

Michigan Law Review

Volume 118 | Issue 6

2020

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Recommended Citation

Janice Nadler, *Ordinary People and the Rationalization of Wrongdoing*, 118 MICH. L. REV. 1205 (2020).
Available at: <https://repository.law.umich.edu/mlr/vol118/iss6/14>

<https://doi.org/10.36644/mlr.118.6.ordinary>

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ORDINARY PEOPLE AND THE RATIONALIZATION OF WRONGDOING

*Janice Nadler**

THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR. By *Yuval Feldman*. Cambridge, UK: Cambridge University Press. 2018. Pp. xvii, 234. \$34.99.

INTRODUCTION

In March 2019, over fifty people were criminally charged with participating in a scheme to gain fraudulent student admissions to various U.S. universities. The investigation—dubbed Operation Varsity Blues—uncovered fabricated athletic portfolios, bribes paid to athletic coaches and university administrators, money laundered through a fake charity, and impostors paid to cheat on standardized tests and take online courses to pad high school transcripts.¹ At the center of the scheme was an “admissions consultant” who acted as a fixer and whose clients consisted of dozens of wealthy parents who paid him to lie, cheat, bribe, and defraud their children’s way into elite universities.² The parents included real estate developers, CEOs, investment executives, lawyers, doctors, and prominent Hollywood stars.³

How did these individuals end up engaging in plainly nefarious felony criminal offenses? There is no backstory here of economic, educational, or social deprivation; to the contrary, the parents were some of the most advantaged individuals in the nation, and yet they convinced themselves they needed more. Why did these occupants of society’s highest professional and

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1. See Graham Kates, *Lori Loughlin and Felicity Huffman Among Dozens Charged in College Bribery Scheme*, CBS NEWS (Mar. 12, 2019, 8:35 PM), <https://www.cbsnews.com/news/college-admissions-scandal-bribery-cheating-today-felicity-huffman-arrested-fbi-2019-03-12/> [<https://perma.cc/H8DU-PD7J>].

2. *Id.*

3. *Who Are the 33 Parents Charged in the College Admissions Cheating Scandal?*, WALL STREET J. (Mar. 12, 2019, 11:13 PM), <https://www.wsj.com/articles/who-are-the-33-parents-charged-in-the-college-admissions-cheating-scandal-11552443487> (on file with the *Michigan Law Review*).

financial ranks decide to involve themselves in a criminal scheme when there was so much at risk for them? How did they overlook or simply ignore moral red flags when they decided to participate? Some of the perpetrators were likely fully aware of both the criminal and unethical nature of their behavior. But others seem to have participated by convincing themselves that this is how the “system” works.⁴ How did they blind themselves to the moral meaning of their behavior?

It is tempting to explain events like these as the simple product of the behavior of a few bad apples. But in his comprehensive book *The Law of Good People: Challenging States’ Ability to Regulate Human Behavior*, Yuval Feldman⁵ counters this simplistic explanation with a more nuanced, evidence-based account of wrongdoing. Feldman’s thesis is that misconduct is often the product of people who are more ordinary than they are evil, who slide unthinkingly into unethical and even criminal behavior by blinding themselves to the ethical implications of their actions.

Feldman’s thesis is evidence based because it relies upon a body of empirical research in the emerging field of Behavioral Ethics. This research demonstrates—across a range of different contexts and across a wide variety of individuals—that wrongdoing is remarkably easy to provoke, in part because people fail to fully recognize the ethical implications of their actions. The perpetrators of everyday wrongs glide seamlessly into unethical behavior by constructing rationales that allow them to maintain a positive view of themselves. Thus, a city official who accepts a “gift” of expensive Super Bowl tickets from a contractor bidding on a city project can maintain his self-image as a good person by mentally separating the act of accepting tickets (which he just did) from the act of accepting cash (which he would never do), as if there were some meaningful difference.⁶ In this context, these constructed categories (e.g., tickets versus cash) make it easier for actors to convince themselves that their acts are morally unproblematic.

The findings of Behavioral Ethics have received attention by organizational behavior scholars and now are being taught routinely in business schools, but they have yet to be taken up in a systematic way by legal schol-

4. See Vanessa Romo, *Actress Felicity Huffman Sentenced to 14 Days in College Admissions Scandal*, NPR (Sept. 13, 2019, 3:44 PM), <https://www.npr.org/2019/09/13/759256335/actress-felicity-huffman-sentenced-to-14-days-in-college-admissions-scandal> [<https://perma.cc/F5V9-38XT>].

5. Mori Lazarof Professor of Legal Research, Bar-Ilan University Faculty of Law.

6. See DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2013). Ariely placed either a six pack of Coke or a plate with six one-dollar bills in several communal dormitory refrigerators on a college campus. Within a few days, nearly all of the Cokes were gone but none of the dollar bills were taken. *Id.* at 32. People are more likely to behave dishonestly to gain nonmonetary objects than actual money. In a laboratory experiment, participants were paid according to the number of math problems they reported solving. About twice as many participants cheated when they were paid in tokens (which they immediately exchanged for cash at another table a few feet away) than when they were paid directly in cash. Nina Mazar, et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MARKETING RES. 633 (2008).

ars. The empirical Behavioral Ethics literature, though fairly new, has now developed sufficiently that there are some lessons that can be drawn from it, not only for business leaders managing organizations but also for legal institutions managing compliance with law.

In his book, Feldman argues that people's limited awareness of the unethical nature of their behavior requires redesigning legal rules to anticipate this aspect of human psychology. Indeed, there are domains in which government already seems to have designed systems to prevent inevitable unlawful behavior by ordinary people. For example, when given the opportunity many people underpay taxes legally owed, often because they convince themselves that others are behaving similarly and so underpaying is socially and ethically normative. But when the opportunity to underpay is removed (through, for example, mandatory withholding of tax from employee wages), compliance becomes highly likely.⁷ In this way, the question of law's reach extends not only to punishing bad behavior and compensating victims after the fact but also to preventing people from committing wrongful conduct in the first place, through mechanisms other than threat of punishment.

Part I of this Review examines Feldman's synthesis of existing Behavioral Ethics research and his analysis of its implications for law. A central claim of the book is that law should devote more resources to regulating "ordinary unethicity"—contract breach, tortious conduct, property-rights violations, public corruption, tax cheating, and corporate misconduct (p. ix). Law currently is structured to best address serious harms carried out by individuals explicitly committed to advancing their material self-interests. But most wrongdoing is committed by individuals who see themselves as simply "bend[ing] the laws within the confines of their conscience" (p. x). Feldman's bottom line is that because people are often unaware of the moral meaning of their behavior, law must focus on identifying and regulating that behavior before the fact, rather than punishing it afterwards.

Part II explores an important category of wrongdoing for which the traditional regulatory approach of threats of punishment *ex post* might in many cases be suboptimal: corruption. This category provides examples of settings where actors are difficult to deter within standard enforcement frameworks because their motivations are complex. Concern for the well-being of others or of their organization can tempt people to cheat on behalf of others, especially when they themselves derive some benefit, but even sometimes when they do not. Thinking about the benefits to others makes cheating easier to rationalize because helping others does not feel selfish. Feelings of empathy exacerbate this temptation, and cheating in groups can also enhance this dynamic.

Even when people are acting solely on behalf of themselves, they can be more inclined to cheat depending on their relative position. Some corruption occurs in the context of power, whether it is economic, social, or con-

7. See p. 86.

textual. An individual's high social class and power increase their likelihood of engaging in unethical behavior that benefits the self and is facilitated by euphemistic language. Corruption is also enabled by gray zones (such as university admissions advantages for important donors) that are constructed to benefit those in positions of social and economic power. The structure of these situations permits these actors to convince themselves that their acts are ethical (or simply outside the domain of morality).

Part III offers a regulatory approach that goes beyond traditional legal enforcement practices. Although I join Feldman in his call to consider approaches to legal regulation better suited to shaping behavior *ex ante*, it is my contention that this approach should not be limited to a discrete group of "good people" that, according to Feldman, regulators have overlooked. Instead, I will argue that the motivation to see oneself as ethical and to interpret one's own behavior in the most flattering light is pervasive. As a result, the power of denial undermines the deterrent power of law across a wide variety of people and situations. In the end, it is not clear that Feldman's central framework of three types of people (erroneous wrongdoers, situational wrongdoers, and bad people) is especially useful for the project of rethinking legal regulation. What is clear, however, is that law must broadly take account of the emerging Behavioral Ethics evidence. Regulation must be designed to shape environments to make it difficult to slide unconsciously into unethical behavior *ex ante*.

