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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\**

## INTRODUCTION

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.<sup>2</sup> By 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 these professionals?” 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>3</sup> As a corporate/securities scholar, I was fascinated by the gatekeeper question and, having been at the Securities and Exchange Commission (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

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1. David E. Rosenbaum, *The B.C.C.I. Scandal; Charm for Plebeians and Patricians*, N.Y. TIMES (July 30, 1992), <https://www.nytimes.com/1992/07/30/business/the-bcci-scandal-charm-for-plebeians-and-patricians.html> [<https://perma.cc/S3LF-NG25>].

2. *See id.*

3. *See* Lincoln Sav. & Loan Ass’n v. Wall, 743 F. Supp. 901, 920 (D.D.C. 1990). 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 generally* Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986).

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>4</sup>

To my knowledge, this was the first article to apply social cognition research to the professional responsibilities of corporate lawyers.<sup>5</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>6</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 palpable resistance from orthodox law and economics scholars arguing that the heuristics, biases, and other cognitive traits that were being identified with such fanfare had no sustainability in competitive marketplace settings that bountifully rewarded rationality and harshly punished flawed thinking.<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,

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4. See generally 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).

5. There was already influential literature on the "law and society" movement looking at the beliefs and behaviors of corporate lawyers by sociologists and cultural anthropologists, including Robert Nelson's monumental book *Partners with Power*. See generally ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); *infra* notes 64–68 and accompanying text.

6. In 1998, I published a literature review of this early work, which had already grown in prominence and quantity. See generally Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

7. See Roberta Romano, *A Comment on Information Overload, Cognitive Illusions, and Their Implications for Public Policy*, 59 S. CAL. L. REV. 313, 319–24 (1986). Richard Posner later elaborated on this theme. Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998).

8. See, e.g., PAUL BREST & LINDA H. KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* (2010); Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE W. RES. L. REV. 975 (2019); see also Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411 (2008); Catherine G. O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Perspective*, 15 NEV. L.J. 671 (2015); Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639 (2015); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941 (2007); Jennifer K. Robbennolt, *Behavioral*

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 subdiscipline of its own.<sup>9</sup>

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—maybe even a sociopathic choice—of giving into pressure and temptation.<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 disinterested in any further public-regarding ethical dimension to their practice.<sup>13</sup> Clients are in charge: full stop. The authors saw some psychological distancing going on but were struck by how candidly the elite lawyers roundly rejected the

*Ethics Meets Legal Ethics*, 11 ANN. REV. L. & SOC. SCI. 75 (2015); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013).

9. See, e.g., Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 89–91 (2012); Robbennolt, *supra* note 8, at 76–77.

10. For my book-length treatment of these 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 WIS. L. REV. 495.

11. I was also jolted reading an article by a research team including Linda Klebe Treviño, a preeminent 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. See generally Niki A. den Nieuwenboer et al., *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 ambiguation 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. *Id.* at 781.

12. See generally 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'Y 83 (2019); Steven Vaughan & Emma Oakley, “Gorilla Exceptions” and the Ethically Apathetic Corporate Lawyer, 19 LEGAL ETHICS 50 (2016).

13. See Oakley & Vaughan, *supra* note 12, at 106; Vaughan & Oakley, *supra* note 12, at 60–61.

idea that ethics has (or should have) much relevance at all to their work, given so much professional rhetoric otherwise.<sup>14</sup> 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 harder to stop. Looking at corporate lawyers’ professional responsibility through this lens has some interesting and, as far as I can tell, underexplored 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 many scholars and practitioners have written about.<sup>15</sup> But there has emerged in recent years a new 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>16</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 counsel 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.

#### I. 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

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14. See Vaughan & Oakley, *supra* note 12, at 74–75.

15. See, e.g., Ben W. Heineman, *The Rise of the General Counsel*, HARV. BUS. REV. (Sept. 27, 2012), <https://hbr.org/2012/09/the-rise-of-the-general-counsel> [<https://perma.cc/2B8N-HXXC>].

16. See *infra* notes 63–81 and accompanying text.

forces them into acquiescence. Absent countervailing regulatory or disciplinary pressures, 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>17</sup>

To be sure, we would not expect corporate lawyers to willfully facilitate client fraud when it exposes them to serious 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—when professional judgments lead apathetic lawyers to sit idly while clients threaten the common good, lawfully or not. In this Part, 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 are not so many bad apples as bad barrels.<sup>18</sup> That is to say, ordinary (nonsociopathic) people are naturally inclined to be reasonable and honest but easily tempted otherwise by self-serving inferences, especially in the face of strong situational incentives and pressures.<sup>19</sup> People cheat less than cold economic calculations would suggest but more than they should under common ethical norms.<sup>20</sup> The main research task is to discover, by manipulating situational variables, how and when ordinary behavior turns better or worse than this baseline. The results over the past four decades or so provide 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>21</sup>

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 large amount of automaticity to mental processing,

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17. See, e.g., JOHN C. COFFEE JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* (2006); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 *STAN. L. REV.* 1867 (2008); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 *MD. L. REV.* 869 (1990).

