klebe Trevino, a pre-eminent organizational behaviorist, describing the behavior of sales managers at a particular firm who altered reporting routines to falsify information about performance sent up to senior management. Niki A. den Nieuwenboer, Joao Vieira da Cunha & Linda Klebe Trevino, *Middle Managers and Corruptive Routine Translation: The Social Production of Deceptive Performance*, 28 *Org. Sci.* 781 (2017). They did this through pressure on their subordinates. While this setting was ripe for ambiguity and cognitive distortion of the sort now largely taken for granted in management studies, the article reports a disturbingly high degree of candor that what they were doing was wrong, yet they were doing it anyway.

<sup>12</sup> Steven Vaughan & Emma Oakley, “*Gorilla Exceptions*” and the Ethically Apathetic Corporate Lawyer, 19 *Legal Ethics* 50 (2016); Emma Oakley & Steven Vaughan, *In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms*, 46 *J. L. & Soc.* 83 (2019).

disinterested in any further public-regarding ethical dimension to their practice. Clients are in charge: full stop. The authors see some psychological distancing going on, but were still struck by how candidly the elite lawyers roundly rejected the idea that ethics has (or should have) much relevance at all to their work, given so much professional rhetoric otherwise. If apathy prevails, maybe the “good people” category deserves to be truncated when it comes to responsibility for bad things, suggesting something close to conscious indifference.

These are big issues, and this is a small essay. Here, I simply want to move things forward in the study of the professional responsibility of corporate lawyers in two ways that are somewhat related. One is to push harder on consciousness by looking more closely at the lengthy continuum—not a binary yes/no—in the awareness of wrongdoing risk as heavily influenced by the “slippery slope.” That is a layman’s intuition put to use well beyond academic research: armchair philosophers have long understood that the road to hell is not only paved with good intentions but starts in small, often unconscious steps that gradually grow larger and hard to stop. Looking at corporate lawyers’ professional responsibility through this lens has some interesting, and as far as I can tell, under-explored implications that help us understand the source of ethical apathy.

The other is to consider the possibility that diminished interest in gatekeeping ethics among private practitioners might be offset by greater embrace of the possibility by in-house lawyers. The remarkable ascension of the general counsel in authority and status in the corporate setting is something about which many scholars and practitioners have written, mostly from a sociological perspective. But there has emerged in recent years a different lens for the empirical examination of corporate lawyers, taking the tools of financial economics to seek correlations (and maybe causation) between identifiable lawyer

characteristics and outcomes for the company in terms of (for example) its legal exposure.<sup>13</sup> There is some hopeful news in this research, albeit heavily contingent on the company's governance structure, broadly conceived. So I end by suggesting that, while the effort in normative legal ethics to enlist corporate lawyers in more than a legalistic conception of gatekeeping has failed, corporate governance and corporate ethics—surprisingly, perhaps—have some *potential* to enable gatekeeping general counsels in a way that filters down to the demand for ethically-sensitive outside counsel as well. Good gatekeepers are not necessarily facing extinction, though stronger species preservation efforts are surely in order.

## II. BEHAVIORAL ETHICS AND SLOW DEGRADATION

The diagnosis that would-be gatekeepers have surrendered to ethical apathy should surprise no one. As a matter of simple economics, clients pay the bills and normally prefer that the professionals they retain facilitate—not frustrate—their chosen ends. Intense competition among skilled lawyers forces them into acquiescence. Absent countervailing regulatory or disciplinary pressures—which have never been all that strong—what is left is professional integrity, which too easily gives way to norms that are more conducive to competitive success. Numerous legal scholars have told versions of this devolution story, from varying disciplinary perspectives.<sup>14</sup>

To be sure, we would not expect corporate lawyers to willfully facilitate client fraud when it exposes them to serious

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<sup>13</sup> See pp. --- *infra*.

<sup>14</sup> E.g., JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* (2006); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 *Md. L. Rev.* 869 (1990); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 *Stan. L. Rev.* 1867 (2008).

legal or reputational risks. When and why that occasionally happens anyway is the Clark Clifford problem. And as mentioned earlier, the puzzle there is one of good faith: is what goes on cognitively really about blind spots, or instead something more culpable? Answering that addresses both the legal issue when the lawyer seems to have rendered substantial assistance to client misbehavior and—in a larger category of situations—professional judgments about the apathetic lawyers who sit idly by while clients threaten the common good, lawfully or not. So in this section I revisit the culpability problem that has for so long bothered me.