Building on my earlier work on expressive law and social norms,⁸ I develop an alternative conception of compliance that supplements threatened sanctions with leveraging the expressive power of law to decrease the likelihood that people will deceive themselves about the social and ethical meaning of their behavior. Theories of expressive law posit that law can influence behavior through means that go beyond the legal sanctions threatened for violation.⁹ I will specifically focus on informational expressive law: the idea that the state can deploy law to provide information that can change individual beliefs and social norms, which in turn can shape behavior (p. 172). By leveraging the informational function of expressive law, the state can identify situations in which individuals are likely to fail to fully appreciate the meaning of their behavior. Identifying and sorting "good people," I argue, is less important than identifying situations and structures that are amenable to legal interventions that leverage social norms.

8. Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 241 (Eyal Zamir & Doron Teichman eds., 2014); Richard H. McAdams & Janice Nadler, *Testing the Focal Point Theory of Legal Compliance: The Effect of Third-Party Expression in an Experimental Hawk/Dove Game*, 2 J. EMPIRICAL LEGAL STUD. 87 (2005); Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 LAW & SOC. INQUIRY 60 (2017).

9. RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS (2015).

The Law of Good People correctly points out that the more ordinary unethicity of “good people” (such as corporate misconduct, contract breach, and tax cheating) should be targeted for attention using a modified set of enforcement tools from those used to punish more serious misconduct (p. ix). At the same time, the general claim that the law should focus more attention on the bad behavior of “good people” glosses over the patterns of excess attention of law in the form of relentless criminalization of the common predicaments of poor people and especially poor people of color. This overenforcement is perversely coupled with underenforcement of serious crime within the same communities. Just as expressive law can be deployed to root out ordinary unethicity, it also holds promise for affirming the worth of members of socially disempowered communities by stepping up state responses to violence¹⁰ and stepping down state deprivation of individual liberty as a means for raising revenue and generally asserting social control.¹¹

I. BEHAVIORAL ETHICS AND LAW

One of the central building blocks of Behavioral Ethics involves a tenet of human psychology: people seek to promote their own self-interest to the extent that they can continue to feel good about themselves (p. 11). The reason for this fundamental tendency is that individuals sometimes find themselves torn between two competing motivations: gaining from the benefits of wrongdoing versus maintaining a positive view of oneself (p. 50). These dueling motivations bend and cave to accommodate one another. For example, we follow a questionable act with a good deed to prove to ourselves that we’re good (pp. 50–51). Sometimes we even follow a good deed with a questionable act because we’ve “earned it” or established ourselves as good and moral.¹²

The more established field of Behavioral Law and Economics is concerned with mapping flaws in human cognition and showing how they cause decisionmakers to depart from optimal decisions (p. 33). Examples include the tendency to value property more when one already owns it than when one has not yet acquired it (the endowment effect) and the tendency to perceive an outcome as more inevitable after the fact than before the fact (hind-

10. Janice Nadler, “*Deserve Got Nothin’ to Do with It: The Value of Homicide Victims in The Wire*,” 2018 U. CHI. LEGAL F. 163, 186–87; Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1163–64 (2018) (reviewing JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017)).

11. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018).

12. P. 51; see also Benoit Monin & Alexander H. Jordan, *The Dynamic Moral Self: A Social Psychological Perspective*, in PERSONALITY, IDENTITY, AND CHARACTER: EXPLORATIONS IN MORAL PSYCHOLOGY 341 (Darcia Narvaez & Daniel K. Lapsley eds., 2009).

sight bias). Behavioral Ethics, by contrast, focuses on how people make decisions to engage in behavior with an ethical dimension (p. 3).

Perhaps the most important distinction between Behavioral Law and Economics on the one hand and Behavioral Ethics on the other is the scope of the concept of self-interest (p. 34). The narrow material self-interest assumed by Behavioral Law and Economics is expanded by Behavioral Ethics researchers to also encompass “a need to maintain a positive and coherent view of the self” (p. 35), especially with regard to being a good and honest person. Further, Behavioral Ethics approaches recognize that this motivation often operates beneath the level of conscious awareness, with people making choices in order to maintain their positive self-concept without ever realizing that they have this motivation or that it is influencing them (p. 35).

One key concept is that of limited awareness: people often “do wrong without fully grasping the meaning of their behavior” (p. 40). Because self-interested behavior is often largely automatic, individuals often interpret ethical situations through an egocentric lens without realizing it (pp. 44–45). Thus, they find ways to promote their material self-interest while also protecting their ethical self-image. One strategy is the ostrich head in the sand, in which people avoid learning the full (unethical) consequences of decisions that benefit themselves (p. 41). This gives people “moral wiggle room” to deny, even if just to themselves, that they are engaging in unethical behavior (p. 50). For example, a person who suspects he might have an STD might avoid getting tested so that he can continue to have sex without having the duty to inform each sexual partner of his status.¹³

Moral disengagement often plays a pivotal role in decisions to behave unethically (pp. 51–53). For example, key leaders of Penn State University repeatedly referred to Jerry Sandusky’s rape of a young boy on campus as “horsing around” during the time in which they decided not to report it to law enforcement.¹⁴ Denigrating, dehumanizing, and blaming the victim is also a way of morally disengaging from one’s own unethical behavior. The opportunity to deploy a placebic reason for acting also encourages people to frame their decisions as morally unproblematic. For example, participants in laboratory experiments played a game in which they were awarded a cash payment that depended on the roll of a die. Participants were asked to privately roll the die and report the results. Because they knew that the outcome would not be verified, a certain percentage of participants cheated on this task. But the frequency of cheating increased substantially when participants were asked to roll the die twice and report only the first roll. Fabricating a number from thin air was apparently more difficult to morally disengage

13. Cf. Jason Dana et al., *What You Don’t Know Won’t Hurt Me: Costly (but Quiet) Exit in Dictator Games*, 100 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 193 (2006) (reporting a study suggesting that people are more likely to choose a route to selfish behavior that ensures that the person affected remains unaware of being taken advantage of, even if choosing this route is more costly).

14. Kristen Lucas & Jeremy P. Fyke, *Euphemisms and Ethics: A Language-Centered Analysis of Penn State’s Sexual Abuse Scandal*, 122 J. BUS. ETHICS 551 (2014).

from than taking the best of two actual rolls of the die (p. 53). Moral disengagement and other types of moral self-deception reduce psychological discomfort by permitting the decisionmaker to maintain moral self-regard.

Feldman argues that securing compliance with law requires focusing on people's motivations for acting as well as on their level of awareness that they are engaging in some form of wrongdoing (p. 61). For this purpose, he identifies three mindsets of wrongdoing: (1) "Bad" calculative people who "deliberately engage in unethical behavior" with full awareness of its wrongfulness, (2) "[S]ituational wrongdoers" who engage in unethical actions but who maintain their self-concept as a good person by deploying rationalizations, and (3) "[E]rroneous wrongdoers" who do not actively seek rationalizations for their wrongdoing because it never occurs to them that their acts might be wrong (p. 61). Feldman is careful to point out that these categories do not always have defined boundaries; the purpose is to design enforcement mechanisms that take into account these varying mindsets (p. 61).

Given these three mindsets underlying wrongdoing, it becomes apparent that the economic model of deterrence is not well suited to influence the behavior of situational wrongdoers and erroneous wrongdoers. Threats of punishment in these cases are less effective because punishment is perceived as being reserved for wrongdoers, which these individuals are convinced refers to other ("bad") people (pp. 68–69). Social norms can sometimes serve as guidelines for maintaining one's positive moral self-concept, and legal regulation can help develop and enforce social norms. Regulatory designs that respond to various motivations for wrongdoing in a context-sensitive fashion can address unethicity that does not fully emerge into conscious awareness (p. 86). These include structural solutions such as mandatory withholding of tax from wages, breath alcohol ignition lock devices to prevent drunk driving, and traffic engineering solutions that discourage speeding, such as speed bumps, traffic circles, chevrons (a pattern that creates the illusion of moving faster, causing drivers to slow down), and rippled shoulders. Structural solutions have only just begun to be explored.¹⁵ At the same time, structural solutions cannot feasibly prevent all misconduct, and legal policymakers need to consider other enforcement mechanisms to take into account people's limited awareness of the unethical nature of their own wrongdoing.

