2015

Behavioral Ethics: Can It Help Lawyers (And Others) Be Their Best Selves?

Robert A. Prentice

BEHAVIORAL ETHICS: CAN IT HELP LAWYERS (AND OTHERS) BE THEIR BEST SELVES?

ROBERT A. PRENTICE*

ABSTRACT

Using the principles of behavioral psychology and related fields, marketers have changed human behavior in order to increase sales. Governments have used these same principles to change human behavior in order to advance policy goals, such as increasing savings behavior or organ donations. This article surveys a significant portion of the new learning in behavioral ethics in support of the claim that by teaching behavioral ethics we have a realistic chance to improve the ethicality of human decision-making and actions.

* Ed & Molly Smith Centennial Professor of Business Law, McCombs School of Business, University of Texas at Austin

INTRODUCTION

> [A]fter being asked to recall the Ten Commandments, participants who were given the opportunity to cheat and to gain financially from this action did not cheat at all; by contrast, when given the same opportunity to cheat, those who had not been reminded of the Ten Commandments cheated substantially.[1]

Behavioral ethics is the body of learning that focuses on how and why people make the ethical (and unethical) decisions that they do. Behavioral ethics is primarily descriptive, rather than normative, explaining how cognitive heuristics, psychological tendencies, social and organizational pressures, and even seemingly irrelevant situational factors can make it more likely that good people will do bad things.[2] Because attorneys are as vulnerable to these heuristics, biases, and pressures as anyone (and sometimes more so[3]), behavioral ethics and

---

    1. Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 330, 333 (2011), *citing* Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MKT. RES. 633 (2008).

    2. *See* Joshua Margolis & Andrew Molinsky, *Three Practical Challenges of Moral Leadership*, *in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT AND POLICY 77, 92 (Deborah L. Rhode ed., 2006) ("Social science has illuminated just how vulnerable we human beings are to act in unethical ways. Breathtaking findings sober us to just how much human behavior can be influenced by organizational features, social pressures, and cognitive tendencies."); Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1111 (2013) ("Many ethical lapses result from a combination of situational pressures and all too human modes of thinking.").

    3. *See* Andrew M. Perlman, *Remedying Law's Partiality Through Social Science*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW 404, 406 (Jon Hanson ed., 2012) ("Lawyers are likely to be especially susceptible to a false belief in their objectivity."); Robbennolt and Sternlight have examined many of them in detail. *See generally* Robbennolt & Sternlight, *supra* note 2 (discussing many of these tendencies and lawyers); *see also* Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010) (reporting study finding that lawyers, especially male lawyers, tended to be overly optimistic regarding outcomes in their cases).

related notions have deservedly received much attention recently by those concerned with legal professionalism.[4]

Can any good come from teaching ethics to law students, MBAs, accounting students, medical students, young professionals, and others? This question has been addressed often,[5] but this article focuses only on the promise of behavioral ethics. It argues that teaching behavioral ethics in law schools, business schools, and elsewhere has a realistic chance of increasing students' (and others') ability and inclination to live up to their own moral standards, which should have a beneficial

---

4. *See* Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 Indiana L. J. (forthcoming 2015), *available at* http://ssrn.com/abstract=2320605. Among other recent writings applying behavioral concepts to legal ethics, Perlman cited the following: Anthony V. Alfieri, *The Fall of Legal Ethics and the Risk of Risk Management*, 94 Geo. L.J. 1909 (2006); Lawrence J. Fox, *I'm Just an Associate . . . At a New York Firm*, 69 Fordham L. Rev. 939 (2000); Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 Geo. J. Legal Ethics 137 (2011); Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 Harv. Negot. L. Rev. 95 (2011); Pam Jenoff, *Going Native: Incentive, Identity, and the Inherent Ethical Problem of In-House Counsel*, 114 W. Va. L. Rev. 725 (2012); Sung H. Kim, *Gatekeepers Inside Out*, 21 Geo. J. Legal Ethics 411 (2008); Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 Wis. L. Rev. 495 (2012); Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 Va. L. Rev. 853 (1995); Donald C. Langevoort, *What Was Kaye Scholer Thinking?*, 23 Law & Soc. Inquiry 297 (1998); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 Vand. L. Rev. 75 (1993); Richard Lavoie, *Subverting the Rule of Law: The Judiciary's Role in Fostering Unethical Behavior*, 75 U. Colo. L. Rev. 115 (2004); Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QLR 643 (2004); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 Geo. J. Legal Ethics 1549 (2009); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 Fordham L. Rev. 773 (1998); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology,* 36 Hofstra L. Rev. 451 (2007); W. Bradley Wendel, *Ethical Lawyering in a Morally Dangerous World*, 19 Geo. J. Legal Ethics 299 (2006). *See also* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587 (2006); Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 Rutgers L. Rev. 333 (2013); Kath Hall & Vivien Holmes, *The Power of Rationalization to Influence Lawyers' Decisions to Act Unethically*, 11 Legal Ethics 137 (2008); Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 Fordham L. Rev. 773 (1998); Robbennolt & Sternlight, *supra* note 2; Cassandra B. Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 Case W. Res. J. Int'l L. 389 (2009).

5. Some believe that ethics education can be beneficial. *See generally* Derek C. Bok, *Can Ethics Be Taught?*, 8 Change 26 (1976); *see also* E.L. Felton & R.R. Sims, *Teaching Business Ethics: Targeted Outputs*, 60 J. Bus. Ethics 377 (2005); *see also* Edwin M. Hartman, *Can We Teach Character? An Aristotelian Answer*, 5 Acad. Mgmt. Learn. & Educ. 68 (2006); *see also* Scott D. Williams & Todd DeWett, *Yes, You Can Teach Business Ethics: A Review and Research Agenda*, 12 J. Leadership & Org. Studies 109 (2005). Others are very dubious. *See, e.g.,* Eric Schwitzgebel, Do Ethics Classes Influence Student Behavior? (Dec. 10, 2013) (unpublished manuscript) ("Given the lack of direct evidence, it is hard to feel much confidence, but the most reasonable guess, I suggest, is that the average ethics class has an average moral effect on student behavior very close to zero and approximately as likely to be slightly negative as slightly positive."), http://www.faculty.ucr.edu/~eschwitz/SchwitzPapers/EthicsClasses-131210a.pdf.

impact on society and the world we live in. It can move the needle in the right direction.

Teaching behavioral ethics will not turn most students into saints or remake the world. All the preaching and teaching of priests, ministers, rabbis, imams, and other religious figures as well as all the philosophizing of Socrates, Plato, Aristotle, Mill, Bentham, Kant, and others over the centuries have failed to turn our societies into a paradise on earth. Aspirations must remain modest. But there is reason for optimism. Although it is difficult to believe after reading a book like Jonathan Glover's *Humanity: A Moral History of the Twentieth Century*,[6] which explores in some detail (and from a psychological perspective) the misdeeds of Hitler, Stalin, Mao, Pol Pot, and Lt. Calley, our moral environment can improve. Steven Pinker presents substantial (though controversial) statistical evidence that human violence is on the decline and has been for centuries,[7] and of course Martin Luther King Jr. proclaimed that "[t]he arc of the moral universe is long, but it bends toward justice."[8] Moral progress is difficult, but not impossible.

I. A Brief History of Behavioral Psychology and Related Fields

Although economists have, in order to simplify their analyses, long modeled people as rational decision makers,[9] Kahneman and Tversky created the "heuristics and biases" literature which ended any notion that it is safe to assume that people are rational decision makers.[10]

---

6. *See generally* Jonathan Glover, Humanity: A Moral History of the Twentieth Century 26 (2d ed. 2012).

7. Steven Pinker, The Better Angels of Our Nature: Why Violence Has Declined 294 (2011) ("After half a millennium of wars of dynasties, wars of religion, wars of sovereignty, wars of nationalism, wars of ideology, of the many small wars in the spine of the distribution and a few horrendous ones in the tail, the data suggest that perhaps, at last, we're learning."). Pinker's thesis has been challenged by many, however. *See* Jeffrey Moussaieff Masson, Beasts: What Animals Can Teach Us About the Origins of Good and Evil 175–79 (2014).

8. Although this quotation did not originate with him, Dr. King famously made this statement in a Baccalaureate Speech at Wesleyan University in Middletown, Connecticut in 1964. *See The Arc of the Moral Universe is Long But It Bends Towards Justice*, Quote Investigator (Nov. 15, 2012) http://quoteinvestigator.com/2012/11/15/arc-of-universe/.

9. Standard economic analysis is largely built upon the premise that man is a completely rational decision maker. Waller has described this assumption:

Individuals are assumed to act *as if* they maximize expected utility. That is, an individual's preferences are taken as given, consistent, and representable in the form of a utility function. An individual knows a priori the set of alternative actions and chooses the action with the highest utility or expectation thereof. When uncertainty exists as to the actions' consequences, an individual can assess the probability distribution corresponding to his or her knowledge. When new information may be collected from the environment, an individual knows the information's possible content and can assess, in accord with Bayes' theorem, the probability distribution conditioned on the conjunction of such content and his or her prior knowledge.

William S. Waller, *Decision-Making Research in Managerial Accounting: Return to Behavioral-Economics Foundations, in* Judgment and Decision-Making Research in Accounting and Auditing 29, 32 (Robert H. Ashton & Alison H. Ashton eds., 1995).

10. *See* Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 Science 1124 (1974). This article is one of the most-cited in the history of the

Concentrating not on how people *should* decide but upon how they *do* decide, Kahneman, Tversky, and their progeny have established beyond dispute that people are rational, but only boundedly so.[11] Insights from behavioral psychology, cognitive science, and related fields created entirely new academic disciplines, including behavioral economics,[12] behavioral finance,[13] and, finally, behavioral ethics, which establishes that people are also *boundedly ethical.* Because of psychological and related factors, "many people are blind to their own unethical conduct."[14]

A. *Behavioral-Based Policy Making*

Law, governmental regulation, and ethics teaching all strive to alter people's behavior. Governments strive to deter and/or punish bad behavior while incentivizing and/or rewarding good behavior. This can be done by addressing people's conscious decision-making on the assumption that they are rational actors who will do less of what is punished and more of what is rewarded.[15] This works generally, though far from perfectly. But, the insights of behavioral psychology tell us, people's behavior can be altered in many ways other than appeals to rational self-interest.