The behavioral approach to ethics is a lively field with a progressive research agenda that identifies much behavior that is still only dimly understood, so both broad generalizations and confident conclusions are unwise. But in a rough sense it deserves the organizing description that it is about good people doing bad things—there aren't so many bad apples as bad barrels.<sup>15</sup> That is to say, ordinary (non-sociopathic) people are naturally inclined to be reasonable and honest but easily tempted otherwise by self-serving inference, especially in the face of strong situational incentives and pressures. People cheat less than cold economic calculations would suggest, but more than they should under common ethical norms. The main research task is to discover, by manipulating situational variables, how and when ordinary behavior turns better or worse than this baseline. The result over the past four decades or so is a rich body of insights. There are both popular and scholarly books available; for lawyers and legal scholars, Yuval Feldman's recent *The Law of Good People*, treats the subject in depth.<sup>16</sup>

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<sup>15</sup> Linda Klebe Trevino et al., *(Un)ethical Behavior in Organizations*, 65 Ann. Rev. Psych. 635 (2014).

<sup>16</sup> YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING THE STATE'S ABILITY TO REGULATE HUMAN BEHAVIOR* (2018). See also, e.g., MAX BAZERMAN & ANN TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* (2011).



For our purposes, perhaps the most interesting question in behavioral ethics is one of consciousness: how much in the way of ethical and legal judgment and decision making happens outside of consciousness, so that what is processed within awareness is something of an illusion. The research suggests that there is a largely amount of automaticity to mental processing, only partly (if that) subject to the force of cognitive will. This, in turn, has a strong temporal dimension. Depending on situational circumstances, many ethical challenges are initially processed so that the ethical dimension is hidden from awareness, not triggering moral anxiety at all. This is pure blind-spot territory, such that the individual or group's good intentions go unchallenged. Sooner or later, the ethical danger cues may come closer to consciousness but dismissed or downplayed by a combination of natural cognitive conservatism and motivated inference (we are often slow to understand what we don't really want to know). This is often referred to as ethical fading.<sup>17</sup> With more evidence, there may finally be some awareness, although rationalizations and denial may still blunt full realization of what now may be an ethical or legal mess. If and when there finally is a more unfiltered awareness, the actor is in deep. Then, often enough, comes the conscious (though still probably rationalized) cover-up.<sup>18</sup>

This temporal continuum is a challenge to lawyers and ethicists used to looking for simple accounts of dispositional blameworthiness. Awareness is gradual and delayed, often until it is too late to avoid harm. This is a misfit with many legal constructs based explicitly on awareness,<sup>19</sup> like bad faith, and certainly points in the direction of lessened culpability even

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<sup>17</sup> Ann Tenbrunsel & David Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 Soc. Justice Res. 223 (2004).

<sup>18</sup> For a classic early work in social psychology describing the institutional manifestation of this, see Barry Staw, *Knee Deep in Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 Org. Behav. & Human Dec. Processes 27 (1978).

<sup>19</sup> See Langevoort, *SELLING HOPE*, supra, at 43-45.

though the decision might be described as negligent or perhaps even reckless. This is why behavioralists use the good people/bad things locution. Of course we can and often do blame people anyway, making an example of them as a lesson to others who might then be more cognitively awake. But deterrence doesn't necessarily work that way absent draconian threats, in-the-moment interventions, or intrusive monitoring, all of which generate their own problems. In day-to-day routines it is hard to instill more ethical awareness in people who are wedded to the assumption that they are good and all is well. Moreover, the act of judging awareness after the fact of some ethical failure is hopelessly biased by hindsight, which makes it hard to learn from experience. On-going work in organizational behavior and compliance design tries hard to overcome all this, and there are some promising steps.<sup>20</sup> But it remains a challenge, especially in high-velocity business environments populated by aggressive risk-takers.<sup>21</sup>

There is so much more to be said about all of this, but the interested reader has more than enough to choose from elsewhere to go more deeply into the research. As noted at the outset, my question is about relatively how often this blind spot account accurately describes problematic ethical and legal behavior as opposed to a more deliberate, consciously calculated explanation. We can assume that there are plenty of instances of both, but is there anything to say about the relative distribution?

There are various ways of addressing the consciousness question, none entirely dispositive. Researchers acknowledge that laboratory experiments don't get at this particularly well.