18. See Linda Klebe Treviño et al., *(Un)Ethical Behavior in Organizations*, 65 *ANN. REV. PSYCHOL.* 635, 648–49 (2014).

19. See *id.* at 647–48.

20. See *id.* at 642–43.

21. See generally MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* (2011); YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR* (2018).

only partly (if that) subject to the force of cognitive will.<sup>22</sup> 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.<sup>23</sup> This is pure blind-spot territory, such that the individual or group's good intentions go unchallenged.<sup>24</sup> 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 do not really want to know).<sup>25</sup> This is often referred to as ethical fading.<sup>26</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>27</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 conscious awareness,<sup>28</sup> like bad faith, and certainly points in the direction of lessened culpability even 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. 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. Ongoing work in organizational behavior and compliance design tries hard to overcome all this, and there are some promising steps.<sup>29</sup> But it

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22. Ann Tenbrunsel & David Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 232 (2004).

23. *See id.* at 225–26, 233.

24. *See id.* at 233.

25. *See id.* at 230, 233.

26. *See generally id.*

27. 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 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27, 28 (1976).

28. *See* LANGEVOORT, *supra* note 10, at 43–45.

29. *See* Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV. (Mar.–Apr. 2018), <https://hbr.org/2018/03/why-compliance-programs-fail> [<https://perma.cc/MXJ3-Z64X>]; *see also* David Hess, *Ethical Infrastructure and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317 (2017).

remains a challenge, especially in high-velocity business environments populated by aggressive risk-takers.<sup>30</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? Asking wrongdoers to recall their thought processes—the approach of Eugene Soltes’s important book *Why They Do It: Inside the Mind of the White-Collar Criminal*<sup>31</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>32</sup> others more jaded.

#### A. *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.<sup>33</sup> But they will engage in minor transgressions, finding ample ways to justify the small steps as not really improper at all.<sup>34</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 by the revised definition of ethical or legal acceptability. And so on, as what is 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

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30. See Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 952 (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. 129, 139–40 (2018).

31. See generally EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL* (2016).

32. *Id.* at 58 (neuroscience perspectives); *id.* at 155 (cognitive dissonance); *id.* at 257–58 (self-deception).

33. See Treviño et al., *supra* note 18, at 647–48.

34. David T. Welsh et al., *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 J. APPLIED PSYCHOL. 114, 115 (2015).



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>35</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>36</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 overoptimism, an inflated sense of personal (or senior management team) efficacy.<sup>37</sup> Firms with overconfident chief executive officers (CEOs) and chief financial officers (CFOs), they found, were more likely to take the first steps, and end up in trouble.<sup>38</sup> 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—a trait that is not entirely rational but nonetheless promotes competitive success.<sup>39</sup> It is thus a counterexample to the idea that marketplace pressures wash out all biases that interfere with the economists' assumption of rationality.<sup>40</sup>

I have long relied on both overconfidence and the slippery slope in making the case for behavioral ethics.<sup>41</sup> In a strikingly evocative way, neuroscientists have now joined in.<sup>42</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).<sup>43</sup> That emotions-driving portion of the brain plays a big role in doing what is right.<sup>44</sup> But if there is a small step toward cheating, the level of activation goes down slightly in the next opportunity.<sup>45</sup> This goes on and

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35. See generally John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177 (2005).

36. See generally Catherine M. Schrand & Sarah L. C. Zechman, *Executive Overconfidence and the Slippery Slope to Financial Misreporting*, 53 J. ACCT. & ECON. 311 (2012).

37. See *id.* at 312.

38. See *id.*

39. See *id.* at 313.

40. See *supra* note 7 and accompanying text.

41. See LANGEVOORT, *supra* note 10, at 26–27, 35–37.

42. See generally Neil Garrett et al., *The Brain Adapts to Dishonesty*, 19 NATURE NEUROSCIENCE 1727 (2016). For a commentary, see generally Jan B. Engelmann & Ernst Fehr, *The Slippery Slope of Dishonesty*, 19 NATURE NEUROSCIENCE 1543 (2016).

43. See Garrett et al., *supra* note 42, at 1731.

44. See *id.*

45. See *id.* at 1727, 1731.

on, down the slippery slope.<sup>46</sup> Gradually, the amygdala's electrical energy dims to indifference.<sup>47</sup>

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 partway 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 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, people become willing and able to admit that they were cheating from the start but had largely stopped caring (i.e., ethical apathy).