If the principles underlying behavioral psychology, behavioral economics, and related fields can help realize policy goals by shaping human behavior, then it is plausible to believe that comparable principles might improve moral behavior if properly applied.[16] Because

---

social sciences and its ideas have been usefully applied in, among other fields, "medical diagnosis, legal judgment, intelligence analysis, philosophy, finance, statistics, and military strategy." DANIEL KAHNEMAN, THINKING, FAST AND SLOW 8 (2011).

11. *See* Herbert A. Simon, *Search and Reasoning in Problem Solving,* 21 ARTIFICIAL INTELLIGENCE 7, 21 (1983) (suggesting that people are rational, but only boundedly so); *see also* HERBERT A. SIMON, MODELS OF MAN, SOCIAL AND RATIONAL: MATHEMATICAL ESSAYS ON RATIONAL HUMAN BEHAVIOR IN SOCIAL SETTINGS 196, 200 (1957) (same).

12. For general surveys of the field of behavioral economics, see generally ADVANCES IN BEHAVIORAL ECONOMICS (Colin F. Camerer et al. eds., 2004); BEHAVIORAL ECONOMICS AND ITS APPLICATIONS (Peter Diamond & Hannu Vartiainen eds., 2007); RICHARD H. THALER, QUASI RATIONAL ECONOMICS (1991).

13. For general surveys of the field of behavioral finance, *see generally* HERSH SHEFRIN, BEYOND GREED AND FEAR: UNDERSTANDING BEHAVIORAL FINANCE AND THE PSYCHOLOGY OF INVESTING (2002); ANDREI SHLEIFER, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIORAL FINANCE (2000); ROBERT J. SHILLER, IRRATIONAL EXUBERANCE (2000); ADVANCES IN BEHAVIORAL FINANCE (Richard H. Thaler ed., 1993).

14. Eldred, *supra* note 4, at 359.

15. *See* Catherine Herfeld, *The Potentials and Limitations of Rational Choice Theory: An Interview with Gary Becker,* 5 ERASMUS J. PHIL. & ECON. 73 (Spring 2012) (quoting Gary Becker as saying "[i]n areas where the rational choice model does not work so well, one has to modify it, but I have been persuaded, at least by my own thinking and by looking at the world and the actual data, that it does a very good job, and that there is no other comparable approach in the social sciences with the same degree of explanatory power, or even anywhere near").

16. *See generally* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law,* 35 J. LEGAL STUD. 199 (2006) (suggesting that the law can be recruited to improve decision-making); *see also* Richard P. Larrick, *Debiasing, in* BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 316?37 (Derek Koehler & Nigel Harvey eds., 2004) (arguing that the law can be used to counter biases and improve decision-making).

behavioral research provides insights into how and why people make decisions, it has already been used to improve those decisions and thereby improve the human condition.[17] As Cass Sunstein, former Administrator of the White House Office of Information and Regulatory Affairs,[18] recently noted:

> In the United States, a number of initiatives have been informed by relevant empirical findings, and behavioral economics has played an unmistakable role in numerous domains. These initiatives enlist such tools as disclosure, warnings, and default rules, and they can be found in multiple areas, including fuel economy, energy efficiency, environmental protection, health care, and obesity. As a result, behavioral findings have become an important reference point for regulatory and other policymaking in the United States.
>
> In the United Kingdom, Prime Minister Cameron has created a Behavioural Insights Team with the specific goal of incorporating an understanding of human behavior into policy initiatives. The official website states that its "work draws on insights from the growing body of academic research in the fields of behavioural economics and psychology which show how often subtle changes to the way in which decisions are framed can have big impacts on how people respond to them." The team has used these insights to promote initiatives in numerous areas, including smoking cessation, energy efficiency, organ donation, consumer protection, and compliance strategies in general.   Other nations have expressed interest in the work of the team, and its operations are expanding.[19]

Here are a few additional examples of actual or potential governmental application of the principles of behavioral psychology to affect people's decision-making in furtherance of policy goals:

- Because people are cognitive misers[20] "who use mental resources sparingly,"[21] the federal government can increase the

---

17. *See generally* Richard H. Thaler & Cass R. Sunstein, Nudge: Improving Decisions About Health, Wealth, and Happiness (2008); The Behavioral Foundations of Public Policy (Eldar Shafir ed., 2012).

18. In 2013, President Obama was forming a Behavioral Insights Team to more systematically utilize the insights of behavioral psychology to make government more effective. *See* Courtney Subramanian, *'Nudge' Back in Fashion at White House*, Time.com (Aug. 9, 2013), http://swampland.time.com/2013/08/09/nudge-back-in-fashion-at-white-house/.

19. Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 Yale L.J. 1826, 1832–33 (2013).

20. Regarding people as cognitive misers, see generally John A. Bargh, *The Cognitive Monster: The Case against the Controllability of Automatic Stereotype Effects*, in Dual-Process Theories in Social Psychology 361, 362 (Shelly Chaiken & Yaacov Trope eds., 1999). S*ee also* Shelley Taylor & Susan Fiske, *Salience, Attention, and Attribution: Top of the Head Phenomena*, in 11 Advances in Experimental Psychology 249 (L. Berkowitz ed., 1978).

21. David J. Arkush, *Situating Emotion: A Critical Realist View of Emotion and Nonconscious Cognitive Processes for Law and Legal Theory*, 2008 BYU L. Rev. 1275, 1296 (2008).

number of students who apply for (and receive) financial aid by simplifying application forms.[22]

- Because having too many choices often makes it more difficult for people to make optimal decisions,[23] governments can improve the quality of people's decision-making about prescription drug plans by reducing the number of options available.[24]
- Because people respond more to factors that are salient,[25] cities can reduce litter by requiring grocery stores to charge customers a tiny five cent fee to use an unrecyclable grocery bag thereby putting the problem more prominently on customers' radar screens.[26]
- Because of the status quo bias,[27] governments can increase by a large percentage the number of people who donate organs upon their death by legally presuming that people agree to donate but allowing them to easily opt out (rather than by presuming that people will not donate and requiring those who wish to donate to opt in).[28]
- Because people are loss averse,[29] school districts can more effectively incentivize teachers to do their best by giving them a

---

22. *See* Cass R. Sunstein, Simpler: The Future of Government 40 (2013). The notion that people are cognitive misers encompasses much more than the fact that people are more likely to fill out a 2-page form than a 6-page form, but it includes that fact. *See also* Uri Gneezy & John A. List, The Why Axis: Hidden Motives and the Undiscovered Economics of Everyday Life 165 (2013) (reporting results of test indicating that simplifying a form dramatically increased sign-up rates).

23. *See* Barry Schwartz, The Paradox of Choice: Why More Is Less (2004) (suggesting that with limitless choice, we produce better results with our decisions than we would in a more limited world, but we feel worse about them.).

24. *See* Sunstein, *supra* note 22, at 40. *See also* Tibor Besedes et al., *Reducing Choice Overload Without Reducing Choices*, (Netspar, Discussion Paper No. 09/2012-064, 2014), *available at* http://ssrn.com/abstract=2357376 (noting that studies show a multitude of choices can lead to choice overload that reduces decision quality, but suggesting a change in choice architecture that can improve decision-making without unduly reducing choice).

25. *See* Scott Plous, The Psychology of Judgment and Decision Making 178–80 (1993).

26. *See generally* Tatiana A. Homonoff, *Can Small Incentives Have Large Effects? The Impact of Taxes Versus Bonuses on Disposable Bag Use* (Princeton Univ., Working Paper No. 575, 2013), *available at* http://dataspace.princeton.edu/jspui/bitstream/88435/dsp014q77fr47j/3/575.pdf (analyzing experience of Washington, D.C.).

27. When presented with choices, people tend strongly to choose the one they perceive to represent the status quo. *See* Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, *in* Choices, Values, and Frames 288, 294 (Daniel Kahneman & Amos Tversky eds., 2000); *see generally* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. Risk & Uncertainty 7, 7?11 (1988).

28. Eric J. Johnson & Daniel G. Goldstein, *Defaults and Donation Decisions*, 78 Transplantation 1713, 1715 (2004) (reporting donation rates of 98% in all but one of the countries requiring people to opt out of organ donation plans versus 27.5% or less in countries requiring participant's affirmative consent); *see also* Eric J. Johnson & Daniel Goldstein, *Do Defaults Save Lives?*, 302 Sci. 1338 (2003) (similar).

29. Loss aversion is the tendency of people to hate losses substantially more than they enjoy gains. This causes people, among other things, to take bigger risks to avoid results that they perceive as losses than to achieve functionally identical results that they perceive as gains. Loss aversion is at the core of Kahneman and Tversky's famous pros-

"bonus," which they must return if they do not produce results rather than by giving them a reward for results at the end of the year.[30]

- Similarly, prospect theory, which builds upon loss aversion and related concepts,[31] indicates that governments are more effective in inducing consumers to purchase more energy efficient appliances if they focus consumers' attention on how much money they will lose if they do not switch rather than on how much they will save if they do switch.[32]

- Using the status quo bias and some social shaming, David Cameron's administration in the UK may reduce the viewing of pornography on the Internet by requiring users to opt-in in order to gain access to pornography sites.[33]

- Prospect theory indicates that governments could increase small business tax compliance by over-collecting taxes.[34]

- Because of the salience factor noted above, when governments require restaurant owners to disclose the calories of their menu items, the unhealthiness of those items may capture the owners' attentions. Then, because of the "tell-tale heart" effect,[35] these restaurant owners will tend to offer healthier options.[36]

- Because people evaluating insurance tend to over-weigh out-of-pocket costs and deductibles, a simple psychologically-based change in choice architecture could save purchasers of Afforda-

---

pect theory. *See generally* Amos Tversky & Daniel Kahneman, *Advances in Prospect Theory: Cumulative Representation of Uncertainty*, 5 J. RISK & UNCERTAINTY 297 (1992); *see also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453–55 (1981).