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<sup>20</sup> See Hui Chen & Eugene Soltes, *Why Compliance Programs Fail and How to Fix Them*, 117 Harv. Bus. Rev. (March-April 2018); David Hess, *Ethical Infrastructure and Evidence-based Corporate Compliance and Ethics Programs: Policy Implications from Empirical Evidence*, 12 NYU J. L. & Bus. 317 (2017).

<sup>21</sup> See Donald C. Langevoort, *Cultures of Compliance*, 54 Am. Crim. L. Rev. 933 (2017). This is a particular challenge in internal efforts to deter high-impact white collar crime. See Todd Haugh, *The Power Few of Corporate Compliance*, 53 Ga. L. Rev. 1 (2018).

Asking wrongdoers to recall their thought process—the approach of Eugene Soltes’ important book *Why They Do It: Inside the Mind of the White Collar Criminal*<sup>22</sup>--is helpful, but one gets the impression that wrongdoers (especially after a period of punishment) might not really have the self-insight or recollection to answer accurately, and may be motivated to construct an account in hindsight that serves purposes other than accuracy. Recall that even with significantly impaired awareness at the beginning of and through much of the course of the misbehavior, the misconduct may well end with some recognition of guilt, however softened by lingering rationalizations. Even with that, Soltes finds substantial variations in the stories, some more consistent with the cognitive approach,<sup>23</sup> others more jaded.

## B. The Slippery Slope

In making the case for impaired awareness, I have long found the idea of the slippery slope compelling. As noted earlier, it is the idea—amply found in folk wisdom as well as social science research—that most people will not often go immediately from their ordinary good behavior to serious impropriety, even under strong situational pressure. But they will engage in minor transgressions, finding ample ways to justify the small steps as not really improper at all.<sup>24</sup> Once the first step is taken, however, the line as to what is permissible moves because of the rationalization—now that becomes the baseline. The next temptation is measured not by the starting point, but the revised definition of ethical or legal acceptability. And so on, as what is

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<sup>22</sup> EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE COLLAR CRIMINAL* (2016).

<sup>23</sup> *Id.* at 58 (neuroscience perspectives); 155 (cognitive dissonance); 257-58 (self-deception).

<sup>24</sup> David Welsh et al., *The Slippery Slope: A Self-regulatory Examination of the Cumulative Effects of Minor Ethical Transgressions*, 100 *J. App. Psych.* 114 (2015).

done becomes more harmful. This bears substantial kinship with the temporal account for delayed awareness, and draws from work on commitment biases, cognitive dissonance and the like for why each subsequent step becomes easier (and stopping so much harder) down an increasingly steep and icy slope. The underlying idea is a gradual descent into corruption, not a discrete choice.

Much work in behavioral ethics invokes this kind of gradualism. The famous social psychologist John Darley drew from it in a notable law review article describing how corporations become miscreants.<sup>25</sup> Of particular note to corporate lawyers, a study by two financial economists, Catherine Schrand and Sarah Zechman, looked at companies that found themselves in legal trouble with the SEC and found fairly consistent patterns of accounting choices that at the outset were plausible (if aggressive), with intermediate steps that only gradually over time crossed the line to financial misreporting.<sup>26</sup> That is hard data evidence for the behavioral side.

Schrand and Zechman found something else interesting. There is lots of social science evidence for many corporate executives exhibiting an excess of self-confidence and over-optimism, an inflated sense of personal (or senior management team) efficacy. Firms with overconfident CEOs and CFOs, they found, were more likely to take the first steps, and end up in trouble. That makes sense: to the genuinely overconfident, the first steps (aggressive recognition of income or minimized costs) would be perceived as honest and realistic. Overconfidence has emerged as the best example in behavioral economics of an adaptive bias, i.e. a trait that is not entirely rational but nonetheless promotes competitive success. It is thus a counter-example to the idea that marketplace pressures wash out all

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<sup>25</sup> John Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 *Brook. L. Rev.* 1177 (2005).

<sup>26</sup> Catherine Schrand & Sarah Zechman, *Executive Overconfidence and the Slippery Slope to Financial Misreporting*, 15 *J. Acct'g & Econ.* 311 (2012).

biases that interfere with the economists' ideal of Bayesian rationality.