The tension between promoting one's material self-interest and protecting one's ethical self-image is often resolved through means that do not reach the level of conscious awareness. For example, when a person perceives that others are engaging in an unethical action, whether that perception is correct or not, that individual is more likely to also engage in it (p. 106). Law sometimes can counteract this perception by indicating societal consensus. Both legislation and court decisions sometimes can signal what is socially approved and disapproved. For example, the legalization of same-sex

15. See, e.g., Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 657 (2006).

marriage in the United States came from a combination of state court decisions and state legislation, culminating in the U.S. Supreme Court ruling striking down state laws banning same-sex marriage in *Obergefell v. Hodges* in 2015.¹⁶ All the while, law reflected increasing public support for same-sex marriage.¹⁷ By signaling public opinion, law can express social norms and can increase compliance by encouraging people to internalize these norms.

Feldman addresses the question of how governments can encourage automatic ethical behavior (Chapter Eight). The Behavioral Ethics literature has begun to provide insight regarding the circumstances under which individuals are likely to be unaware of the ethical dimension of their behavior. In some of these situations, expressive law can function to highlight the prevailing social norm, undermining the opportunity for individuals to convince themselves that their contemplated act is consistent with being a good person (pp. 172–73). When law is integrated into social life through education and public information campaigns, the social meaning of once innocuous acts such as drunk driving, smoking, and foregoing seat belts can be transported into the domain of the moral, giving pause to those contemplating them.¹⁸ Changing the social meaning of certain acts can strengthen internal motivation to perceive them within the moral domain and act accordingly (p. 172).

In social life the motivations of individuals making decisions are often mixed. The city council member who votes in favor of a finance measure feels persuaded by the strong argument of the lobbyist and believes he can easily ignore the possibility of future financial support. Unclear or ambiguous legal rules enable individuals to feel confident that their unethical action is in fact ethical (pp. 194–95). Compared to general standards, specific rules can reduce the extent to which people use legal ambiguity to their advantage. Nonmonetary goods and services are especially problematic because people are better able to use elastic justifications to convince themselves of the ethicality of receiving these (pp. 195–96). Individuals are also sometimes more tempted when their behavior does not benefit them directly, but rather their organization or a client. Scientists are motivated to cut ethical corners by the temptation of professional prestige and recognition, so they cheat to show positive results on clinical trials (p. 201). Self-interest entails more than simply direct material gain.

In sum, individuals rely on justifications that render them unaware of the wrongful nature of their conduct (p. 215). For legal regulation to address this fact, it needs to intervene to leverage individuals' concern for fairness and morality (p. 218). Such interventions need to take into account not just the influence of heuristics and biases that prevent individuals from making rational, self-interested decisions but also the influence of the motivation to interpret one's behavior as consistent with that of a moral and ethical per-

16. 135 S. Ct. 2584 (2015).

17. *Id.* at 2588–89.

18. *See* pp. 172–74.

son. Understanding motivation and not just cognition is key to encouraging compliance by otherwise law-abiding people (pp. 224–25). Because Behavioral Ethics is a relatively new field it is not yet clear how to deploy its findings to law (p. 232). Going forward, it will be crucial to identify interventions in the laboratory that make it more difficult for individuals to rationalize wrongdoing and then export those interventions from the lab to legal regulation. Some areas of law seem to hold particular promise: designing contracts to discourage breach, providing taxpayers with clear rules, and designing tort law to account for motivations to be careless (p. 234).

Feldman's comprehensive summary and taxonomy of literatures on Behavioral Ethics, legal enforcement, and compliance represent a valuable start to the project of integrating knowledge about human behavior into legal enforcement and regulation. Feldman has brought to light the cognitive and behavioral mechanisms that easily defeat legal enforcement frameworks designed to deter only the most calculative wrongdoers. At the same time, without a fine-grained understanding of how these mechanisms come into play in the real world, it will be difficult for legal policymakers to know where to begin.

II. CORRUPTION: HOW MOTIVATED RATIONALIZATION ENCOURAGES ABUSE OF POWER

A. *Self-Deception: Being the Hero of Our Own Narrative*

The cognitive and behavioral mechanisms that lead to unethical behavior arise largely due to a single underlying motivation—to think of oneself as a good, moral person. Even though dishonest and destructive behavior is widespread, people want to see themselves as moral and care about morality in the sense that they object to unethical acts performed by others.¹⁹ Moral decisions and actions therefore are best understood when examined within the context of the self.

Although we are motivated to enhance and maintain our self-image as a general matter,²⁰ thinking of ourselves as honest and moral is especially central.²¹ Accordingly, nearly everyone is deeply convinced that they are a good, moral person and that their acts are generally honorable.²² We like to think

19. Celia Moore & Francesca Gino, *Approach, Ability, Aftermath: A Psychological Process Framework of Unethical Behavior at Work*, 9 ACAD. MGMT. ANNALS 235, 247 (2015).

20. Mark D. Alicke & Constantine Sedikides, *Self-Enhancement and Self-Protection: What They Are and What They Do*, 20 EUR. REV. SOC. PSYCHOL. 1 (2009).

21. Dolly Chugh & Mary C. Kern, *A Dynamic and Cyclical Model of Bounded Ethicality*, 36 RES. ORGANIZATIONAL BEHAV. 85, 90 (2016); Nina Strohminger & Shaun Nichols, *The Essential Moral Self*, 131 COGNITION 159 (2014).

22. Scott T. Allison et al., *On Being Better but Not Smarter than Others: The Muhammad Ali Effect*, 7 SOC. COGNITION 275 (1989).

that “we are heroes of our own narratives.”²³ Even though we sometimes behave in ways that are dishonorable or unethical, we resolve this contradiction through self-deception, by downplaying or reinterpreting evidence of our wrongdoing, minimizing our own responsibility for it, and later reframing it or forgetting it. Thus, we remain the hero of our own narrative and continue to claim and believe, as former Enron executive Kenneth Lay did after getting caught for overseeing an enormous accounting fraud, “I . . . always maintained that most important to me was my integrity”²⁴

In the examples of corruption that follow, the perpetrators make use of a variety of self-deception techniques to diminish their own responsibility for their wrongdoing. These techniques might or might not successfully persuade others after the fact that they were not to blame or were trying to do the right thing at the time. But for our purposes, the important role of techniques of rationalization is that they are deployed initially and primarily to persuade oneself that one can engage in the conduct in question and remain an honest, good, and moral person.

B. *Organizational Socialization and Minimization*

Cheating, lying, and stealing often do not occur in a vacuum. In organizations, newcomers are sometimes invited into “social cocoons” where their induction into corruption begins with observing veteran members modeling and easily accepting what is in fact corrupt behavior, even if no one fully recognizes it as such. Newcomers “are encouraged to affiliate and bond with veterans and develop desires to identify with, emulate, and please the veterans,” and they are encouraged to “attribute any misgivings they may have to their own shortcomings (particularly naivete).”²⁵

Consider, for example, the 178 teachers and administrators in the Atlanta public school system who were implicated in a scandal involving falsifying standardized test scores.²⁶ Much of this cheating was done by teachers and administrators gathered in rooms, erasing wrong answers and filling in correct ones on student answer sheets. It is now well understood that the pressures exerted on the Atlanta teachers were enormous: new federal education policy had imposed aggressive goals and threatened school closures if goals were not met. In response, the Atlanta school superintendent implemented system-wide practices of praising and financially rewarding teachers who met their test score goals and threatening and firing those who did not, re-

23. Celia Moore, *Always the Hero to Ourselves: The Role of Self-Deception in Unethical Behavior*, in CHEATING, CORRUPTION, AND CONCEALMENT 98, 98 (Jan-Willem van Prooijen & Paul A.M. van Lange eds., 2016).

24. *Id.*

25. Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, ACAD. MGMT. EXECUTIVE, May 2004, at 39, 46–47.

26. Rachel Aviv, *Wrong Answer*, NEW YORKER (July 14, 2014), <https://www.newyorker.com/magazine/2014/07/21/wrong-answer> [https://perma.cc/5MEG-V252]. The facts that follow pertaining to the scandal can be located directly in the article.

peating the mantra “No exceptions and no excuses.”²⁷ Every fall, the district held a convocation at the Atlanta Falcons football stadium during which the “[s]chools that met their performance targets were seated on the field, while schools that fell short were relegated to the bleachers.”²⁸ To be seated in the bleachers was to be marked as a failure.

One middle school principal was under intense pressure to cheat because teachers and administrators in the elementary schools that fed into his school were altering student test scores. Thus, students in this middle school who were actually reading only at a first-grade level had standardized test scores that indicated an ability several grades higher. Under these circumstances there was no possible way to meet performance targets legitimately, so he encouraged his teachers to cheat. If anyone hesitated, he said, “Are you a team player? Are you on my team?”²⁹ By 2009, a majority of K-8 schools in the Atlanta public school system were regularly submitting falsified test scores.