30.   *See* GNEEZY & LIST, *supra* note 22, at 87.

31.   *See* PLOUS, *supra* note 25, at 95–105.

32.   SUNSTEIN, *supra* note 22, at 61, *citing* Marti Hope Gonzales et al., *Using Social Cognition and Persuasion to Promote Energy Conservation: A Quasi-Experiment*, 18 J. APPLIED SOC. PSYCHOL. 1049, 1062 (1988).

33.   *See generally* Nico Hines, *British Prime Minister David Cameron's War on Porn*, THE DAILY BEAST (July 23, 2013), http://www.thedailybeast.com/articles/2013/07/23/british-prime-minister-david-cameron-s-war-on-porn.html.

34.   *See* Kathleen D. Thomas, *Presumptive Collection: A Prospect Theory Approach to Increasing Small Business Tax Compliance*, 67 TAX L. REV. 111, 115 (2013) (noting that small businesses will be much more likely to file tax returns if they are looking to receive a refund than if they face paying more to the tax collector).

35.   *See* George Loewenstein et al., *Disclosure: Psychology Changes Everything* 18–19 (Regulatory Policy Program, Working Paper No. RPP-2013-20, 2013) ("Evidently some disclosers either have an exaggerated expectation of the likely consumer response or feel guilty about the information disclosed. We suspect that sellers may well have an inflated sense of the public salience of disclosures, in a phenomenon related to the spotlight effect, by which people exaggerate how much other people are looking at them, and also analogous to the protagonist in Edgar Allen Poe's famous short story, *The Telltale Heart,* who imagines that the police can hear the heartbeat of the man he has killed and buried beneath the floorboards of his apartment.") (internal citation omitted).

36.   *See* Alex Namba et al., *Exploratory Analysis of Fast-Food Chain Restaurant Menus Before and After Implementation of Local Calorie-Labeling Policies, 2005–2011*, 10 PREVENTING CHRONIC DISEASE (June 20, 2013) (finding this effect).

ble Care Act policies and taxpayers approximately $10 billion each year.[37]

- Because of the conformity bias,[38] people take their clues for proper behavior from their peers. Using social comparison theory,[39] governments have improved people's water conservation over the long term.[40]

Moving beyond governments, consider that:

- Because of the status quo bias, companies can dramatically increase the amount of money that their employees save for their retirement by simply changing default rules so as to raise the amount that will be withheld from paychecks if employees do not check a different box.[41]
- Because how a question is framed can dramatically affect how most people answer it,[42] doctors can dramatically increase the percentage of patients who agree to an operation by telling them that 90% of people who have the operation are alive after

---

37. Eric J. Johnson, et al., *Can Consumers Make Affordable Care Affordable? The Value of Choice Architecture* (Univ. of Pa. Inst. for Law and Econ., Paper No. 13-28, 2013), *available at* http://ssrn.com/abstract=2291598.

38. The conformity bias (also known as "social proof") is the idea that people in particular situations will tend to take their cues for proper behavior, including which products to buy and use, from others they observe. ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 95 (3d ed. 1993). It is an important driver of white collar crime. *See* David Luban, *Making Sense of Moral Meltdowns*, *in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT AND LEADERSHIP, *supra* note 2, at 57, 70 (Deborah L. Rhode ed., 2006) ("The desire to fit in with those around us helps explain how lower-level employees, such as lawyers and accountants, become fatally implicated in corporate wrongdoing. In large organizations, decisions get parceled out among many people, and every piece of work is the product of many hands.").

39. Social comparison theory suggests that individuals validate the appropriateness of their actions and thoughts by comparing them to the actions and thoughts of others. *See* Leon Festinger, *A Theory of Social Comparison Processes*, 7 HUM. RELATIONS 117 (1954).

40. *See* Paul J. Ferraro et al., *The Persistence of Treatment Effects with Norm-Based Policy Instruments: Evidence from a Randomized Environmental Policy Experiment*, 101 AM. ECON. REV. 318, 321–22 (2011) (finding that appeals to conserve based on social comparisons had a long-term beneficial impact); Maria Bernedo et al., *The Persistent Impacts of Norm-Based Messaging and Their Implications for Water Conservation*, 37 J. CONSUMER POL'Y 437 (2014) (same).

41. Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149 (2001). *See also* Shlomo Benartzi et al., *Choice Architecture and Retirement Savings Plans, in* BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY, *supra* note 17, at 246 (Eldar Shafir ed., 2013) (reporting that an "escalator program" where employees pre-commit to periodic saving increases significantly increased employee savings); Robert L. Clark et al., *Can Simple Informational Nudges Increase Employee Participation in a 401(k) Plan?*, (Nat'l Bureau of Econ. Research, Working Paper No. w19591, 2013), *available at* http://ssrn.com/abstract=2348502 (reporting results from field experiment finding that simple informational interventions can nudge workers to participate more fully in retirement savings plan, enhancing their retirement income).

42. *See generally* ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 34–47 (1988); PLOUS, *supra* note 25, at 69–76. For example, people prefer hamburger labeled 75% fat free to hamburger labeled 25% fat, though the two are identical. MAX SUTHERLAND, ADVERTISING AND THE MIND OF THE CONSUMER 21 (1993).

five years, rather than by noting that 10% of patients are dead after five years.[43]

B. *Behavioral-Based Marketing*

Although governmental initiatives have raised a legitimate, but perhaps overblown, debate about government paternalism,[44] businesses have, with relatively little controversy, long used principles of behavioral psychology to maximize sales and profits.[45] For example:

- Utilizing framing principles, Williams-Sonoma increased the sales of its formerly most expensive bread-maker ($275) by introducing an even more expensive model ($400) that suddenly made the $275 model appear relatively affordable.[46]
- Because of the scarcity effect,[47] companies can increase sales by advertising that items are available for "a limited time only" or "in limited quantities" or "in only selected locations."[48]
- Using the impact of the conformity bias, companies can increase sales by advertising a product as "America's favorite" or

---

43. SAM HARRIS, THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES 143 (2010) (citing studies); SUNSTEIN, *supra* note 22, at 61, *citing* Donald A. Redelmeier et al., *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*, 270 J. Am. Med. Ass'n 72, 73 (1993).

44. Much of Sunstein's recent book is devoted to addressing this debate. SUNSTEIN, *supra* note 22, at 190–208. *See also* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003); Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 93, 175 (2003); George Loewenstein et al., Warning: You Are About to be Nudged (Mar. 28, 2014) (unpublished manuscript), *available at* http://ssrn.com/abstract=2417383 (finding that informing people that they were being defaulted did not appreciably change the impact of the default; in other words, subjects appeared not to mind being nudged).

45. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 724 (1999) [hereinafter Hanson & Kysar, *TBS I*] ("Once it is acknowledged that consumer risk perceptions may be affected by, for instance, the manner in which information is framed, then it becomes inevitable that manufacturers will exploit those framing effects in a way that maximizes manufacturer profits.").

46. DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 14–15 (2008), *citing* Itamar Simonson, *Get Closer to Your Customers by Understanding How They Make Choices*, 35 CAL. MGMT. REV. 68 (1993). *See also* Gerald E. Smith & Thomas T. Nagle, *Frames of Reference and Buyers' Perception of Price and Value*, 38 CAL. MGMT. REV. 98, 100 (1995) (noting that "managers can . . . influence purchase decisions by how they present, or 'frame,' price and benefits relative to a reference point."); Simone Moran & Joachim Meyer, *Using Context Effects to Increase a Leader's Advantage: What Set of Alternatives Should Be Included in the Comparison Set?*, 23 INT'L J. RES. MARKETING. 141, 142 (2006) (making a similar point).

47. The scarcity effect causes consumers to assume that a product is more desirable if it is scarcer than if it is not. *See* Heribert Gierl et al., *Scarcity Effects on Sales Volume in Retail*, 18 INT'L REV. OF RETAIL, DISTRIBUTION & CONSUMER RES. 45 (2008) (isolating conditions under which scarcity effect has impact); Michael Lynn, *Scarcity's Enhancement of Desirability: The Role of Naïve Economic Theories*, 13 BASIC & APPLIED SOC. PSYCHOL. 3 (1992) (finding that consumers tend to believe that scarcity signals value).

48. Ravi Dhar & Stephen M. Nowlis, *The Effect of Time Pressure on Consumer Choice Deferral*, 25 J. CONSUMER RES. 369, 373 (1999) (demonstrating that limiting the availability of a product increases the likelihood that consumers will purchase).

> "most popular" or "fastest growing," because such representations make the product more appealing to consumers.[49]

- Using framing effects by calling cigarettes "light" and "regular" rather than "regular" and "heavy," tobacco companies reduce consumers' perceptions of the risk of tobacco smoking.[50]

- Using the concept of moral equilibrium,[51] grocery stores typically funnel shoppers initially into the fruit and vegetable section of the store, knowing that if consumers buy some healthy foods they often start feeling good about themselves and may grant themselves license to splurge on some ice cream or potato chips before they leave the store.[52]

- Because of consumer "price blindness,"[53] firms can plump up sales and profits by pricing items at, say, $9.99 rather than $10.00.[54]

- Because reciprocity is one of the fundamentals of human interaction,[55] pharmaceutical companies increase sales by making "bribes that don't appear to be bribes" to prescribing physicians.[56]

- Because different emotions cause different reactions, advertisers can effectively increase sales by tailoring different ads for consumers watching scary shows than for those watching romantic shows.[57]

---

49.   Robert Prentice, *Contract-Based Defenses in Securities Fraud Litigation: A Behavioral Analysis*, 2003 U. Ill. L. Rev. 337, 373 (2003).

50.   Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1507 (1999) [hereinafter Hanson & Kysar, *TBS II*] ("The tobacco industry also seems to have developed ways to take advantage of framing effects by portraying the product so as to minimize smoker risk perceptions.").