I have long relied on both overconfidence and the slippery slope in making the case for behavioral ethics.<sup>27</sup> In a strikingly evocative way, neuroscientists have now joined in.<sup>28</sup> Using magnetic imaging of the brain during ethics-related laboratory experiments, they have found that the amygdala is normally strongly activated by ethical stress (pressures to misbehave). That emotions-driving portion of the brain plays a big role in doing what's right. But if there is a small step toward cheating, the level of activation goes down slightly in the next opportunity. This goes on and on, down the slippery slope. Gradually, the amygdala's electrical energy dims to indifference.

The study of slippery slopes in behavioral ethics tends to be focused on discrete choices that lead to a wrongful act. In that framing, it does weigh in on the side of diminished or delayed awareness. But it raises an interesting question if we extend the timeline. Suppose, over many years perhaps, a person makes gradual ethical compromises down the slippery slope in pursuit of competitive success, without suffering any serious penalty. When ethical (or legal) stresses arise again, does the decision-making reset to the starting point of innocence or instead, do all the prior compromises accumulate, cognitively, so that they are essentially starting out part way down, already unbalanced?

If so, it raises the possibility that character becomes corrupted by earlier ethical compromises even when unrelated to the particular dilemma at hand. Then the question becomes whether this priming brings the person sooner to an actual awareness that they are cheating, as they have done before, or

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<sup>27</sup> See Langevoort, *SELLING HOPE*, *supra*, at 26-27, 35-37.

<sup>28</sup> Neil Garrett et al., *The Brain Adapts to Dishonesty*, 19 *Nature Neuroscience* 1727 (2016). For a commentary, see Jan B. Engelmann & Ernst Fehr, *The Slippery Slope of Dishonesty*, 19 *Nature Neuroscience* 1543 (2016).

whether this whole process stays out of consciousness. If the former, it suggests that habits of compromise gradually impair character generally, perhaps with less cognitive resistance to the implications. In other words, more unfiltered wrongdoing, contrary to the behavioral account—people willing and able to admit, to themselves at least and maybe to others, that they had greater awareness that they were cheating from the start, but had largely stopped caring (i.e., ethical apathy).

### C. Corporate Lawyers

So we now turn this account specifically to the world of corporate lawyers and their capacity as gatekeepers. Though I am by no means suggesting that that ethical compromises are everyday occurrences, lawyers do seem to get into legal and ethical muck often enough, whether in the form of insider trading<sup>29</sup> or the facilitating of client fraud, as in the opinion mills that churn out false representations of legal compliance with resale restrictions under the securities laws so as to enable unlawful distributions that too often take the form of pump and dump.<sup>30</sup> A 60 Minutes sting operation that showed multiple New York lawyers more than ready to help hide the unsavory identity of a prospective client wanting to engage in a high-end real estate transaction (and actually led to bar discipline against some of them) surely

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<sup>29</sup> Even when the lawyer in question is the company's insider trading compliance officer. See SEC Charges former Senior Attorney at Apple with Insider Trading, Feb. 13, 2019, available at <https://www.sec.gov/news/press-release/2019-10>.

<sup>30</sup> See Robert Freidel, Beware of Lawyers Bearing Gifts (In the Form of Rule 144 Opinions), April 4, 2010, available at <https://www.pepperlaw.com/publications/beware-of-lawyers-bearing-gifts-with-respect-to-rule-144-opinions-2010-04-14/>.

resonated among members of the public inclined to see lawyers as fixers and hired guns.<sup>31</sup>

Those of us who have spent time with (or were) corporate lawyers know that the public perceptions are stereotypes, and that the vast majority of corporate lawyers present as “good people.” This invites us to think in terms of behavioral explanations when—like Clark Clifford—they are accused of doing bad things. But if it were possible, what would a deep moral census of corporate lawyers reveal? How willing are lawyers to willingly step over the legal line to aid a client’s economic interests, after having made the Holmesian “bad man” risk calculation as to both client and self? Or assuming that legal and reputational risk has properly been managed, how many of them would do harm to another simply because the client’s self-interest called for it? The latter recreates the laboratory situation that started the field of behavioral ethics: measuring the incidence of cheating under circumstances where there are real gains to be had and zero chance of detection. I have no idea what that census would reveal regarding the state of professional responsibility among business lawyers, other than the strong suspicion that lawyers’ ethics and respect for law run along a lengthy spectrum and that clients sniff out these preferences to match their own. Much of this, as noted earlier, tends toward apathy.