Notably, the more that teachers and administrators identified personally with the success of the school and the students, the more personally invested they became in preventing failure, and the more tempted they were to cheat. One teacher who became involved in one school’s cheating early on and helped scale up the system of cheating in his school was also particularly devoted to the students. Many of his students lived in impoverished circumstances, and he invited them to leave their dirty laundry in his pickup truck so that he could wash it for them; on occasion he had students living with him when they experienced parental absence or neglect.³⁰ In a well-functioning organization, identification with and commitment to one’s role and the group is a strong predictor of compliance with workplace rules and policies.³¹ But in an organization where corruption is endemic, individual commitment and devotion can actually increase willingness to engage in rule breaking and lawless behavior. Focusing on the social utility to the organization makes it easier to frame one’s own dishonest actions in positive terms.³²

The motivations for unethical conduct in public school cheating scandals are borne out by empirical research. Concern for the well-being of others, especially similar others, can lead people to find a way to benefit those others, even if it means behaving unethically.³³ In one study, university stu-

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Tom R. Tyler, *Psychology and the Deterrence of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 11, 13–15 (Jennifer Arlen ed., 2018).

32. Francesca Gino et al., *Self-Serving Altruism? The Lure of Unethical Actions that Benefit Others*, 93 J. ECON. BEHAV. & ORG. 285, 289 (2013).

33. Francesca Gino & Lamar Pierce, *Dishonesty in the Name of Equity*, 20 PSYCHOL. SCI. 1153 (2009).

dents were randomly assigned to be either test takers or graders. All were paid \$2 for showing up, and at the beginning of the session, half the students were handed a \$20 bill based on a coin flip (a large sum to be paid for an experiment of this kind).³⁴ Thus, each test taker began the session as “wealthy” or “poor,” as did each grader. In a procedure analogous to the Atlanta testing scandal, graders had the opportunity to cheat to help test takers by falsely inflating the number of correct answers, thereby earning more money for the test takers. Graders cheated quite often to benefit “poor” test takers, and “poor” graders cheated to help “poor” test takers almost 100% of the time when both would benefit. But even when the test taker would benefit and the grader would lose money, graders cheated to help “poor” test takers most of the time.³⁵

The similarities between the results of this experiment and the behavior of teachers and administrators in the Atlanta cheating scandal are remarkable. Nearly all of the cheating in Atlanta was carried out in schools serving a student population that was mostly African American and poor.³⁶ In the experiment, over 60% of “poor” graders inflated the number of correct answers of “poor” test takers when doing so meant the graders earned less money themselves.³⁷ Apparently, the teachers and the administrators who cheated in Atlanta were not much different than the university students in Pittsburgh and Chapel Hill who cheated in the experiment—when given the opportunity to benefit their school or their partner, they did so, regardless of whether they incurred benefits or costs themselves. In the context of high-stakes standardized testing, there is some evidence that teacher and administrator cheating to inflate student standardized test scores is not unique to Atlanta. There have been questions raised about widespread cheating in many other large school districts; Atlanta Public Schools was alone in being the target of a large federal criminal investigation.³⁸

There are several reasons why people are tempted to cheat to benefit others. First, even when an individual stands to benefit, cheating becomes easier to rationalize if one can point to benefits to others to prove—even if just to oneself—that one is not acting selfishly.³⁹ Second, feelings of empathy can prompt people to cheat to benefit others. In one field study, state auto-emissions testing inspectors were more prone to bend the rules to help the

34. *Id.*

35. Poor graders almost never cheated to help “wealthy” test takers. *Id.* at 1157.

36. See Aviv, *supra* note 26.

37. Gino & Pierce, *supra* note 33, at 1156.

38. See Aviv, *supra* note 26 (“There have been accounts of widespread cheating in dozens of cities . . .”); Michel Martin, *Former Teacher Blames Education Policymakers for Atlanta Cheating Scandal*, NPR (Feb. 16, 2019, 5:07 PM), <https://www.npr.org/2019/02/16/695344751/former-teacher-blames-education-policymakers-for-atlanta-cheating-scandal> [<https://perma.cc/3KRQ-FCPH>].

39. Scott S. Wiltermuth, *Cheating More when the Spoils Are Split*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 157, 159 (2011).

owners of regular cars pass the test compared to owners of luxury cars.⁴⁰ A follow-up lab experiment suggested that feelings of empathy for regular car owners prompted this cheating.⁴¹ In another study, group members who inhaled oxytocin, a hormone that promotes social bonding, were more likely to cheat to earn more money for their group than members of a control group given a placebo.⁴² The cheating prompted by oxytocin disappeared when the potential gain benefitted the individual decisionmaker and not the group.

C. *Wealth and Power*

The social cocoon phenomenon points to an important feature of corruption that Feldman does not squarely address: power. Social, organizational, economic, and political power are frequently important factors in unethical and unlawful behavior. Specifically, “individuals from different social class groups differentially value, emphasize, and behave in ways that prioritize their own interests above the interests of others.”⁴³ Compared to lower-class individuals, those in the upper class tend to have occupations that afford more independence from and control over other people, leading to emphasis on individuality and entitlement. By contrast, individuals from lower classes are more attuned to social environment due to greater vulnerability. Taken as a whole, empirical evidence suggests that “whereas upper-class individuals are comparatively less attuned to others and prioritize their individual selves, lower-class individuals orient to others in the social environment and prioritize those relationships.”⁴⁴

Even though lower social-class individuals live in environments that are more unstable, threatening, and resource deprived than upper-class individuals, the evidence appears to suggest that the former are less inclined to engage in many forms of unethical behavior than the latter.⁴⁵ One study used the make and age of vehicles to index drivers’ social class and found that, compared to drivers of all other classes, upper-class drivers were more likely to cut off other drivers by entering a four-way intersection without waiting their turn.⁴⁶ Adults in the laboratory were asked to report computer-generated dice rolls to determine their eligibility for a prize. The higher the participant’s social class, the more likely they were to cheat in reporting the

40. Francesca Gino & Lamar Pierce, *Robin Hood Under the Hood: Wealth-Based Discrimination in Illicit Customer Help*, 21 *ORG. SCI.* 1176 (2010).

41. *Id.* at 1177.

42. Shaul Shalvi & Carsten K. W. De Dreu, *Oxytocin Promotes Group-Serving Dishonesty*, 111 *PNAS* 5503 (2014).

43. Paul K. Piff et al., *Wealth and Wrongdoing: Social Class Differences in Ethical Reasoning and Behavior*, in *CHEATING, CORRUPTION, AND CONCEALMENT*, *supra* note 23, at 185, 188.

44. *Id.*

45. *Id.* at 186–87.

46. Paul K. Piff et al., *Higher Social Class Predicts Increased Unethical Behavior*, 109 *PNAS* 4086 (2012).

dice rolls, controlling for age, sex, ethnicity, religiosity, and political orientation.⁴⁷ Taken together, these studies show that participants from higher social classes behaved more unethically in the world and in the lab.

These findings also help make sense of the motivations of participants in the 2019 university admissions scandal. The parents who hired Rick Singer to bribe and cheat their children's way into elite colleges were wealthy, high-income, high-status individuals. They were senior executives and CEOs, doctors and lawyers, and Hollywood stars.⁴⁸ Their motive was largely status based. All of their children were apparently capable of being admitted to college without bribery and fraud. But they wanted to ensure that their children went to the "right" college. For them, the "right" college is one of a tiny group of exclusive institutions that confers the right level of "social status and bragging rights and an aristocratic identification If you look at the hallways of power in our society . . . you will find a lot of people with . . . degrees from elite schools."⁴⁹ Mitchell Stevens, a sociologist of education, asserts that these parents "live in a world in which the mark of good parenting is substantially tied to where one's children are admitted to college and university There are bragging rights, and fear of shaming if one's sons or daughters are not in the running"⁵⁰ A college admissions consultant remarked, "The parents want to brag to other parents at the grocery store when they're standing in line."⁵¹ The parents apparently cheated in part to maintain their own social status and that of their families. In this way, they were themselves the beneficiaries of their unethical behavior, arguably even more than their children. Individuals belonging to high social class "often want to cement that status by making their family a permanent part of whatever passes for aristocracy in America."⁵²

On the one hand, some of the acts these parents participated in seem bizarrely brazen. They helped photoshop the faces of their children onto the bodies of star athletes; they provided samples of their children's signature so an adult impostor could take the SAT; they paid impostors to take online courses to appear for credit on their children's high school transcript; and they "donated" large sums of cash to a fake charity used to transfer large bribes to sailing coaches, soccer coaches, and athletic department officials.⁵³

47. *Id.*

48. *See supra* note 3.