51.   The notion behind moral equilibrium is that most people keep a kind of running scoreboard in their heads comparing the kind of person they envision themselves being with their actions. If they do something bad, like tell a little lie, they may look to compensate for that by finding an opportunity, maybe to donate to charity, to put their scoreboard back in equilibrium. On the other hand, if they do something good, their scoreboard is now in surplus and they may give themselves license to fail to live up to their own standards. Moral compensation plus moral licensing equals moral equilibrium. *See generally* Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 Wis. L. Rev. 1059, 1094–1104 (2011).

52.   David Brooks, The Social Animal 171 (2011) (noting that "shoppers in grocery stores usually confront the fruit-and-vegetable section first. Grocers know that shoppers who buy the healthy stuff first will feel so uplifted they will buy more junk food later in their trip").

53.   Because of what Hanson and Kysar call "price blindness," consumers tend to view a price of $9.99 as closer to $9.00 than to $10.00. Hanson & Kysar, *TBS II, supra* note 50, at 1441–42.

54.   *Id.*

55.   *See* Cialdini, *supra* note 38, at 17–57.

56.   *See* Michael J. Oldani, *Thick Prescriptions: Toward an Interpretation of Pharmaceutical Sales Practices*, 18 Med. Anthropology Q. 325 (2004); Sunita Sah & Adriane Fugh-Berman, *Physicians Under the Influence: Social Psychology and Industry Marketing Strategies*, 14 J. L. Med. & Ethics 665 (2013).

57.   *See* Vladas Griskevicius et al., *Fear and Loving in Las Vegas: Evolution, Emotion, and Persuasion*, 46 J. Marketing. Res. 384, 393 (2009).

- Envy is a powerful emotion.[58] By stimulating envy in consumers, sellers can induce them to purchase products that they can ill afford and would not otherwise purchase.[59]
- Because of multiple vulnerabilities, businesses often draft contracts to profitably take advantage of laymen's cognitive and psychological weaknesses.[60]

C. *Why Not Ethics Also?*

If all these changes in decision-making in matters of finance, health, and consumer products can be effected by governments and private actors utilizing the principles of behavioral psychology, then it seems plausible that people might use comparable principles to improve their own decision-making in ethical matters. If people can be fruitfully warned about their vulnerability to psychology-based marketing techniques so that they can guard against them, as seems to be the case,[61] then perhaps they can be similarly educated regarding how to avoid making ethical mistakes caused by these same and related phenomena.

And, perhaps governments, firms, and other organizations can make simple changes that will improve the ethical behavior of their employees and others.[62] Thaler and Sunstein note that by changing the *choice architecture*—the conditions under which people make decisions—employers, governments, and others can dramatically affect the outcome of those choices.[63] In theory, this should apply to ethical decisions as well as to other categories of decisions.[64]

---

58.   Envy can power unethical behavior. *See* Francesca Gino & Lamar Pierce, *The Abundance Effect: Unethical Behavior in the Presence of Wealth*, 109 Org. Behav. & Human Decision Processes 142, 152 (2009) (finding in three experiments "the presence of abundant wealth led to more frequent cheating than an environment of scarcity . . . [t]he results showed that . . . feelings of envy toward wealthy others . . . led to unethical behavior").

59.   *See* L. Sun, The Fairness Instinct: The Robin Hood Mentality and Our Biological Nature 90 (2013) (giving examples).

60.   *See generally* Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003).

61.   *See, e.g.*, Melanie Greenberg, *Ten Ways Your Local Grocery Store Hijacks Your Brain*, Psychol. Today (Mar. 14, 2012), http://www.psychologytoday.com/blog/the-mindful-self-express/201203/ten-ways-your-local-grocery-store-hijacks-your-brain.

62.   There is, of course, a huge literature on how to structure financial incentives in order to motivate employees to engage in or refrain from certain behavior, but there are many psychological and social levers that can be pulled as well. *See* Tom Tyler, *The Psychology of Cooperation: Implications for Public Policy*, in Behavioral Foundations of Public Policy, *supra* note 17, at 77, 79 (Eldar Shafir ed., 2013) (although economists assume that people are self-interested and are primarily motivated by a desire to maximize their own material rewards, "there are a broader range of [social] motivations that can be tapped to encourage desirable behavior than is encompassed within traditional incentive and sanctioning models").

63.   Thaler & Sunstein, *supra* note 17, at 11. *See also* Sunstein, *supra* note 22, at 190–208 (discussing the potential of choice architecture throughout the book).

64.   *See* David O. Brink, *Situationism, Responsibility, and Fair Opportunity*, 30 Soc. Phil. & Pol'y 121, 127 (2013) (calling for the modification of "our institutions, policies, and

II. KEYS TO ETHICAL ACTION

There are arguably four key steps to acting ethically.[65] First, people must perceive the ethical dimensions of an issue that they face (Moral Awareness). Second, they must have the ability to decide upon a course of action that is ethical (Moral Decision Making). Third, they must have the desire to act on that ethical decision (Moral Intent). Fourth, and finally, they must have the motivation and courage to act upon that desire (Moral Action).[66] Teaching behavioral ethics can have a beneficial impact by creating the potential for improvement in all four steps.

A. *Moral Awareness*

Attorneys and other people cannot make ethical decisions if they are not aware of the ethical dimensions of issues they are trying to resolve. Absent moral awareness, people might accidentally make the

---

personal plans" in light of the influence of situational factors); Ray Fisman & Adam Galinsky, *Can You Train Business School Students to Be Ethical?*, SLATE (Sept. 4, 2012), http://www.slate.com/articles/business/the_dismal_science/2012/09/business_school_and_ethics_can_we_train_mbas_to_do_the_right_thing_.html ("What we need to do is equip our students to become 'Moral Architects,' to create environments that naturally lead people—themselves included—in the right direction. Being a moral architect can involve modest organizational changes (like shifting where people sign a document) to more complex ones (like introducing an ethical checklist for all important decisions, in the way that doctors and pilots use checklists to reduce errors and save lives). It also involves training students to know when it's most valuable to remove a temptation in the first place (for example, designing organizations to minimize conflicts of interest)."); David Messick, *Ethical Judgment and Moral Leadership, in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY, *supra* note 2, at 95, 97 (Deborah L. Rhode ed., 2006) ("Moreover, some psychologists who study conformity bias, the tendency for people to make erroneous judgments when they witness others having done the same, claim that there are two fundamental desires in conflict in these situations, the desire to be right and the desire to be liked. . . . We know a good deal about the dynamics of these situations, thanks to the pioneering research of people like Latane and Darley and like Stanley Milgram, but *more emphasis needs to be placed on the design of cultures and environments that promote moral leadership and sound ethical judgments.*") (emphasis added).

65. In this section, I use a modified version of Professor James Rest's four "components of moral decision making." *See* JAMES R. REST, MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY 26–39 (1994).

66. Rest's four keys are: (1) Moral Awareness (recognition that a situation raises ethical issues); (2) Moral Reasoning (determining what course of action is ethically sound); (3) Moral Intent (identifying which values should take priority in the decision); and (4) Moral Behavior (acting on ethical decisions). *See* Deborah L. Rhode, *Introduction: Where is the Leadership in Moral Leadership, in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT AND POLICY, *supra* note 2, at 1, 22 (Deborah L. Rhode ed., 2006) (summarizing Rest). Professor Rest calls these four categories moral awareness, moral reasoning, moral intent, and moral behavior. I am changing moral reasoning to moral decision making for reasons that are explained below, moral behavior to moral action (which I feel is slightly more indicative), and am slightly altering his meanings of the term moral intent. The terms ethics and morality are used interchangeably, based on the work of Moore and Gino. *See* Celia Moore & Francesca Gino, *Ethically Adrift: How Others Pull Our Moral Compass from True North, and How We Can Fix It*, 33 RES. IN ORG. BEHAV. 53, 54 n.1 (2013) (noting that "current usage" involves treating "moral" and "ethical" as synonyms and that "Cicero coined the Latin term *moralis* (proper behavior of a person in society) as a direct translation of the Greek *ethicus*").

"right" choice, but if they never see the ethical aspect of the issue it is difficult to ascribe an ethical quality to the decision they blindly make. And, obviously, absent moral awareness, people might well accidentally make an unethical choice because they are focusing upon other aspects of the decision calculus and inadvertently omitting any ethical considerations.

Studies on selective attention prove that people generally see what they expect to see. When asked to watch a video and to count how many times members of a group of students pass a basketball to one another, people get so involved in counting the passes that half of them do not even notice a person wearing a gorilla costume come strolling into the center of the group, pound his chest, and then go strolling out the other side.[67] But there are more problems with moral awareness than just selective attention. People's brains are very adept at hiding the ethical dimensions of issues from people when other matters are salient. The ethical dimension can fade away. *Ethical fading* is:

> [A] process that removes the difficult moral issues from a given problem or situation, hence increasing unethical behavior. From this perspective, such unethical behavior occurs not because people are morally uneducated but, rather, because they do not see the "ethical" in the decision. Self-deception is identified to be at the root of this problem. Such deception involves avoidance of the truth, the lies that we tell to, and the secrets we keep from, ourselves.[68]

Like everyone else, lawyers are subject to ethical fading.[69] Many factors can contribute to ethical fading. People's tendency to be obedi-

---

67. *See generally* CHRISTOPHER CHABRIS & DANIEL SIMONS, THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US (2010). For a look at Professor Daniel Simons' experiment, see Daniel J. Simons, *Selective Attention Test*, YOUTUBE (Mar. 10, 2010), http://www.youtube.com/watch?v=VJG698U2Mvo.

68. Ann E. Tenbrunsel, *Commentary: Bounded Ethicality and Conflicts of Interest, in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 96 (Don A. Moore et al. eds., 2005), *citing* Sissela Bok, Secrets (1989) and Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUSTICE RES. 223 (2004). *See also* Joel J. Van der Weele, Inconvenient Truths: Determinants of Strategic Ignorance in Moral Dilemmas (Apr. 23, 2014) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247288 (finding that people "remain ignorant more often if fairness requires a larger sacrifice, whereas a larger expected loss for others does not lead to significant changes in ignorance or prosocial behavior . . . subjects consciously choose to avoid inconvenient information").