There are a number of findings in behavioral ethics to support the idea that lawyers would be particularly susceptible to slippery slopes. There is norm ambiguity: the ample (and largely aspirational) principles of professional responsibility for the public good sit in the shadow of counter-balancing demands of zealous representation, confidentiality and loyalty. Ample research shows that people will cheat in the interest of significant

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<sup>31</sup> 60 Minutes: Anonymous Inc., Aug. 28, 2016, available at <https://www.cbsnews.com/news/hidden-camera-investigation-money-laundering-60-minutes/>. This led to bar disciplinary proceedings against some of those caught in the sting.

others to a greater extent than for their own good.<sup>32</sup> Helping a client out via what is processed cognitively as a benign and not unreasonable step into the ethical gray area comes easily, even though it then moves the baseline for next time. Lawyers covet being thought of as problem-solvers for their clients, which puts pressure on them to live up to expectations as a matter of professional identity. Interviews with law-breakers reveal how the first steps toward abject criminality in business settings were often by people who did a little too much not to let others down, and then couldn't stop once committed to the course of action (a form of cognitive dissonance).<sup>33</sup>

The often subjective nature of the law also makes the slope more slippery. As with ethical precepts, vague legal principles invite interpretation in a self-serving fashion, without awareness of the biased construal. Yuval Feldman, most notably, has done considerable work on the connection between legal ambiguity and actions that set a course toward questionable judgment at least, and a heightened risk of subsequent violations.<sup>34</sup>

Next is the matter of culture and group identity, which to an extent goes back to self-definition as a reliable problem-solver.<sup>35</sup> There is a very famous study of cheating behavior, where the subjects were all European bankers.<sup>36</sup> Their conduct in the control conditions were little different from other professionals—moderate cheating behavior at most. But one group of subjects had their identities as bankers primed just before the testing, and this group had higher rates of dishonesty. I am not aware that a comparable study has been done of lawyers, but it would be

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<sup>32</sup> Francesca Gino & Dan Ariely, *Self-Serving Altruism: The Lure of Unethical Actions that Benefit Others*, 93 J. Econ. Behav. & Org. 285 (2013).

<sup>33</sup> See Clinton Free & Pamela Murphy, *The Ties that Bind: The Decision to Co-offend in Fraud*, 32 Contemp. Acct'g Res. 18 (2015); see also Soltes., *supra*, at 155,

<sup>34</sup> See Feldman, *supra*; Yuval Feldman & Doran Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. Rev. 980 (2009).

<sup>35</sup> Soltes, *supra*, at 189, 233.

<sup>36</sup> Alain Cohn et al., *Business Culture and Dishonesty in the Banking Industry*, 516 Nature 86 (2014).



interesting to see what that would invoke cognitively. Whatever the finding, I think it would be a glimpse into precisely how—in terms of ethics—the role of lawyering is interpreted by lawyers themselves.

Tying all this together for our purposes is the concept of ethical depletion.<sup>37</sup> Research shows that being ethical is harder cognitive work than giving into temptation. So resisting temptation depletes energy over time; tiredness and stress, in turn, increases the likelihood of further cheating. And corporate lawyers, by all accounts, inhabit workplaces filled with stamina-challenging workloads, along with many other competitive stressors tied to promotion, status and compensation. Greater cheating is associated with falling just short of goals *and* achieving competitive success.<sup>38</sup>

The slippery slope would have less danger were the earliest, largely innocent, steps subject to corrective feedback in terms of being called out for the behavior, or maybe even sanction. That is indeed an important intervention in building good ethics and compliance. But here again, various forces conspire against this kind of discipline. Various cognitive biases affect supervisors and peers so as to make them less willing and able to perceive and act on warning signs.<sup>39</sup> Even when the conduct crosses the line into actual illegality, enforcement resources and incentives are such that only a small fraction of wrongdoing is detected and dealt with via sanction. In that sense, as I've written elsewhere, the absence of negative feedback adds ice to the slope by allowing ethical and

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<sup>37</sup> See David Welsh & Lisa Ordonez, *The Dark Side of Consecutive High Performance Goals: Linking Goal Setting, Depletion and Unethical Behavior*, 121 *Org. Behav. & Hum. Dec. Processes* 79 (2014); Anne Joosten et al., *Being In Control Can Make You Lose Control: The Role of Self-regulation in Unethical Leadership Behavior*, 121 *J. Bus. Ethics* 1 (2014).

<sup>38</sup> See Amos Schurr & Ilana Ritov, *Winning a Competition Predicts Dishonest Behavior*, 113 *Proceedings of the National Academy of Sciences* 1754 (Feb. 16, 2016).