49. Isaac Chotiner, *An Investigative Journalist on How Parents Buy College Admissions*, NEW YORKER (Mar. 13, 2019), <https://www.newyorker.com/news/q-and-a/an-investigative-journalist-on-how-parents-buy-college-admissions> [<https://perma.cc/482W-A3LD>].

50. Joe Pinsker, *A Scandal Fit for a Win-at-All-Costs Society*, ATLANTIC (Mar. 13, 2019), <https://www.theatlantic.com/education/archive/2019/03/college-admissions-scandal-elite-anxieties/584740/> [<https://perma.cc/G3GC-K382>].

51. *Id.*

52. Chotiner, *supra* note 49.

53. Alia Wong, *Why the College-Admissions Scandal Is So Absurd*, ATLANTIC (Mar. 12, 2019), <https://www.theatlantic.com/education/archive/2019/03/college-admissions-scandal-fbi-targets-wealthy-parents/584695/> [<https://perma.cc/B9KV-69DX>].

On the other hand, the scandal arose in the context of a higher-education landscape that itself had become rotten. Elite American families have leveraged their power and wealth to gain their children's admission into elite colleges and universities through longstanding methods that are now widely recognized. University admissions offices recognize "legacy" as a characteristic that weighs in favor of admitting applicants whose ancestors attended the school. Some of these parents are major donors (or viewed as potential major donors) to the university, and the implicit reciprocity involved in these tax-deductible transactions approaches bribery, even if it is carefully crafted to avoid legal liability.⁵⁴

Moving even further toward direct reciprocity are donations from members of the elite who are not alumni of the school, whose children miraculously gain admission after they make a massive tax-deductible gift. For example, presidential son-in-law Jared Kushner's father Charles Kushner, a New Jersey real-estate developer, pledged a \$2.5 million gift to Harvard while Jared was in high school.⁵⁵ Shortly thereafter, Jared, who was according to high-school administrators a mediocre high-school student, gained admission to Harvard. Jared's parents had not attended Harvard, so their gift was not an alumni donation, and Jared's admission profile did not fit into the legacy category. This appeared to be straightforward reciprocity.⁵⁶

The public is rarely privy to the explicit language with which university officials sometimes discuss these transactions, and it can be jarring to hear discussions where pretenses are dispensed with. Former Harvard Kennedy School Dean David Ellwood sent an email to a Harvard admissions dean calling him "My Hero" after the admissions dean arranged for the admission of several applicants of interest. Ellwood called two of them "big wins" and noted that a third person "has already committed to [donating enough money to fund] a building."⁵⁷ In another email, a Harvard University vice president of development opined on the possibility of future donations from the family of a specific applicant by noting that the family had donated over \$8 million in the past, that extracting further donations in recent years had proven "challenging," and, with some hopefulness, that the family "had an

54. Libby Nelson, *The Real College Admissions Scandal Is What's Legal*, VOX (Mar. 12, 2019, 5:00 PM), <https://www.vox.com/2019/3/12/18262037/college-admissions-scandal-felicity-huffman> [<https://perma.cc/R89Y-2K2E>].

55. Daniel Golden, *The Story Behind Jared Kushner's Curious Acceptance into Harvard*, PROPUBLICA (Nov. 18, 2016, 2:00 PM), <https://www.propublica.org/article/the-story-behind-jared-kushners-curious-acceptance-into-harvard> [<https://perma.cc/EP2D-U5MX>].

56. Shortly after Jared graduated from Harvard, Charles Kushner was convicted of tax violations, campaign finance violations, and witness tampering. Since that time Harvard has appeared to distance itself from Charles Kushner, who once served on Harvard's Committee on University Resources along with several hundred other wealthy donors and friends of the university. *Id.*

57. Delano R. Franklin & Samuel W. Zwickel, *In Admissions, Harvard Favors Those Who Fund It, Internal Emails Show*, HARV. CRIMSON (Oct. 18, 2018), <http://www.thecrimson.com/article/2018/10/18/day-three-harvard-admissions-trial/> [<https://perma.cc/REA9-2EVF>].

art collection which conceivably could come our way.”⁵⁸ The applicant was then assigned a numerical rating which would serve to increase his or her chances of admission.⁵⁹

American college and university admissions practices involve granting favors for the children of alumni and donors. This fact is an open secret and has been tolerated for decades by lawmakers, policymakers, politicians, and almost everyone else, probably in part because there is a sense of powerlessness to change these practices.⁶⁰ It was therefore absurdly ironic when the federal prosecutor holding a press conference about Operation Varsity Blues asserted, “We’re not talking about donating a building . . . We’re talking about fraud.”⁶¹ The meaning here is clear: as far as the law is concerned, upper-crust families are free to secure their child’s admission to any university that is willing to exchange that spot for a sufficiently large donation; but the moment that false information about credentials is deployed, the government will treat that as a serious criminal offense punishable by imprisonment.

Lawyers are well equipped to draw bright lines delineating lawful from unlawful conduct. And wealthy clients of lawyers can benefit economically from strategies designed to maximize gains while arguably staying within the confines of legal rules even when the boundary between lawful and unlawful conduct is fuzzy. For example, in 2007 J.B. and M.K. Pritzker purchased the house next door to their residence. According to NPR, the property remained vacant, and in 2015 the Pritzkers had five toilets removed from the property, after which they claimed in their pending property tax appeal that the property was “uninhabitable.”⁶² As a result, the county assessor lowered the assessed value of the property from \$6.3 million to \$1.1 million, resulting in property tax refunds and savings totaling over \$300,000. J.B. Pritzker defended the claims he made in his property tax appeal, saying he had “fol-

58. *Id.*

59. *Id.*

60. Upper class families have many other options to facilitate admission into elite universities, all involving methods not available to applicants of modest means. These include expensive private consultants who help the applicant with test tutoring and preparation, application essay writing, and placement in internships. See Dana Goldstein & Jack Healy, *Inside the Pricey, Totally Legal World of College Consultants*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/admissions-cheating-scandal-consultants.html> [<https://perma.cc/EG8C-PQ7Y>]. Admissions advantages are also developed by parents through arranging attendance at elite high schools whose graduates are sought after by elite colleges, with access to a wide array of clubs and teams that help round out the college application. See Nell Gluckman, *How the Wealthy and Well Connected Have Learned to Game the Admissions Process*, CHRON. HIGHER EDUC. (Aug. 2, 2019), <https://www.chronicle.com/article/How-the-WealthyWell/246872> (on file with the *Michigan Law Review*).

61. Wong, *supra* note 53 (alteration in original).

62. Laurel Wamsley, *Illinois Governor Candidate Removed Mansion’s Toilets to Dodge Taxes, Report Finds*, NPR (Oct. 3, 2018, 7:35 PM), <https://www.npr.org/2018/10/03/654201077/illinois-gov-candidate-removed-mansions-toilets-to-dodge-taxes-report-finds> [<https://perma.cc/5E38-EQPE>].

lowed the rules.”⁶³ As a general matter, tax avoidance is one way that entities and individuals plan and arrange their affairs to minimize their tax burden to the extent permitted by law. A client who hires a well-trained and experienced lawyer has assurance that she can remain on the correct side of the line between lawful tax avoidance and unlawful tax evasion.

By contrast, when it comes to delineating ethical from unethical conduct, we leave individuals to their own devices, and their devices are psychologically structured to allow for bad behavior while generating rationalizations to maintain their positive self-concepts. Arguably, the main thing distinguishing the parents who paid Rick Singer from those who paid universities directly is a legally substantial but ethically less visible distinction: if you simply pay for access you can avoid stepping over the bribery line; but once you lie about material facts to gain access, you fall into the abyss of criminal fraud.

It’s an easy mistake to make, because as a matter of ethics, it’s difficult to distinguish the two, especially when the language of these transactions is replete with euphemistic rhetoric designed to create moral wiggle room. Rick Singer’s pitch to parents was that the admissions process to elite universities operates through several “doors.” The front door is the one everyone sees, which most applicants seek to enter by submitting their application and hoping for the best. The back door is more discreet and is accessed by major donors and other important people. Singer’s “innovation” was claiming to have discovered a “side door” to which he had the key.⁶⁴ The name of his consulting company was, in fact, The Key.⁶⁵ The side door was very secret, but Singer promised that his key could open it every time, so long as his clients were able to carefully follow his instructions.