Closely related to ethical fading is Drumwright and Murphy's concept of moral myopia. Minette E. Drumwright & Patrick E. Murphy, *How Advertising Practitioners View Ethics: Moral Muteness, Moral Myopia, and Moral Imagination*, 33 J. ADVERTISING 7 (2004).

69. *See* Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research, in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING 47, 50 (Leslie C. Levin & Lynn Mather eds., 2012); John Flood, *Transactional Lawyering: Clients, Ethics, and Regulation, in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING 193 (Leslie C. Levin & Lynn Mather eds., 2012) ("[S]ocialization, conformity, and ethical fading are so prevalent, so deeply embedded into professionals' lives, that there is no escape."); MILTON C. REGAN, EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 303 (2004) (explaining how

ent to authority[70] may cause them to be so focused on pleasing their superiors that they do not even notice that their superiors are asking them to do something unethical. The conformity bias[71] may cause people to take their cues as to proper behavior from their peers and not even notice that their peers are cutting ethical corners. The phenomenon of incrementalism[72] (also known as the slippery slope) may cause people to fail to notice that their actions have evolved from small, insignificant technical departures from proper procedures to larger, perhaps fraudulent, noncompliance. Of the many causes of ethical fading, this article will, due to space limitations, take a detailed look at just two—framing and incrementalism.

1. Framing

How questions are framed can dramatically affect how people answer them.[73] People would rather purchase potato chips labeled 90% fat free than potato chips labeled 10% fat, even though they are the exact same potato chips.[74] Indeed, people actually report that hamburgers labeled 75% fat free taste better than identical hamburgers labeled 25% fat.[75]

Kahneman and Tversky famously established that due to natural loss aversion, people will tend to make different decisions when faced with a course of action framed as involving a chance for gain than they will when the identical course of action is framed as involving a risk of loss.[76] People will be more likely to take unethical steps to avoid what

---

prominent attorney John Gellene went to jail due to problems like ethical fading, framing, and loss aversion).

70. *See* MARGARET HEFFERNAN, WILLFUL BLINDNESS: WHY WE IGNORE THE OBVIOUS AT OUR PERIL 108–09 (2011).

71. People have evolved to take cues for behavior from those around them, and in their workplaces they will tend to look to their co-employees for cues as to appropriate conduct. Albert Bandura, *Self-efficacy: Toward a Unifying Theory of Behavioral Change*, 84 PSYCHOL. REV. 191 (1977). If they see their coworkers acting unethically, they are much more likely to do the same than in the absence of the signal that such conduct sends. Sandra L. Robinson & Anne M. O'Leary-Kelley, *Monkey See, Monkey Do: The Influence of Work Groups on Antisocial Behavior of Employees*, 41 ACAD. MGMT. J. 658 (1998).

72. *See infra* text accompanying notes 109–15.

73. Shiller provides one aspect of "framing" as "the notion that when people make decisions without enough deliberation, consultation, and information, they are easily influenced by superficial forms and irrelevant details of presentation or wording." Robert J. Shiller, *'Framing' Prevents Needed Stimulus*, N.Y. TIMES, Sept. 2, 2012, at BU4.

74. IAN AYRES, CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE 111 (2010) (citing study by Wertenbroch). *See also* Caglar Irmak et al., *The Impact of Product Name on Dieters' and Nondieters' Food Evaluations and Consumption*, 38 J. CONSUMER RES. 390 (2011) (reporting results of study showing that dieters were misled by labels of dishes—for example, Daily Salad Specials seemed healthier than Daily Pasta Specials, even though the dieters were shown the ingredients for the dishes and they were the same).

75. WRAY HERBERT, ON SECOND THOUGHT: OUTSMARTING YOUR MIND'S HARD-WIRED HABITS 94 (2010).

76. *See* Christine Jolls, *On Law Enforcement with Boundedly Rational Actors, in* THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR 268, 271–72 (Francesco Parisi & Vernon L. Smith eds., 2005) (discussing prospect theory). Relatedly, "the choice to undergo a risky medical procedure will be heavily influenced by whether its possible outcomes are framed

has been framed as a potential loss than to achieve an identical result that has been framed as a possible gain.[77]

What the concept of framing means for ethical decision making, in part, is that people will make different decisions if ethics is part of the lens through which they view a choice than if it is not. In one famous study, people were asked to consider the following scenario:

> ABC Drug Company's most profitable drug, its internal studies indicate, causes 14–22 "unnecessary" deaths a year. Competitors offer a safe medication with the same benefits at the same price. If regulators knew of the internal study, they would ban sale of the drug. Is it ethical for ABC to continue to sell the drug?

Unsurprisingly, 97% of respondents concluded that it would be unethical for ABC to continue to sell the drug.[78] However, when other subjects were divided into 57 groups and told to pretend that they were on ABC's board of directors and then given this scenario and asked what they should do, not one of 57 groups chose to remove the drug from the market. A strong majority of groups decided to hire lawyers and lobbyists to protect ABC's right to continue to sell the drug.[79] When evaluating others' actions, people framed the issue as an ethical one and concluded that it was clearly unethical to keep selling the drug. But when playing the role of ABC directors, subjects framed the issue as a business decision and continued to sell, seemingly ignoring the decision's ethical aspects, which had faded away.[80]

In a recent experiment, students were asked to act as CEOs of a struggling company that was facing layoff decisions. Some were given a table listing the number of employees in one column and corresponding profits in the other. Others were given an equation that expressed

---

in terms of survival rates or mortality rates." Sam Harris, The Moral Landscape: How Science Can Determine Human Values 143 (2010).

77.   *See* Mary C. Kern & Dolly Chugh, *Bounded Ethicality: The Perils of Loss Framing*, 20 Psychol. Sci. 378, 379, 381 (2009) (citing literature and three studies of their own indicating that "people trying to avoid a loss are more likely to draw upon lower-road ethical choices than are people trying to attain a gain"); Kaye J. Newberry et al., *An Examination of Tax Practitioner Decisions: The Role of Preparer Sanctions and Framing Effects Associated with Client Condition*, 14 J. Econ. Psychol. 439, 449 (1993) (finding that tax preparers are more likely to be aggressive in approving deductions when faced with losing a client than when trying to add clients); Jessie S. Cameron & Dale T. Miller, *Ethical Standards in Gain Versus Loss Frames*, in Psychological Perspectives on Ethical Behavior 91 (David De Cremer ed., 2009) ("We propose that trying to avoid a loss will not only elicit more sympathetic evaluations of unethical behavior . . . but will also elicit more unethical behavior than will trying to secure a win. At the root of this idea is the psychology of loss aversion."). This is the result predicted by Kahneman and Tversky's prospect theory. *See* Tversky & Kahneman, *supra* notes 10 and 29.

78.   J. Scott Armstrong, *Social Irresponsibility in Management*, 5 J. Bus. Res. 185, 197 (Sept. 1977).

79.   *Id.* at 200.

80.   The notion of "role morality" is that people tend to adopt different sets of moral rules for different roles that they play in society (i.e. mother, church member, stock broker). *See, e.g.*, Robin R. Radtke, *Role Morality in the Accounting Professions—How Do We Compare to Physicians and Attorneys?*, 79 J. Bus. Ethics 279 (2008) (noting that role morality involves claiming moral permission to harm others in ways that would be wrong were it not for the role the person is playing as, for example, a loyal employee).

profits as a function of the number of employees, but was otherwise the same. Students given the equation were much more likely to choose to fire as many workers as necessary to maximize profits than those given the table, apparently because the former group simply "solved" the company's profit maximization problem while members of the latter group were more likely to think about the consequences to the employees they were laying off.[81] With consequences to employees in their frame of reference, they made different decisions.

Studies show that when people are presented with a choice and prompted to think of cooperation, they make different (and more pro-social) decisions than when they are prompted to think of competition.[82] Other studies demonstrate that merely priming people to think of money leads them to adopt a business frame of mind, which tends to lead to unethical intentions and behaviors.[83]

Many real life situations mirror the results of these studies. When engineers from Morton Thiokol first evaluated whether the space shuttle *Challenger* should be launched under conditions that were chillier than it had ever been tested in, they concluded that it should not. They were looking at the problem as a safety issue. When their supervisor asked them to put on their "managers' hats" (in other words, to look at the issue as one involving dollars and cents), they changed their minds and recommended launch (with disastrous results).[84] Reframing the issue from a safety issue to a managerial issue changed their conclusion by 180 degrees.[85]

And when a day care center added fines for parents who picked up their children after the daily deadline, tardiness *increased* as the parents reframed the action from an ethically-tinged one ("I shouldn't be late and burden the staff unfairly") to a purely economic one ("I can pay x amount and buy the staff's time to watch my child").[86]

Albert Speer said after World War II that he was able to play his role in Hitler's death machine by viewing his job as that of a mere "administrator" who had no responsibility for the human consequences of the policies he helped execute.[87] Energy traders for Enron were

---

81. Fisman & Galinsky, *supra* note 64 (citing a study by Ariel Rubinstein).

82. DACHER KELTNER, BORN TO BE GOOD: THE SCIENCE OF A MEANINGFUL LIFE 187–88 (2009) (describing a study by Robert Kurzban who created an atmosphere of trust and changed behavior from competition to cooperation simply by having experimenter touch participants on the back).

83. Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORG. BEHAV. & HUM. DECISION PROCESSES 53, 59 (2013) (finding that people primed to think of money were more likely to indicate that they would do certain unethical acts, to lie in a deception game to gain better results, to lie to the experimenters to gain greater rewards, and to say that they would hire a job applicant who indicated that he would bring a competitor's confidential information along with him if hired).

84. MAX H. BAZERMAN & ANNE E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 16 (2011).

85. ALLAN J. MCDONALD & JAMES R. HANSEN, TRUTH, LIES, AND O-RINGS: INSIDE THE SPACE SHUTTLE *Challenger* Disaster 112, 228 (2009).

86. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000).

87. BAZERMAN & TENBRUNSEL, *supra* note 84, at 31.

able to manipulate the markets to the detriment of consumers by framing their actions as "marketing,"[88] or by focusing on a goal of getting around rules rather than complying with them.[89] A study of a life insurance company that mistreated thousands of customers by having them cash in the equity in their existing policies to buy larger policies found not that the employees were consciously making unethical decisions, but that the company's culture reframed the situation as one where literally everyone was underinsured, making it easy for the employees to rationalize their actions.[90]

Obviously if people, including lawyers, frame their jobs as one of evading rules rather than complying with rules, as competing rather than cooperating, as making a business decision rather than an ethical decision,[91] or as meeting performance goals rather than acting honorably,[92] they will make different (and more ethically dubious) decisions. It has been suggested that the biggest ethical mistakes in business are mistakes of framing.[93] Can the principles of behavioral ethics do anything to improve the situation?

a. *Can Individuals Resist Ethical Fading Caused by Framing?*

Moral awareness is a precondition to moral action.[94] It should be the moral responsibility of every attorney, indeed of every individual, to keep ethical considerations in his or her own frame of reference whenever making decisions. And it is the responsibility of firms that wish their employees to act legally and ethically to continually prompt them

---

88. Robert Hoyk & Paul Hersey, The Ethical Executive: Becoming Aware of the Root Causes of Unethical Behavior: 45 Psychological Traps That Every One of Us Falls Prey To 69 (2008). The authors quote the following audiotapes from Enron energy traders:

Greg: "It's all how well you can weave these lies together, Shari."
Shari: "I feel like I'm being corrupted now."
Greg: "No, this is marketing."
Shari: "O.K."

89. *Id.* at 86 ("The attitude was, 'play by your own rules,'" says a former trader. "We all did it. We talked about it openly . . . . We took *pride* in getting around the rules.").

90. Tammy L. MacLean, *Framing and Organizational Misconduct: A Symbolic Interactionist Study*, 78 J. Bus. Ethics 3 (2008).

91. Vidya N. Awasthi, *Managerial Decision-Making on Moral Issues and the Effects of Teaching Ethics*, 78 Bus. Ethics 207, 208 (2008) ("I propose that, when managers face a moral issue in decision-making, they make a different decision depending upon how the problem is presented to them or how they perceive the problem, whether in an ethical frame or a managerial frame.").

92. Jennifer M. Mitchell & Eric D. Yordy, *COVER It: A Comprehensive Framework for Guiding Students Through Ethical Dilemmas*, 27 J. Legal Stud. Educ. 35, 36 (2010) (quoting ethics consultant David Gebler as saying that "[m]ost unethical behavior is not done for personal gain, it's done to meet performance goals").

93. Ronald A. Howard & Clinton D. Korver, Ethics for the Real World: Creating a Personal Code to Guide Decisions in Work and Life 95 (2008) ("[O]ur biggest mistakes in ethical decision making are mistakes in framing.").

94. Moore & Gino, *supra* note 66, at 60 ("Individuals are better equipped to make moral decisions if they are aware of the relevant moral values and implications of the decisions they are facing.").

to do so. The behavioral ethics literature indicates that this can have a meaningful impact.

Looking first at individuals, people can help keep ethics in their frame of reference by reminding themselves every morning in the shower that they wish to be good people and that to meet that goal, they must constantly strive to act ethically, just as they must constantly strive to gain more knowledge and skill regarding the technical aspects of their jobs.[95]

Behavioral ethics teaches that people must practice listening to their moral intuition—to their gut—rather than turning all ethical discussions into legalistic exercises where lawyers are weighing both sides of the issue or accountants are parsing technical language in an attempt to justify a position their intuition tells them is wrong.[96] By listening to their moral intuition, people can increase their own moral awareness by keeping ethics in their frame of reference. DeSteno and Valdesolo note that "[o]ne answer can be found in a simple gut check. When faced with a moral decision, take a few seconds to pause and listen to your inner voices. Is there a hint of guilt, a hint of shame, a gut feeling of unease? If so, don't ignore it."[97]

Rudolf Hess, commandant at Auschwitz during much of World War II, provided a chilling example of the adverse consequences that can ensue when people do not listen to their gut. Regarding watching the exterminations, he wrote:

> My pity was so great that I longed to vanish from the scene: yet I might not show the slightest trace of emotion. . . . I was repeatedly asked how I and my men could go on watching these operations, and how we were able to stand it. My invariable answer was that the iron determination with which we must carry out Hitler's orders could only be obtained by a stifling of all human emotions.[98]

There is also evidence in the negotiation realm that specific training can teach negotiators to pay attention to their own biases and resist framing effects.[99] Such training, combined with a little self-monitoring

---

95. Obviously, one need not stop at the shower. Robbennolt and Sternlight recommend that attorneys who wish to be ethical, among other things: (1) reflect regularly on core values; (2) keep a reminder of core values (such as a paperweight) close at hand; (3) imagine and individualize the people who will be affected by their decisions; and (4) bear in mind the long-term consequences of unethical conduct. Robbennolt & Sternlight, *supra* note 2, at 1159.

96. Perlman, *supra* note 4, at 23, *citing* Lawrence Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence,* 52 J. Legal Educ. 112 (2002).

97. David DeSteno & Piercarlo Valdesolo, Out of Character: Surprising Truths About the Liar, Cheat, Sinner (and Saint) Lurking in All of Us 55–56 (2011).

98. David G. Winter, *Taming Power, in* Moral Leadership: The Theory and Practice of Power, Judgment and Policy, *supra* note 2, at 159, 164 (Deborah L. Rhode ed., 2006) (quoting Hess's memoirs).

99. Margaret A. Neale & Max H. Bazerman, *The Effects of Framing and Negotiator Overconfidence on Bargaining Behaviors and Outcomes,* 28 Acad. of Mgmt. J. 34, 38, 45–46 (1985).

by the individuals involved, has the potential to reduce the impact of framing effects in the moral realm as well.[100]

b.   *Can Firms Minimize Ethical Fading Caused by Framing?*

Corporations and other firms can help their employees battle ethical fading. Experimental studies show that just reminding people that they should act ethically helps them keep ethical considerations in their frame of reference and thereby improves ethical conduct.[101] Priming morality by asking people to write down the Ten Commandments or even unscramble religious words increases good behavior[102] and reduces bad behavior.[103] Just having employees swear to the truth of a document at its beginning *before* filling it out, rather than at its end *after* filling it out increases employee truth-telling.[104] All these actions improve moral awareness by making the ethical dimensions of the situa-

---

100.   Tenbrunsel, Diekmann, Wade-Benzoni, and Bazerman point to studies indicating that dieters can more effectively avoid temptation by refocusing their attention from the qualities of the temptation (for example, how yummy a pretzel would taste) to its abstract qualities (for example, thinking of the pretzel as if it were merely a picture of a pretzel), and suggest that:

> In the domain of ethical decision making, when people are faced with a decision, they may be able to enact the "should" self [in other words, establish an ethical frame for their decision] by similarly focusing on the high-level aspects of the situation. For example, consuming limited natural resources can be thought of as an intergenerational tradeoff. When the decision is framed as such, people can take the long-term harm of consumption to the collective—including future generations—into account. . . . In ethical dilemmas, we should envision two choices before us—the ethical choice and the unethical choice. Doing so allows us to see that in choosing the unethical action, we are not choosing the ethical act. Not doing so allows the ethical choice to hide in the background and helps to fade just how unethical the unethical choice is.

Ann E. Tenbrunsel et al., The Ethical Mirage: A Temporal Explanation as to Why We Aren't as Ethical as We Think We Are 39–40 (Harv. Bus. Sch., Working Paper No. 08-012, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010385, citing Walter Mischel et al., *Delay of Gratification in Children*, in CHOICE OVER TIME 147, 154–56 (George Loewenstein & Jon Elster eds., 1992).

101.   DAN ARIELY, THE (HONEST) TRUTH ABOUT DISHONESTY 40 (2012) ("[In experiments] merely trying to recall moral standards was enough to improve moral behavior.").

102.   Azim F. Shariff & Ara Norenzayan, *God is Watching You: Priming God Concepts Increases Prosocial Behavior in an Anonymous Economic Game*, 18 ASS'N FOR PSYCHOL. SCI. 803 (2007) (finding that "[s]ubjects allocated more money to anonymous strangers when God concepts were implicitly activated than when neutral or no concepts were activated"). *See also* Moore & Gino, *supra* note 66, at 68 ("[S]imple role model primes, such as thinking of one's parents, have been shown to help people improve their moral judgment and regulate their moral behavior."); Liane Young & A.J. Durwin, *Moral Realism as Moral Motivation: The Impact of Meta-Ethics on Everyday Decision-Making*, 49 J. EXPERIMENTAL SOC. PSYCHOL. 302, 305 (2013) (finding that priming study participants to think about moral realism—the notion that objective moral facts exist—doubles charitable donations over priming participants to think about moral antirealism).

103.   Mazar et al., *supra* note 1, at 633 (finding that people acted more ethically after being prompted to think of honor codes and the Ten Commandments).