<sup>39</sup> Francesca Gino & Max Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others' Unethical Behavior*, 45 *J. Exp. & Soc. Psych.* 708 (2009).

legal risk-takers to claim greater status and rewards.<sup>40</sup> They become the winners, and their style of behavior—the can-do, aggressive client-server—becomes something to be envied and copied.

I realize that what I have done here is largely to make a somewhat updated case for a behavioral approach to understanding corporate lawyers' ethical behavior—why good lawyers, however sanctimonious, may act less ethically than the professional ideal and do things somewhere along the spectrum of bad acts. This still leaves open what they are conscious of as they misbehave—the degree of culpable intent in any given case. But the more I think about the slippery slope, the more I see it in terms of wearing down the protective defenses of lawyers caught in high stress settings. We should at least think about this dynamic of professional apathy, and the cultural effects it is likely to generate.

### III. IN-HOUSE: LESSONS FROM FINANCIAL ECONOMICS AND CORPORATE GOVERNANCE

The British studies demonstrating such considerable ethical apathy focused on lawyers in elite law firms. As noted, some portion of this can be explained by shifts in the demand for legal services, which may not value long-standing lawyer-client relationships so much as “just in time” specialist interventions, robbing the attorney of the ability to develop the deep familiarity with the client and the build-up of trust and credibility necessary to take a strong ethical stance. My suspicion is that that what we hear from these lawyers is either a form of total depletion at the bottom of the slippery slope or (from the more junior ones who

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<sup>40</sup> Langevoort, *Getting (Too) Comfortable*, supra, at 503-04.

haven't yet succumbed) the expression of an internal firm-wide culture that signals that form of ethical surrender.

That shift in private practice was accompanied by a rapid growth in the power and authority of the in-house general counsel (and her team) as the ones who select and supervise the outsiders.<sup>41</sup> This role expansion also brought with it the ability to internalize more expert competencies, such that outside law firms had less to do (and thus competed more vigorously with each other for the externalized work). So an obvious point to consider is that whatever gatekeeping role might have been played by outside counsel was itself internalized, so that we have to look there for evidence of its presence or absence. In his admirable writings on the contemporary role of the general counsel, Ben Heineman makes the somewhat optimistic claim that in-house counsel “operate seamlessly in business teams, gaining credibility by helping more swiftly to achieve performance goals and by assisting business leaders promote high integrity down the line inside the corporation,” the result of which is a “smaller total legal spend (inside plus outside) for the company.”<sup>42</sup>

Heineman's view runs up against the image of the in-house lawyer as the CEO's loyal consigliere, ready to do what it takes to promote the corporate agenda, not to be anybody's good conscience. While that caricature is surely over-drawn, doubts about internal professional independence abound. For this reason, in-house lawyers have been studied in depth. Most of the work here uses the tools of sociology and cultural anthropology—learning what goes on inside the firm by observing and asking. Nelson and Nelson's tripartite division of in-house lawyers into

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<sup>41</sup> The contributions to this colloquium by Eli Wald and Omari Scott Simmons illuminate these developments.

<sup>42</sup> Ben W. Heineman Jr., *The Rise of the General Counsel*, Harv. Bus. Rev., Sep. 27, 2012. See generally BEN W. HEINEMAN JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016).

“cops, counsel and entrepreneurs” is a justly famous rendering.<sup>43</sup> But as noted earlier, there are doubters who wonder how well ethnography and structured interviews get deeply into what is actually believed and done inside societal institutions as opposed to what is revealed to strangers. Even trained observers may see what they want to see amidst the fog. My intention here is not to weigh in on subjectivity and rigor except to say that the methodological criticism has led some sociologists to a more quantitative, data-driven approach to empirical observation. That has led to an interesting convergence with work in financial economics, which has long used the same quantitative methods as the gold standard for proof as to testing how preferences and behaviors match the predictions of economic theory. In the last decade, and mainly with respect to the general counsel, this has been put to work to understand corporate lawyering.