This discourse of doors and keys served as a euphemism to disguise unethical actions. The euphemism tells the story of the services Rick Singer provided devoid of all the ethical implications.⁶⁶ It masks repugnant acts with neutral language. Just as Enron engaged in “aggressive” accounting practices,⁶⁷ Rick Singer found the side door and had the key. For the parents involved in this corrupt scheme, euphemistic language renders invisible the full truth about the unethical nature of the act. Parents are not actually fooled by the euphemisms, of course. But euphemistic language facilitates ethical fading, in which the unethical features of an action fade into the background over time, enabling the actor to maintain their self-concept as a

63. *Id.*

64. Kate Taylor & Patrick J. Lyons, *William Singer, the Man in the Middle of the College Bribery Scandal*, N.Y. TIMES (Mar. 12, 2019), <https://www.nytimes.com/2019/03/12/us/william-singer-admissions-scandal.html> [<https://perma.cc/HU2H-ZGFQ>].

65. *Id.*

66. See Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 226–28 (2004).

67. See *id.* at 226.

good and ethical person.⁶⁸ Singer asked his clients to write their checks out to the tax-exempt nonprofit “Key Worldwide Foundation,” the stated purpose of which was to assist “disadvantaged students around the world.”⁶⁹ This fraudulent foundation further enabled the parents to creatively reinterpret their behavior as having a charitable component.

Rick Singer successfully persuaded dozens of parents, many (maybe most) of them presumably otherwise law-abiding, upstanding citizens, to commit serious felonies. He did so by leveraging the anxieties of members of the upper class, some of whom probably convinced themselves that their fraudulent behavior was within the acceptable boundaries of the fudge factor. The parents’ high social class seems to have played an important role in their motivation and decisions in this case. Social class can be thought of as having two psychological components: status and power.⁷⁰ Status reflects “respect and admiration in the eyes of others,”⁷¹ and it seems clear that what was at stake for some parents was both achieving success and avoiding “failure.” Success came in the form of maintaining or increasing social status: bragging rights among their peers following their child’s coveted admission into the elite school of their choice, and “failure” came in the form of the “shame” of their child attending a state university (even one that in objective terms is of high quality).⁷²

Understanding the influence of the other psychological component of social class in this case—power—is perhaps even more crucial. Power can be thought of as access to and control over resources, especially in relation to others.⁷³ In laboratory experiments, people granted power within a situation are more likely to cheat.⁷⁴ Powerful individuals whose power is unstable engage in riskier behavior than do people whose power is stable.⁷⁵ Individuals with more power (assigned to be the “leader” in a laboratory task) feel enti-

68. *Id.*

69. Janelle Lawrence et al., *For Mastermind of Vast College Scam, Fat Fees Weren't Enough*, BLOOMBERG (Mar. 14, 2019, 7:00 AM), <https://www.bloomberg.com/news/articles/2019-03-14/for-mastermind-of-college-entrance-scam-fat-fees-weren-t-enough> [<https://perma.cc/SEB6-WVE6>].

70. David Dubois et al., *Social Class, Power, and Selfishness: When and Why Upper and Lower Class Individuals Behave Unethically*, 108 J. PERSONALITY & SOC. PSYCHOL. 436, 438 (2015).

71. *Id.*

72. Mossimo Giannulli, one of the parents implicated in the admissions scandal, requested a meeting to discuss “a roadmap for success as it relates to [our daughter] and getting her into a school other than ASU [Arizona State University]!” See Alexandra Robbins, *Kids Are the Victims of the Elite-College Obsession*, ATLANTIC (Mar. 12, 2019) (first alteration in original), <https://www.theatlantic.com/ideas/archive/2019/03/college-bribe-scandal-shows-elite-college-obsession/584719> [<https://perma.cc/ED4J-XNLH>].

73. Dubois et al., *supra* note 70.

74. Joris Lammers et al., *Power Increases Hypocrisy: Moralizing in Reasoning, Immorality in Behavior*, 21 PSYCHOL. SCI. 737 (2010).

75. Jennifer Jordan et al., *Something to Lose and Nothing to Gain: The Role of Stress in the Interactive Effect of Power and Stability on Risk Taking*, 56 ADMIN. SCI. Q. 530, 546 (2011).

tled to take and do take more resources than those with less power.⁷⁶ Individuals primed with power by recalling a time when they felt powerful were more likely to take action to make their environment more comfortable by moving a fan blowing uncomfortably in their face than individuals who were primed with low power.⁷⁷

This body of research suggests that people with power are more likely to take action in an effort to benefit themselves. This might be because possessing power instills a sense of confidence that actions will turn out well.⁷⁸ When individuals are prompted to consider a specific painful future result, individuals with more power anticipate experiencing less pain than individuals with less power,⁷⁹ which seems to be consistent with the actual experiences of economically secure (versus insecure) individuals.⁸⁰ If it is generally true that power “increases feelings of control and actual control, making failure seem improbable and less painful,”⁸¹ this has implications for rule breaking that reach far beyond corruption. These effects of power extend not only to those inhabiting the upper social class but also to those with power in a given social interaction. In the law enforcement context, the connection between power and action might partly explain some instances of violent and aggressive policing that result in unnecessary injuries and deaths. In organizational contexts, the connection between power and action might partly explain supervisors’ decisions to make unwanted sexual advances or contact. The question for legal policymakers is how legal institutions can take into account individuals’ contextual propensity for wrongdoing and psychological propensity to minimize it in order to remain the heroes of their own narrative.

III. EXPRESSIVE LAW AND THE REGULATION OF ALL PEOPLE

A. *Three Types of People?*

The title of Feldman’s book refers to the law of “Good People” because it focuses on the subset of wrongdoers who are not fully aware of the wrongfulness of their actions and who think that law does not apply to them be-

76. David De Cremer & Eric Van Dijk, *When and Why Leaders Put Themselves First: Leader Behaviour in Resource Allocations as a Function of Feeling Entitled*, 35 EUR. J. SOC. PSYCHOL. 553 (2005).

77. Adam D. Galinsky et al., *From Power to Action*, 85 J. PERSONALITY & SOC. PSYCHOL. 453 (2003).

78. Cameron Anderson & Adam D. Galinsky, *Power, Optimism, and Risk-Taking*, 36 EUR. J. SOC. PSYCHOL. 511, 522, 530 (2006).

79. M. Ena Inesi, *Power and Loss Aversion*, 112 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 58, 59–60, 67 (2010).

80. See Eileen Y. Chou et al., *Economic Insecurity Increases Physical Pain*, 27 PSYCHOL. SCI. 443 (2016).

81. Brian E Pike & Adam D Galinsky, *Power Leads to Action Because It Releases the Psychological Brakes on Action*, 33 CURRENT OPINION PSYCHOL. 91, 93 (2020).

cause law is for “bad people” and they see themselves as being among the “good people.” Feldman’s central framework of three types of people (erroneous wrongdoers, situational wrongdoers, and bad people) is useful insofar as existing enforcement frameworks that rely on customary deterrence principles and practices are best suited for those who engage in calculative wrongdoing (“bad people”). The prototype is the Holmesian “bad man” who cares little for ethics and simply tries to avoid costs.⁸² He engages in cost-benefit calculations and acts accordingly. Experimental research shows that in the laboratory most people limit the magnitude of their cheating by staying within a “fudge factor” even when there is no chance of getting caught for cheating to the maximum.⁸³ The fudge factor serves as a crutch for individuals to avoid having the cheating negatively impact their moral self-concept. But a smaller percentage of people do cheat to the maximum, and these can be thought of as the “bad people” in Feldman’s framework. Feldman argues that existing legal regulation, liability, and punishment are oriented toward this group of bad people; but because most people fall in the other groups, we must rethink and redesign legal regulation to better address the wrongdoing committed by “good people.”

Feldman acknowledges that the three-types framework is merely a tool for thinking about policy design, that many “situational wrongdoers” are in fact somewhat aware of the wrongful nature of their actions (p. 215), and that the category membership of any single individual varies across different behaviors and contexts (p. 232). So is the three-types framework a useful tool for redesigning legal policy? Perhaps yes, but perhaps not as much as Feldman claims. Perpetrators of even the most heinous acts are sometimes impressive in their powers of rationalization. Heinrich Himmler told SS officers in 1943: “We have the moral right, we had the duty to our people to do it, to kill this people who wanted to kill us.”⁸⁴ It is conceivable that sometimes even among the worst of the worst, the ability to remain the hero of one’s own narrative is potent. In addition, as Feldman acknowledges, a certain level of awareness of wrongdoing by “good people” is not uncommon (p. 215). In any case, it is difficult to know in any given instance the extent to which an individual wrongdoer is aware of the unethicity or unlawfulness of her act. Even if we could gauge awareness of wrongdoing in individual cases, this information is of limited usefulness in designing legal policy.