104.   *See* FRANCESCA GINO, SIDETRACKED: WHY OUR DECISIONS GET DERAILED, AND HOW WE CAN STICK TO THE PLAN 221 (2013) (discussing study).

tion more salient and thereby can improve moral decision-making and moral behavior.[105]

Creating a culture that emphasizes ethics, that punishes unethical behavior and rewards ethical behavior, and that does whatever it takes to keep ethical aspects of decision-making constantly in view, should lead to more ethical decision-making and actions.[106] Frequent open discussions of ethics[107] and repeated telling of legendary stories of firm ethical heroism that employees can model their actions upon are also excellent ways to help build such a culture.[108]

2. Incrementalism

Another of the many factors that can prevent lawyers and others from seeing that they are acting unethically is incrementalism—the old slippery slope. People can slide from small, technical violations of rules to large, unethical violations of laws, almost without noticing it. Glover noted in his history of morality in the 20th century that "[s]ometimes people's actions seem to be disconnected from their sense of who they are. This may be because they slide into participation by imperceptible degrees, so that there is never the sense of a frontier being crossed."[109] Certainly this is a concern in business where "[t]he combination of ambition, high need for achievement, and little personal sense of what [economic actors] consider right and wrong from an ethical standpoint can be a formula for disaster. It is all too easy to slide down the slippery slope of unethical behavior, even when well-intentioned."[110] It is an obvious problem in the practice of law as well.[111]

Studies show that people are much less likely to notice a gradual deterioration in ethical conduct by others than a quick, marked decline,[112] so it is not surprising that they have the same problem in

---

105. It is unclear whether the employees and students act more ethically because they are reminded of their desire to or of the consequences of not doing so, but in either event it appears that ethical behavior is increased when people through their own actions, or the actions of the organizations, are prompted to keep the ethical aspects of a decision in their frame of reference.

106. Guido Palazzo et al., *Ethical Blindness*, 109 J. Bus. Ethics 323, 329 (2012) ("Only strong organizational pressures (e.g., establishing strong organizational sanctions when employees breach the organization's code of conduct) can break this influence of organizational authorities, indicating that context pressures that run counter to initial framing may indeed reduce the risk of ethical blindness.") (internal citation omitted).

107. *See* Linda K. Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 J. Mgmt. 951, 967 (2006).

108. *See* Linda K. Treviño & Katherine A. Nelson, Managing Business Ethics: Straight Talk About How To Do It Right 287–88 (4th ed. 2007).

109. Glover, *supra* note 6, at 403.

110. Linda A. Hill, *Exercising Moral Courage: A Developmental Agenda, in* Moral Leadership: The Theory and Practice of Power, Judgment and Policy, *supra* note 2, at 267, 270 (Deborah L. Rhode ed., 2006).

111. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 917–19 (1999) (discussing how easy it is for attorneys to start cutting ethical corners that get bigger and bigger).

112. *See* Gino, *supra* note 104, at 69–72 (2013) (reporting the results of studies by the author and Max Bazerman examining "how individuals fail to see wrongdoing that occurs in front of their eyes, especially when ethical erosion occurs on a slippery slope").

observing how their own conduct may be degrading. When people become accustomed to wrongdoing in their environment, it becomes the accepted, the status quo. Tenbrunsel and Messick suggest that what begins as unusual can become routine, so padding an expense account a little paves the way for padding the expense account a lot.[113] This "routinization" of bad behavior was illustrated in the Abu Ghraib prison debacle.

> But after four or five nights of running the Military Intelligence ("MI") block of the Abu Ghraib hard site, Davis said, "I just wanted to go home." He felt that what he did and saw there was wrong. "But it was reaffirmed and reassured through the leadership: We're at war. This is Military Intelligence. This is what they do. And it's just a job," he said. "*So, over time, you become numb to it, and it's nothing. It just became the norm. You see it—that sucks. It sucks to be him. And that's it. You move on.*"
>
> . . . .
>
> Sabrina Harman also said she felt herself growing numb at Abu Ghraib, yet she kept being startled by her capacity to feel fresh shocks. "In the beginning," she said, "you see somebody naked and you see underwear on their head and you're like, '*Oh, that's pretty bad—I can't believe I just saw that.' And then you go to bed and you come back the next day and you see something worse. Well, it seems like the day before wasn't so bad.*"[114]

Two figures in the subprime mortgage debacle also had an instructive experience:

> Pavlo and McCumber came up with the idea of getting delinquent customers to sign promissory notes—legally binding promises by clients to pay back what they owed. Since they represented legal obligations to MCI, they could be counted as assets and the company's bad debt disappeared. Pavlo knew it was a fudge but it seemed to work, so he kept doing what he was told. . . . The problem, he says [after serving two years in jail], is not that you are asked to do one big, bad deed; it is that there are so many tiny steps along the way that there is never a moment when it's simple to say no."[115]

a.   *Can Behavioral Ethics Help People Resist Ethical Fading Caused by Incrementalism?*

Can behavioral ethics help attorneys and others avoid the perils of incrementalism? The teachings of behavioral ethics can inform people that many unethical actions stem not from conscious decisions to act

---

113.   Tenbrunsel & Messick, *supra* note 68, at 228.

114.   Philip Gourevitch, *Exposure: The Woman Behind the Camera at Abu Ghraib*, THE NEW YORKER (March 24, 2008), http://www.newyorker.com/magazine/2008/03/24/exposure-5 (emphasis added).

115.   HEFFERNAN, *supra* note 70, at 116.

unethically, but from situational factors that can cause ethical consider-
ations to fade into the background. Behavioral ethics can warn people
that they are subject to making these errors, just like everyone else, and
therefore enable them to realize that they must take precautions. It can
remind them that "the first dishonest act is the most important one to
prevent."[116] It can instill in them Clayton Christensen's lesson that it is
easier to be ethical 100% of the time than 98% of the time, because
that 2% leeway you give yourself becomes 3% and then 5%, and then
10%, and so on.[117] Psychologist Dan Ariely believes that if people
understand how slippery slopes work, they can pay more attention to
early errors and "apply the brakes before it is too late."[118]

> [I]t becomes critically important to give ourselves some kind of
> warning. Set yourself some telltale sign—something that you
> know is wrong. Write down on a piece of paper, "I will never
> backdate a document." Or "I will never let a coworker get blamed
> for something that was my fault." Or "I will never paper a deal
> that I don't understand." Or "I will never do anything that I
> couldn't describe to my dad while looking him in the eye."[119]

Do these teachings guarantee that people will not fall victim to
incrementalism? Sadly, no, but they should reduce the likelihood.

b. *Can Behavioral Ethics Help Firms Minimize Ethical Fading Caused by Incrementalism?*

A plausible "broken windows" argument can be made that firms
that are rigorous in promulgating and enforcing codes of conduct, in
punishing even minor instances of bad behavior, and in rewarding
good behavior, will help their employees fight incrementalism. Wilson
and Kelling famously promulgated the "broken windows theory"[120] of
crime prevention. The basic idea is that "targeting minor disorder—
loitering, panhandling, prostitution, graffiti—could help reduce more
serious crime."[121] Alford has recently proposed a broken windows the-
ory for corruption, providing substantial evidence to support the notion
that "governments that battle corruption improve the general welfare
in a variety of ways that we are only beginning to understand."[122]

---

116. ARIELY, *supra* note 101, at 137.
117. Larissa MacFarquhar, *When Giants Fail: What Business Has Learned from Clayton Christensen*, THE NEW YORKER (May 14, 2012), http://www.newyorker.com/magazine/
2012/05/14/when-giants-fail (quoting Christensen, who refused to make an exception to
his personal religious rule about playing basketball on Sunday even though he had a
chance to play in the national championship game in the U.K.).
118. ARIELY, *supra* note 101, at 131.
119. Luban, *supra* note 38, at 74–75.
120. James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC, March
1982, at 29.
121. Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272 (2006) (stating the
theory, but also providing evidence undermining it).
122. Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO
ST. L.J. 1253, 1281 (2012). Alford wrote, in part:

A firm that executes on a broken windows theory not only fights ethical fading by keeping ethics in employees' frames of reference[123] and encouraging employees to act ethically because they have rational evidence that the company means business about punishing bad behavior and rewarding good behavior,[124] it also fights incrementalism by minimizing the number of minor transgressions that could slowly grow into major wrongdoing.

B.   *Moral Decision-Making*

Even if people ward off ethical fading and detect the ethical dimensions of an issue, they still must be able to choose the "right" option. Sometimes this can be very difficult, as multiple options seem morally defensible (or, perhaps, no option seems morally acceptable). People may face a particularly tricky ethical issue and lack the philosophical training to reason to a defensible conclusion using deontological and/or teleological techniques. The trickiest issues often involve so-called "right vs. right" scenarios where one good (e.g., loyalty to a client) comes into conflict with another (e.g., truth-telling).[125]

However, overbilling, insider trading, paying bribes, hiding income from the IRS, and most other activities that lead lawyers and others to end up doing the perp walk on the front page of the business section do not present intractable ethical conundrums. They are obviously wrong. As Jennings noted in the wake of the Enron-era scandals: "[n]o one within the field [of ethics] looks at Jack Grubman [the scandal-ridden former telecom industry stock analyst], . . . the fees structures, the compensation systems, and the conflicts [of interest] and frets, 'These were very nuanced ethical issues. I never would have seen those coming.'"[126] Regarding ethical lapses by attorneys, Abel similarly notes that, "the rules and their application are clear in the vast majority of breaches. . . . Ignorance does *not* seem to be the problem."[127]

Significantly, the [broken windows] theory's central focus is not on preventing crime, but on the *psychological fear* of crime. Foot patrolmen reduce the fear of crime because they are effective at combating the social disorder that residents correlate with serious crime. It is the perception of crime associated with graffiti, abandoned cars, vagrants, panhandlers, and other incivilities that is uppermost in people's minds. The theory's second order claim—that reducing fear strengthens communities and leads to an actual reduction in crime—remains a contested empirical question. *But the primary claim—that "policing of minor crime and disorder can reduce fear of crime in a community"—has become widely accepted.*
Id. at 1257 (emphasis added).

123.   By continually attacking petty wrongdoing, a firm repeatedly sends a signal to employees that ethical behavior is important.

124.   Employees take their cues as to appropriate behavior from those around them. *See* Linda K. Treviño & Michael E. Brown, *Managing to be Ethical: Debunking Five Business Ethics Myths*, 18 ACAD. OF MGMT. EXECUTIVE 69, 71 (2004).

125.   *See generally* RUSHWORTH M. KIDDER, HOW GOOD PEOPLE MAKE TOUGH CHOICES (2009).