The results are interesting, if far from determinative. Perhaps the best known is by Morse et al.,<sup>44</sup> who estimate that general counsel are nearly half as important as CEO preferences in determining outcomes over a range of activities involving financial reporting, compliance monitoring and business development. This is a surprisingly large effect. Other work shows how senior corporate lawyers affect accounting choices, reporting quality, voluntary disclosure policy, and insider trading enforcement, mostly for the better as general counsel prominence increases. A natural subject of inquiry is whether the compensation packages of general counsel affect these outcomes, especially when laden with stock options and other incentives. Here, Morse et al. show that high powered incentives cause the general counsel to redirect time and attention away from general compliance monitoring toward strategic business development

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<sup>43</sup> Robert Nelson & Laura Beth Nelson, *Cops, Counsel and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & Soc. Rev. 457 (2000).

<sup>44</sup> Adair Morse et al., *Executive Lawyers: Gatekeepers or Strategic Officers?*, 59 J. L. & Econ. 847 (2016).

activity, which has a more immediate payoff. As a result, they prevent some 25% fewer breaches. So incentives do seem to matter.

This is important research for lawyers to pay attention to,<sup>45</sup> even if some of the assumptions about the law will occasionally cause legally-trained readers to cringe. Much of the discussion refers to the presumed gatekeeper role of the in-house lawyer, suggesting that the good news in terms of disclosure and the like demonstrates good gatekeeper behavior while increasing risk tolerance, for example, evidences bad gatekeeping. But that does not show whether the lawyer is doing anything more than keeping the client out of trouble. Morse et al. even push back against the idea that the shift in attention to more strategic functions is an abandonment of a crucial gatekeeper role, claiming that if more attention to strategy is profitable vis-à-vis the risks of not catching violations, there is nothing necessarily wrong from a corporate governance perspective.

Gatekeeping implies more, however, in terms of a commitment to law-abidingness (and perhaps other integrity-based values) whether or not justified by cost-benefit calculations. We have no direct evidence in these particular studies of pay-offs one way or the other in terms of who benefits or is harmed by more intense monitoring—the firm itself, its managers, shareholders or some more diffuse set of stakeholders?

That, of course, is the subject of corporate governance. While the law is famously murky, there is plenty of rhetoric about the duty of (long-term) shareholder wealth maximization that seems to suggest that individual strategic choices are a matter of business judgment so long as they stay within the known confines

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<sup>45</sup> Not all of the analysis is optimistic. For a more jaundiced view of the evidence, see S. Burcu Avci & H. Nejat Seyhun, *Why Don't General Counsels Stop Corporate Crime?*, 19 U. Pa. J. Bus. L. 751 (2016-17). This draws from evidence on who reports corporate crime, where in-house lawyers are not high on the list.

of the law. If so, then the studies seem to suggest that all is (relatively) well, but any more capacious role for gatekeeping is unrealistic.

But Heineman makes a good case for advice that merges law and ethics, delivered with acute sensitivity to chain of command and business constraints. Public companies, especially, can face harsh legal and reputational consequences by mishandling a manageable threat so that it turns into a disaster for the company. As we saw, there is data supporting the view that general counsels do often act as gatekeepers, so long as their pay packages are properly aligned with that function. Wise CEOs should welcome their advice. By way of one provocative example, the economists Harrison Hong and Inessa Liscovich<sup>46</sup> provide evidence that attention to corporate social responsibility correlates with more leniency in criminal prosecutions against corporations for violations of the Foreign Corrupt Practices Act.

So perhaps the powers that be should appreciate and encourage such ethical proactivity. But that style of general counsel work is contingent on prioritization by the CEO and (arguably) key members of the board of directors. Some of this is directly about agency costs inside the company: the senior management team may, out of preference or pressure, be shifting its focus to the short-term in ways that may instruct the general counsel to be aggressive in response to all threats to the status quo, a threat-rigidity response. In principle, the CEO may want wise counsel about the company's reputational and legal risk. In reality, that may be processed through a very self-serving point of view. While that is surely a risk, there are pressures on boards to take a stronger role in legal compliance, and reforms (in board compensation, for example) that could be employed to motivate this. Only when a general counsel is willing to make the board

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<sup>46</sup> Harrison Hong & Inessa Liskovich, *Crime, Punishment and the Value of Corporate Social Responsibility* (2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2492202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492202).

fully informed of tough situations will there be the support needed to pursue the best interest of the corporation rather than the self-interest of those caught in too deep—even if the result of greater candor is to raise the board’s own liability exposure a bit.<sup>47</sup>

The evidence seems to be that significant numbers of general counsel do their job well, though how they do so remains opaque. But culture matters. Good examples of cultures likely to cut off the would-be gatekeeper are not hard to find—Tesla is a good one, apparently. Elizabeth Pollman has written about the not-unusual company (think Uber) that celebrates its role as disrupter in pushing the envelope—or deliberately crossing the line—on legal compliance in the name of innovation.<sup>48</sup> That was a back-story at Enron, where there was a grandiose internal belief that the company was creating a new paradigm for the delivery of energy around the world in the face of entrenched habits and mindless rules. They deserved to be violated. Of course, the slippery slope is at work here, with a large sucking machine at the bottom speeding up the downward slide as ethical accommodations multiply.