### B. Corporate Lawyers

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 ethical compromises are everyday occurrences, lawyers do seem to get into legal and ethical muck often enough.<sup>48</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 resonated among members of the public inclined to see lawyers as fixers and hired guns.<sup>49</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

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46. *See id.*

47. *See id.*

48. For example, insider trading even when the lawyer in question is the company's insider trading compliance officer. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Former Senior Attorney at Apple with Insider Trading (Feb. 13, 2019), <https://www.sec.gov/news/press-release/2019-10> [<https://perma.cc/MH5P-94J5>].

49. *60 Minutes: Anonymous, Inc.* (CBS television broadcast Jan. 31, 2016), <https://www.cbsnews.com/news/hidden-camera-investigation-money-laundering-60-minutes/> [<https://perma.cc/EUJ3-A9WM>]. This led to bar disciplinary proceedings against some of those caught in the sting.

corporate lawyers reveal? How willing are lawyers to intentionally 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 counterbalancing demands of zealous representation, confidentiality, and loyalty. Ample research shows that people will cheat in the interest of significant others to a greater extent than for their own good.<sup>50</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 lawbreakers 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 could not stop once committed to the course of action (a form of cognitive dissonance).<sup>51</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>52</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>53</sup> There is a very famous study of cheating behavior, where the subjects were all European bankers.<sup>54</sup>

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50. See generally Francesca Gino et al., *Self-Serving Altruism?: The Lure of Unethical Actions That Benefit Others*, 93 J. ECON. BEHAV. & ORG. 285 (2013).

51. See Clinton Free & Pamela R. Murphy, *The Ties That Bind: The Decision to Co-offend in Fraud*, 32 CONTEMP. ACCT. RES. 18, 42–43 (2015); see also SOLTES, *supra* note 31, at 154–55.

52. See Yuval Feldman & Doron Teichman, *Are All Legal Probabilities Created Equal?*, 84 N.Y.U. L. REV. 980, 984–85 (2009); see also FELDMAN, *supra* note 21, at 168–89.

53. SOLTES, *supra* note 31, at 134–35.

54. See generally Alain Cohn et al., *Business Culture and Dishonesty in the Banking Industry*, 516 NATURE 86 (2014).

Their conduct in the control conditions were little different from other professionals—moderate cheating behavior at most.<sup>55</sup> But one group of subjects had their identities as bankers primed just before the testing, and this group had higher rates of dishonesty.<sup>56</sup> I am not aware that a comparable study has been done of lawyers, but it would be 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>57</sup> Research shows that being ethical is harder cognitive work than giving in to temptation.<sup>58</sup> Resisting temptation depletes energy over time; tiredness and stress, in turn, increase the likelihood of further cheating.<sup>59</sup> 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 both falling just short of goals *and* achieving competitive success.<sup>60</sup>

The slippery slope would have less danger if the earliest, largely innocent, steps are subject to corrective feedback in terms of being called out for the behavior, or maybe even sanctioned. 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>61</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 have written elsewhere, the absence of negative feedback adds ice to the slope by allowing ethical and legal risk-takers to claim greater status and rewards.<sup>62</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

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55. *See id.*

56. *See id.*

57. *See generally* Anne Joosten et al., *Being “in Control” May Make You Lose Control: The Role of Self-Regulation in Unethical Leadership Behavior*, 121 J. BUS. ETHICS 1 (2014); David T. Welsh & Lisa D. Ordóñez, *The Dark Side of Consecutive High Performance Goals: Linking Goal Setting, Depletion, and Unethical Behavior*, 121 ORGANIZATION BEHAV. & HUM. DECISION PROCESSES 79 (2014);.

58. *See, e.g.*, Joosten et al., *supra* note 57, at 1–2.

59. *See id.*

60. *See* Amos Schurr & Ilana Ritov, *Winning a Competition Predicts Dishonest Behavior*, 113 PROC. NAT'L ACAD. SCI. 1754, 1757 (2016).

61. Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others' Unethical Behavior*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 708, 716 (2009).

62. *See* Langevoort, *supra* note 10, at 503–04.

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.

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

The British studies demonstrating such considerable ethical apathy focused on lawyers in elite law firms.<sup>63</sup> 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 buildup of trust and credibility necessary to take a strong ethical stance. My suspicion is 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 have not 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>64</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 would have to compete more vigorously with each other for the externalized work).<sup>65</sup> So, an obvious point to consider is that whatever gatekeeping role might have been played by outside counsel was internalized along with the competencies. 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>66</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 overdrawn, doubts about internal professional independence abound.<sup>67</sup> For this reason, in-house lawyers have been studied in depth. Most of the work

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63. *See supra* notes 10–11 and accompanying text.

64. The contributions to this Colloquium by Eli Wald and Omari Scott Simmons illuminate these developments.

65. *See generally* Gilson, *supra* note 17 (exploring the consequences of this shift).