What is important for purposes of legal policy reform is to acknowledge that there is now strong empirical evidence that people generally are motivated to find reasons to believe that what they are doing is ethically and legally unproblematic. This is a problem for deterrence—both in theory and in

82. P. 85; see O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–61 (1897).

83. Shaul Shalvi et al., *Justified Ethicality: Observing Desired Counterfactuals Modifies Ethical Perceptions and Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 181 (2011).

84. Noga Arikha, *How Evil Happens*, AEON (July 30, 2018), <https://aeon.co/essays/is-neuroscience-getting-closer-to-explaining-evil-behaviour> [<https://perma.cc/5B3Z-GN7C>].

practice—and it means that ignorance of the law, steep discount rates, and general lack of rationality are not the only reasons that individual behavior is difficult to predict and shape using a traditional rational choice framework. For legal policymakers focused on improving regulation and enforcement, a debate on the extent to which it is helpful to categorize types of bad or good people is in my view less useful than acknowledging the brute fact of rationalization of wrongdoing and understanding the contextual features that give rise to it.

In the laboratory, people who report the result of their roll of a die sometimes cheat; but they cheat more when they are instructed to roll twice and report only the first roll, because the second roll gives them moral wiggle room to think of their action as “not really cheating.”⁸⁵ This experimental finding is consistent with field studies indicating that a large percentage of corrupt individuals do not think of themselves as corrupt.⁸⁶ White collar criminals often leverage their own social advantage to convince themselves and others that their actions could not possibly have been wrong.⁸⁷ Often these are corporate executives or government officials who think of themselves as “upstanding members of the community, caring parents, and givers to charity—clearly different from the image of a typical criminal.”⁸⁸

Dishonest and destructive behavior is unfortunately very common, and with a better understanding of how individuals convince themselves that they can engage in it while remaining a good and moral person, more of it could be within reach of legal regulation. Common examples include public officials grafting, athletes cheating, taxpayers underpaying, managers sexually harassing, and law enforcement officers covering up their own and one another’s misconduct. Existing legal structures currently are not well designed to regulate wrongdoers who are convinced they are doing right (or doing an activity outside of the realm of right and wrong).

Certain pervasive wrongdoing is sufficiently low level that the cost of regulating is largely not worth the benefit. But for pervasive activities that are worth targeting there are success stories that might serve as templates for improving legal regulation and enforcement. Consider intoxicated driving: a sensible target for effective enforcement because it creates a serious risk of harm. Importantly for the project of incorporating Behavioral Ethics into legal policymaking, intoxicated driving is a behavior that was once not even widely recognized as unethical. Up until the late twentieth century, it was quite natural for individuals to drive drunk and convince themselves that their act had no ethical implications. That attitude changed after a combination of activism, education, and legal enforcement sparked a change in social norms, which led people to realize that the act was not just risky but also un-

85. See Shalvi et al., *supra* note 83.

86. Anand et al., *supra* note 25, at 40.

87. *Id.* at 43.

88. *Id.* at 39.

ethical.⁸⁹ With moralization of the activity came a reduction in prevalence, spurred by statutes, enforcement, public education, and open discussion and debate, all resulting in a change in the social meaning of the act.⁹⁰ Going forward, further reductions in the prevalence of driving under the influence are necessary and hopefully possible,⁹¹ but in the meantime it is notable that an act that was once generally seen as funny or normal is now more widely condemned.

B. *The Role of Expressive Law in Compliance*

Criminal prohibition of intoxicated driving is one of many instances where law punishes, but simultaneously law also seeks to persuade. Good Samaritan laws (which impose a duty to rescue persons in danger by phoning for help if it is possible to do so without putting oneself in danger) are designed to shape beliefs about moral duties to help.⁹² In this way, the expressive function of law—which operates by calling out a behavior as illegal, regardless of punishment—can potentially defeat or reduce the effectiveness of the various rationalization mechanisms discussed earlier.

Field experiments show some promise in raising consciousness of wrongdoing in order to prevent it. For example, the Norwegian Tax Administration successfully increased tax compliance by sending letters to taxpayers.⁹³ The specific problem it sought to address was the underreporting of foreign income.⁹⁴ New collaboration among various EU tax authorities made it possible for the Norwegian Tax Administration to identify taxpayers who had previously misreported foreign income.⁹⁵ Letters targeting those taxpayers informing them of reporting requirements prompted some individuals to begin reporting foreign income.⁹⁶ More importantly, including in the letter language about fairness (“In order to treat all taxpayers fairly”)⁹⁷ or societal benefits (“Your tax payment contributes to the funding of publicly financed services in education, health and other important sectors of society”)⁹⁸ prompted people to report a larger share of their foreign income than letters

89. See Jonathan Rosenfeld, *Impact of Safety Campaigns on Reducing Drunk Driving*, NAT'L L. REV. (Oct. 16, 2017), <https://www.natlawreview.com/article/impact-safety-campaigns-reducing-drunk-driving> [<https://perma.cc/YA5D-L2ZZ>].

90. *Id.*

91. Indeed, with the likelihood that legalized cannabis will lead to an increased prevalence of driving while under its influence, innovations in enforcement and renewed moralization of its social meaning are critical.

92. Bilz & Nadler, *supra* note 8.

93. Kristina M. Bott et al., *You've Got Mail: A Randomised Field Experiment on Tax Evasion*, MGMT. SCI. (forthcoming) (on file with the Michigan Law Review).

94. *Id.* (manuscript at 2).

95. *Id.* (manuscript at 5).

96. *Id.* (manuscript at 17).

97. *Id.* (manuscript at 9).

98. *Id.* (manuscript at 11).

without that language. Alternatively, including in the letter language that indicated that the taxpayer was being monitored (“[We have] received information that you have had income and/or assets abroad in previous years”)⁹⁹ prompted a large number of people who had not done so previously to begin to report foreign income.¹⁰⁰ Note that the mechanism through which the latter intervention produced compliance is simple deterrence. But it is a means of implementing deterrence that is not common in the United States and might be scaled up: a personal communication from a government agency informing you that you’ve been observed committing a specific violation and a reminder of the specific legal duty.

Another field study examined rampant low-level cheating among customers buying newspapers on an honor system on the street in Austria. Prior to the intervention, two-thirds of customers did not deposit any money at all, and those that did tended to pay a small fraction of the actual price.¹⁰¹ Including a moral reminder next to the price (“The paper costs €1. Thank you for being honest.”)¹⁰² did not increase the number of people who decided to pay, but it did encourage people who did pay to deposit an amount closer to the actual price.¹⁰³ This is a context in which Feldman’s three-types framework seems to describe the situation well: the reminder prompted the erroneous and situational wrongdoers to pay closer to the full price, but the “bad people” were unmoved by the prompt, and it would take a different intervention to secure their compliance. Reminders need not be so explicit or didactic. In another study, prompting American taxpayers to sign at the top of a tax form before filling it out prompted more honest reporting than the usual practice of signing at the end.¹⁰⁴

Law can also reduce undesirable behavior by designing environments or bureaucratic frameworks to make the problematic behavior in question inconvenient or costly.¹⁰⁵ Smoking restrictions prohibiting smoking inside offices and most indoor spaces open to the public initially had the effect of reducing the target behavior simply because it became much more inconvenient.¹⁰⁶ But once habits change, attitude change sometimes follows, espe-

99. *Id.*

100. *Id.* (manuscript at 21).

101. Gerald J. Pruckner & Rupert Sausgruber, *Honesty on the Streets: A Field Study on Newspaper Purchasing*, 11 J. EUR. ECON. ASS’N 661, 663 (2013).

102. *Id.* at 667.

103. *Id.* at 677.

104. Lisa L. Shu et al., *Signing at the Beginning Makes Ethics Salient and Decreases Dishonest Self-Reports in Comparison to Signing at the End*, 109 PNAS 15,197 (2012).

105. Cheng, *supra* note 15, at 657.

106. *Cf.*, e.g., *Smokefree Policies Reduce Smoking*, CDC, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/protection/reduce_smoking/index.htm [<https://perma.cc/7YCP-4DLE>].

cially if the individual perceives the behavior change as a product of her own choice.¹⁰⁷

A major theme running through Feldman's book is that a variety of different legal enforcement mechanisms are needed to handle the three different types of wrongdoers (Chapter Seven). But it is not clear that the lower levels of awareness of situational and erroneous wrongdoers require an approach that is qualitatively different than that used for "bad people." Many people across different contexts have enough awareness of their own wrongdoing that they will respond to some type of incentive. And many of these people will respond to deterrence if the intervention leverages the social context.