This is just to emphasize the contingency of in-house gatekeeping. Many corporate leaders will see the value; many others don’t. So Heineman is right to urge careful due diligence on general counsel candidates to look deeply into the prevailing climate at any given opportunity. But that is very hard—culture reveals itself only after rites of passage are faithfully completed—especially for someone who really wants the job. And it doesn’t much matter if the person that anxious to be a good gatekeeper

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<sup>47</sup> A reading of the Delaware Supreme Court’s opinion in *City of Birmingham Ret. System v. Good*, 177 A.3d 47 (Del. 2017) is a troubling example of a board that avoids personal liability because they did not know enough, and where the company’s lawyers lack of candor may have contributed. Obviously, good corporate governance sometimes requires putting a board in a tough spot.

<sup>48</sup> E.g., Elizabeth Pollman, *Corporate Disobedience*, 68 *Duke L.J.* – (2018); see also Elizabeth Pollman & Jordan Barry, *Regulatory Entrepreneurship*, 90 *S. Cal. L. Rev.* 383 (2017).

doesn't get that job offer from the corporate thrill-seekers in the first place.

## V. CONCLUSION

Essays about professional responsibility should try to end on a hopeful note, so I can't stop at the previous sentence. Nor do I want to fall prey to naïve (or motivated) cynicism, which psychologists have identified as the common over-estimation of the selfishness (or apathy) of others so as to rationalize responsive self-serving behavior by the observer. Good and bad ethics are contagious, so that a downward spiral in morality can be performative even if the underlying behavioral assumptions are inaccurate and might someday be exposed as such.

That said, I don't think that the institutional structures exist to motivate more than the minimum of gatekeeping by corporate lawyers. I keep coming back to the image of the dimming amygdala. Law firm cultures are doing other work that does not include drawing attention to public needs; individual lawyers become depleted in the face of stress. Clients are to be served, with appreciation for the assignment, not skepticism about its motives. The demand side has won triumphantly. So the supply side (the corporate legal profession itself) is not going to be the best place to find something better.

Rather, we have to look to the demand side, and pose the question of whether corporate governance has something to add. The "business case for ethics" or "ethics pays" approach is problematic, of course—justifying ethics based on its pay-off monetizes morality and deprives it of its core function in promoting goodness as a stand-alone virtue. And so many scandals seem not to give us much hope that good ethics is



pervasive in highly-competitive organizations. I have given much of my scholarly attention to explaining why that is so, thereby polishing my credentials as a pessimist.

But I believe that this perspective, while solidly based and descriptively accurate, is socially constructed and thereby contingent. That's where the financial economics work is so interesting—there are, it seems, significant numbers of firms that welcome good gatekeeping, just as there are many more that do not. The corporate social license (i.e., the demands of publicness) is increasingly difficult to earn, and easily put at risk. A good general counsel is a prized commodity in managing that risk, if supported by the CEO, the board and—under the best of conditions—the internal corporate culture. Ben Heineman's model, in other words.

That model goes in competition with the opposite: the attack dog general counsel willing to do whatever it takes to win, supported by like-minded bosses and more grease-laden cultures. Many will confidently place their bets on the latter, and they may be right, especially in the zeitgeist of today's ill-spirited political economy. But I've seen enough research on sustainability, human capital, halo effects and the like to, for now, hold onto my chips and, if the odds make it worthwhile, even bet some on the good guys. In other words, I can dimly see a future (without predicting one) where the norms of corporate governance shift to favor firms with genuinely influential general counsels who speak both law and ethics.<sup>49</sup> If so, given the demand side dominance of the profession, the image of the lawyer-gatekeeper may be reawakened throughout the profession, shaking it out of its apathy and nudging it off the slippery slope.

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<sup>49</sup> This is not an entirely new hope. See Harwell Wells, "All Lawyers are Somewhat Suspect:" *A.A. Berle and the Modern Legal Profession*, 42 *Seattle U. L. Rev.* 641 (2019).