66. Heineman, *supra* note 15; *see also* BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016).

67. *See generally* Kim, *supra* note 8.

here uses the tools of sociology and cultural anthropology—learning what goes on inside the firm by observing and asking. Robert Nelson and Laura Beth Nielson’s tripartite division of in-house lawyers into “cops, counsel, and entrepreneurs” is a justly famous rendering.<sup>68</sup> More recently, however, the study of lawyers in firms has become more quantitative and data-driven.

The results from this new wave of lawyer studies are interesting, if far from determinative. Perhaps the best known is by Adair Morse, Wei Wang, and Serena Wu, 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.<sup>69</sup> 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.<sup>70</sup> 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, the authors show that high-powered incentives cause the general counsel to redirect time and attention away from general compliance monitoring toward strategic business development activity, which has a more immediate payoff.<sup>71</sup> As a result, they prevent some 25 percent fewer breaches.<sup>72</sup> So incentives do seem to matter.

This is important research for lawyers to pay attention to,<sup>73</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, Wang, and Wu 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

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68. See Robert Nelson & Laura Beth Nielson, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC’Y REV. 457, 460 (2000).

69. See generally Adair Morse et al., *Executive Lawyers: Gatekeepers or Strategic Officers?*, 59 J.L. & ECON. 847 (2016).

70. See, e.g., Justin J. Hopkins et al., *Corporate General Counsel and Financial Reporting Quality*, 61 MGMT. SCI. 129, 130 (2015); Vikramaditya Khanna, *An Analysis of Internal Governance and the Role of the General Counsel in Reducing Corporate Crime*, in RESEARCH HANDBOOK ON CRIME AND FINANCIAL MISDEALING 282, 291–94 (Jennifer Arlen ed., 2018) (reviewing empirical studies).

71. See Morse et al., *supra* note 69, at 874–75.

72. *Id.* at 851.

73. Not all of the analysis is optimistic. For a more jaundiced view of the evidence, see generally S. Burcu Avci & H. Nejat Seyhun, *Why Don’t General Counsels Stop Corporate Crime?*, 19 U. PA. J. BUS. L. 751 (2017). This draws from evidence on who reports corporate crime, where in-house lawyers are not high on the list.

profitable vis-à-vis the risks of not catching violations, there is nothing necessarily wrong from a corporate governance perspective.<sup>74</sup>

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 payoffs 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 of the law.<sup>75</sup> 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.<sup>76</sup> 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 counsel do often act as gatekeepers, so long as their pay packages are properly aligned with that function.<sup>77</sup> Wise CEOs should welcome their advice. By way of one provocative example, economists 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.<sup>78</sup>

So perhaps those in power should appreciate and do more to 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 fully informed of tough situations will there be the support needed to pursue the best interest of the

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74. See Morse et al., *supra* note 69, at 851.

75. See, e.g., *infra* note 79 and accompanying text.

76. See generally Heineman, *supra* note 15.

77. See *supra* notes 69–71 and accompanying text.

78. See generally Harrison Hong et al., Crime, Punishment and the Value of Corporate Social Responsibility (Oct. 14, 2019) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2492202](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492202) [<https://perma.cc/J64C-AUJX>].

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>79</sup>

While the evidence discussed above seems to be that significant numbers of general counsel do their job well, how they do so remains opaque. The culture channel surely matters. Elizabeth Pollman has written about the not-unusual company (think Uber) that celebrates its role as the disrupter in pushing the envelope—or deliberately crossing the line—on legal compliance in the name of innovation.<sup>80</sup> That was a backstory 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.<sup>81</sup> 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 will not. 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 does not much matter if the person that anxious to be a good gatekeeper does not get that job offer from the corporate thrill-seekers in the first place.

#### CONCLUSION

Essays about professional responsibility should try to end on a hopeful note, so I cannot stop at the previous sentence. Nor do I want to fall prey to naïve (or motivated) cynicism, which psychologists have identified as the common overestimation of the selfishness (or apathy) of others so as to rationalize responsive self-serving behavior by the observer.<sup>82</sup> 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 do not 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

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79. A reading of the Delaware Supreme Court’s opinion in *City of Birmingham Retirement & Relief System v. Good* 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. 177 A.3d 47, 64 (Del. 2017). Obviously, good corporate governance sometimes requires putting a board in a tough spot.

80. See, e.g., Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709 (2019); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383 (2017).

81. See LANGEVOORT, *supra* note 10, at 37.

82. See generally Dale T. Miller & Rebecca K. Ratner, *The Disparity Between Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53 (1998).



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 payoff 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 counsel who speak both law and ethics.<sup>83</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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83. This is not an entirely new hope. See Harwell Wells, “All Lawyers Are Somewhat Suspect”: *Adolf A. Berle and the Modern Legal Profession*, 42 SEATTLE U. L. REV. 641, 660–62 (2019).