Consider a field experiment implemented in an area of India where, at the time, 42% of schoolteachers would fail to show up to work on any given day. The rate of teachers absent was cut in half simply by requiring teachers to submit time-and-date-stamped photos of themselves at school at the beginning and end of each school day. Teachers then received bonuses for attending extra days and fines for skipping work.¹⁰⁸ Teacher absenteeism was cut in half (to 21%) among those who were monitored, and these effects persisted even after monitoring ended.¹⁰⁹ In this context it did not really matter whether any given teacher was an erroneous wrongdoer, a situational wrongdoer, or a bad person. A simple monitoring and incentive system addressed all three types.

There are some types of wrongdoing where it is common to find many individuals who have convinced themselves that everyone else is engaging in it too. This belief serves to protect individuals' moral self-image. Expressive law can intervene in this narrative by providing information that most people do not in fact engage in the behavior in question, thus depriving the individual of this particular self-protective mechanism. There is reason to think that in some contexts this intervention can be effective. For example, taxpayers in Australia completed a survey about their views on paying taxes. Half of the respondents then received a letter explaining that a survey showed that "most people think we should be honest with our tax statements."¹¹⁰ The taxpayers who received the letter complied with their tax obligations more than taxpayers who did not learn the results of the survey.¹¹¹ Under conditions of uncertainty, social consensus can serve as a powerful

107. See Joel Cooper & Russell H. Fazio, *A New Look at Dissonance Theory*, in 17 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 229 (Leonard Berkowitz ed., 1984).

108. Esther Duflo et al., *Incentives Work: Getting Teachers to Come to School*, 102 *AM. ECON. REV.* 1241, 1242–43, 1246 (2012).

109. *Id.* at 1243, 1251.

110. Michael Wenzel, *Misperceptions of Social Norms About Tax Compliance: From Theory to Intervention*, 26 *J. ECON. PSYCHOL.* 862, 874 (2005).

111. *Id.* at 877.

reminder of what we are obliged to do, leading not only to conformity with law but also to genuine acceptance of the social norm.¹¹²

C. *The Role of Expressive Law in Subordination*

At the same time, the assertion that the law should focus more attention on the bad behavior of “good people” obscures a major problem in American criminal law enforcement today—that low-level “bad” behavior of “good people” receives too much attention, not too little, when it is committed by members of poor communities of color. About thirteen million Americans per year are charged with misdemeanors, which comprise about 80% of the nation’s court dockets.¹¹³ In some fraction of these cases the formal sentence includes serious punishment, but in almost all cases, the process is in fact the punishment.¹¹⁴ In some communities, individuals are jailed for what are essentially low-level crimes of poverty: failing to pay fines for violations which themselves carry no threat of jail time, such as traffic infractions, sleeping in a public place, or placing one’s feet on a subway seat.¹¹⁵ The consequences can strip the individual of their current job, provide serious obstacles to future employment and education, and compromise their housing, their credit, their eligibility for government benefits, their ability to reside in the United States, and the custody of their children.¹¹⁶ Tools originally designed to incapacitate, deter, punish, monitor, and control dangerous, bad people are today perversely deployed against ordinary people suspected of low-level wrongdoing. The truth of Feldman’s claim that the “bad” behavior of “good people” should occupy more attention of the law depends on where one looks.

Even while overenforcement of law produces serious harms, at the same time, and counterintuitively, poor communities of color are subjected to underenforcement of law.¹¹⁷ In Chicago, African Americans make up a third of the city’s population but constitute about 80% of homicide victims.¹¹⁸ In every major city in America, shooters who kill and injure people are infrequently brought to justice. In many cities, an arrest is made in only about one half

112. Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, in *MORAL JUDGMENT AND DECISION MAKING* 101 (Daniel M. Bartels et al. eds., 2009).

113. ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME* 2 (2018).

114. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 241–42 (1979).

115. KOHLER-HAUSMANN, *supra* note 11; *see* NATAPOFF, *supra* note 113, at 141.

116. NATAPOFF, *supra* note 113, at 19–38; Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 *HARV. L. & POL’Y REV.* 124 (2016).

117. JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 35 (2017).

118. David Heinzmann, *Homicide Numbers Reveal Stark Contrast*, *CHI. TRIB.* (July 12, 2012), <https://www.chicagotribune.com/news/ct-xpm-2012-07-12-ct-met-chicago-homicide-demographics-20120712-story.html> [<https://perma.cc/FX7Y-GVQN>].

of all homicides,¹¹⁹ and the rate is typically lower for gun homicides.¹²⁰ In New York City the 2013 clearance rate for homicides with a white victim was 86%, compared to 45% for homicides with a Black victim.¹²¹ In some cities a substantial percentage of nonfatal shootings are never even investigated.¹²² The state's failure to effectively respond to the victimization of poor communities of color is an ongoing disgrace.

Both underenforcement and overenforcement have expressive potential. Underenforcement can signal to members of vulnerable groups that their lives do not matter, that if they are murdered, their killer will not be brought to justice.¹²³ “[T]he state’s response to violence against them constitutes an expression of their worth as citizens,” and the state’s failure to enforce the law and punish the perpetrator affirms the message of the perpetrator’s violence.¹²⁴ Overenforcement expresses that the state will target the most socially vulnerable for deprivation of liberty and property, labeling those individuals as criminals, and restricting participation in full political, social, and economic life. And for noncitizens, “the petty-offense process has become a net of exclusion through which noncitizens are intimidated, disciplined, and expelled.”¹²⁵

These problems of simultaneous over- and underenforcement of law have become pervasive and systemic in vulnerable communities. As an empirical matter, observing the abstract fact of legal injustice makes it more likely that individuals will engage in the kind of everyday unethicity that Feldman discusses throughout his book: petty theft, shoplifting, tax cheating, and the like.¹²⁶ Experiencing firsthand instances of legal injustice in a systematic way perhaps compounds the problem of everyday unethicity and distrust of legal institutions.

By the same token, improving homicide clearance rates, both by increasing overall clearance rates and by eliminating racial disparities in clearance rates, itself constitutes an expression by the state of affirming the worth of the victims and their communities. And dismantling the system’s deprivation of liberty, opportunity, and property that exclusively targets individuals

119. *Murder with Impunity*, WASH. POST (last updated July 24, 2018), <https://www.washingtonpost.com/graphics/2018/investigations/unsolved-homicide-database/> [<https://perma.cc/4K5V-DPA8>].

120. Sarah Ryley et al., *5 Things to Know About Cities’ Failure to Arrest Shooters*, TRACE (Jan. 24, 2019), <https://www.thetrace.org/2019/01/gun-murder-solve-rate-understaffed-police-data-analysis/> [<https://perma.cc/YQD8-Z7UJ>].

121. Tuerkheimer, *supra* note 10, at 1153–54.

122. For example, in Oakland, CA in 2017, 40% of the felony assault unit cases were not assigned. Ryley et al., *supra* note 120.

123. Nadler, *supra* note 10, at 184 n.162; Tuerkheimer, *supra* note 10, at 1154.

124. Tuerkheimer, *supra* note 10, at 1163; see also Kenworthy Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358 (2016) (presenting empirical support for the expressive theory of punishment).

125. NATAPOFF, *supra* note 113, at 204.

126. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005).

in vulnerable communities constitutes an expression by state actors about equal citizenship. Both of these efforts serve to clearly express that the power of the criminal law will be deployed for blameworthy conduct and will not be leveraged to generate municipal revenue or to incarcerate for unpaid fines on noncriminal infractions like traffic tickets and housing-code violations¹²⁷ and low-level offenses of the sort we all commit. Although beyond the scope of the book, a fertile area for future exploration is how the problem of simultaneous over- and underenforcement of law in poor communities of color fits into the puzzle of “the law of good people.”

CONCLUSION

The Law of Good People provides a comprehensive summary of an important body of research on Behavioral Ethics. It makes a strong case that the bad behavior of “good people” should occupy more attention of the law and proposes that legal policymakers construct a modified set of enforcement tools from those used to punish serious misconduct. This framework correctly suggests that regulating “ordinary unethicity”—contract breach, tortious conduct, property-rights violations, public corruption, tax cheating, and corporate misconduct—can take into account a richer set of motivating forces for individual wrongdoing. The book focuses on basic psychological mechanisms of Behavioral Ethics, and theoretical debates regarding the mechanisms through which law secures compliance. As such, it is written for an international audience and will serve as a useful resource for legal scholars, lawyers, policymakers, and social scientists interested in law and legal institutions.

127. See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *supra* note 11, at 1–10.