126.   Marianne M. Jennings, *Ethics and Investment Management: True Reform*, 61 FIN. ANALYSTS J. 45, 45 (2005).

127.   RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 497 (2008).

More commonly, poor ethical choices are made not because people have not read enough Kant, but because they are unaware of psychological, organizational, and social influences that can cause them to make less than optimal ethical choices. The field of behavioral ethics casts light upon these pressures and can thereby improve ethical decision-making.

While Professor Rest refers to this second step as "moral reasoning,"[128] often very little reasoning goes into the process. *Moral decision-making* is a better term. A key difficulty is people's failure to understand how they make many decisions regarding ethical issues. Although it seems to people that their rational thought processes are responsible for their ethical choices, in reality there is a very strong intuitive component to human ethical decision-making that is emotion-based.[129] Three strong bits of evidence for this conclusion come from (a) brain scans,[130] which show that moral judgments are often made by emotion-processing parts of the brain before the cognitive portions are activated,[131] (b) the common phenomenon of "moral dumbfounding," which occurs when people make firm moral judgments for which, when challenged, they can provide no rational basis,[132] and (c) studies showing that by simply activating the disgust emotion researchers can lead people to make much more critical moral evaluations than they would otherwise make.[133]

---

128. *See* REST, *supra* note 65.

129. *See generally* DANIEL KELLY, YUCK! THE NATURE AND MORAL SIGNIFICANCE OF DISGUST (2011) (emphasizing the role of the emotion of disgust in ethical judgments); Carel van Schaik et al., *Morality as a Biological Adaptation—An Evolutionary Model Based on the Lifestyle of Human Foragers, in* EMPIRICALLY INFORMED ETHICS: MORALITY BETWEEN FACTS AND NORMS 77 (Markus Christen et al. eds., 2014) ("[W]e now know that many every-day moral decisions are not entirely built on conscious deliberation but rather on intuitive, and rapidly executed responses, too fast for mental calculation to have affected them, showing there is an intuitive, emotional (non-cognitive) core.") (internal citations omitted). Even the moral thinking that people do may be often hard-wired and evolutionarily-based. LAURENCE TANCREDI, HARDWIRED BEHAVIOR: WHAT NEUROSCIENCE REVEALS ABOUT MORALITY 81 (2005) ("The current theory held by most evolutionary biologists is that, through a slow process of mutation over millions of years, the capacity for moral thinking—essential for survival because it provides the bases for human cooperation—became hardwired.").

130. Joshua D. Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 AM. ASS'N FOR THE ADVANCEMENT OF SCI. 2105 (2001) (finding significant emotional explanation for differences in people's reaction to different trolley car accident scenarios).

131. *But see* SALLY SATEL & SCOTT O. LILIENFELD, BRAINWASHED: THE SEDUCTIVE APPEAL OF MINDLESS NEUROSCIENCE (2013) (cautioning against expecting too much from neuroscience, including fMRI scans).

132. *See* Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814 (2001) (reporting research supporting the view that moral judgment is generally the result of quick, automatic evaluations). *See also* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 89 (2012) ("Anyone who values truth should stop worshipping reason. . . . [M]ost of the bizarre and depressing research findings make perfect sense once you see reasoning as having evolved not to help us find truth but to help us engage in arguments, persuasion, and manipulation in the context of discussions with other people. . . . This explains why the confirmation bias is so powerful, and so ineradicable.").

133. *See, e.g.*, KELLY, *supra* note 129, at 102; Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 PSYCHOL. SCI. 780 (2005). Consistent

There is substantial evidence that most decisions, including most decisions regarding ethically-tinged issues, are made intuitively by what Nobel Prize winning psychologist Daniel Kahneman refers to as the brain's System 1.[134] It is intuitive and automatic, whereas System 2, the brain's slower cognitive system, is often called into service only after System 1 has made a choice. System 2's reasoning ability is often, though not always, invoked primarily to produce rationalizations for decisions already made intuitively.[135] System 2 has the capacity to override the intuitive decisions of System 1,[136] and many moral decisions are the product of both "'affective' and 'cognitive' mechanisms."[137]

---

with this notion, cleaning can take away the disgust and lead to opposite judgments. *See* Simone Schnall et al., *With a Clean Conscience: Cleanliness Reduces the Severity of Moral Judgments*, 19 Ass'n for Psychol. Sci. 1219 (2008) (reporting study results); Simone Schnall et al., *Disgust as Embodied Moral Judgment*, 34 Personality & Soc. Psychol. Bull. 1096 (2008) (similar).

134.   Eldred, *supra* note 4, at 358 ("The thesis running through [behavioral ethics'] body of work is that, contrary to the assumption that ethical choices are primarily the product of deliberate calculation, significant evidence demonstrates that unconscious aspects of decision making play a substantial role in ethical judgments."); Jesse J. Prinz & Shaun Nichols, *Moral Emotions*, *in* The Moral Psychology Handbook 111, 114 (John M. Doris ed., 2010) ("In sum, emotions motivate or impel us to act morally, and they can do so in the absence of a moral judgment or as a consequence of a moral judgment."); Paul Slovic et al., *Psychic Numbing and Mass Atrocity*, *in* Behavioral Foundations of Public Policy, *supra* note 17, at 126, 127 (Eldar Shafir ed., 2013) (noting that this is true of most decisions people make, including ethical ones, where "feelings associated with moral intuition usually dominate moral judgment, unless we make an effort to use judgment to critique and, if necessary, override intuition").

135.   *See* Kwame Anthony Appiah, Cosmopolitanism: Ethics in a World of Strangers 72 (2006) ("When we offer judgments, after all, it's rarely because we have applied well-thought-out principles to a set of facts and deduced an answer. Our efforts to justify what we have done—or what we plan to do—are typically made up after the events, rationalizations of what we have decided intuitively."); Frans De Waal, The Bonobo and the Atheist: In Search of Humanism Among the Primates 171 (2013) ("According to cognitive science, rationalizations are mostly post hoc. We have a dual mentality that immediately suggests intuitive solutions, well before we've thought about the issue at hand, followed by a second, slower process that vets these solutions for quality and feasibility."); Jesse Graham et al., *Moral Foundations Theory: The Pragmatic Validity of Moral Pluralism*, 47 Advances in Experimental Soc. Psychol. 55, 66 (2013) ("We reason mostly so that we can support our judgments if called upon by others to do so. As such, our moral reasoning, like our reasoning about virtually every other aspect of our lives, is motivated."). And unfortunately, the more creative people are, the better they may be at weaving together convincing stories to support their self-interested instincts. Francesca Gino & Dan Ariely, *The Dark Side of Creativity: Original Thinkers Can Be More Dishonest*, 102 J. Personality & Soc. Psychol. 445 (2012). Lawyers, because of their training, also tend to be very effective rationalizers. Robbennolt & Sternlight, *supra* note 2, at 1126 (noting that "lawyers' expertise at parsing rules, paying attention to exceptions and loopholes, interpreting text, and making arguments on both sides of an issue . . . can also be problematic in this context").

136.   *See, e.g.*, Allen D. Blay et al., Can Moral Reasoning Reduce Auditor Misreporting? An Experimental Examination of Investor Salience and Auditor Sign-Off Requirement (May 16, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061730 (reporting results that indicate moral reasoning can reduce auditor misreporting in a market sector where financial incentives to misreport are present).

137.   Fiery Cushman et al., *Multi-System Moral Psychology*, *in* The Moral Psychology Handbook, *supra* note 134, at 47, 48 (2010).

There is definitely controversy regarding the respective roles of System 1 and System 2. But reason remains "a fairly weak instrument compared to the Stradivarius of our emotions."[138]

  Humans' intuitive systems often make correct ethical decisions, but not universally.[139] "The moral sense, though hardwired, is not always right."[140] For example, Kelly has persuasively argued that "the fact that something is disgusting is not even remotely a reliable indicator of moral foul play,"[141] though it generally seems to people that it is. An important reason that the intuitive System 1 often errs is the self-serving bias, which often leads people to unconsciously make choices that seem unjustifiable to objective third party observers. It is this bias, out of many relevant factors, that this section focuses upon.

1. Self-Serving Bias

  The self-serving bias is an umbrella term[142] that can refer to people's tendency to:

- "[C]onflate what is fair with what benefits oneself."[143]
- Attribute to themselves more skill, intelligence, or contributions to a successful outcome than is objectively justified.[144]
- Gather, process, and even remember information in ways that support positions already taken or that benefit themselves.[145]

  The self-serving bias can overlap with the confirmation bias ("the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand"[146]) and motivated rea-

---

138. MARK MATOUSEK, ETHICAL WISDOM: WHAT MAKES US GOOD 99 (2011). *See also* JOHN MIKHAIL, ELEMENTS OF MORAL COGNITION 319–50 (2011) (reporting the results of seven studies that "constitute significant evidence that adults possess intuitive or unconscious knowledge of complex moral principles . . . [and one study providing] some evidence for inferring that the same may be true of children ages 8–12."). *But see* Joseph M. Paxton & Joshua D. Greene, *Moral Reasoning: Hints and Allegations*, 2 TOPICS IN COGNITIVE SCI. 511, 516 (2010) ("Our hypothesis is that Moral Reasoning not only happens, but that, for all we know, it may be a pervasive and important aspect of our moral psychology, even if it is relatively rare compared to more intuitive moral reasoning.").

139. Eugene Sadler-Smith, *Before Virtue: Biology, Brain, Behavior, and the "Moral Sense"*, 22 BUS. ETHICS Q. 351, 367 (2012) ("[B]ehaviors based on intuitive moral judgments are not of necessity virtuous.").

140. MATOUSEK, *supra* note 138, at 86.

141. KELLY, *supra* note 129, at 148. He goes on to note that "the moral significance that should be assigned to the fact that people are disgusted by [something] is: none." *Id.* at 149.

142. Timothy F. Malloy, *Corporate Decisionmaking: Disclosure Stories*, 32 FLA. ST. U. L. REV. 617, 651 (2005).

143. Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES 109, 110 (1997).

144. Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 569 (2003).

145. Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 135–39 (1997).

146. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998). *See* David Pizarro, *The New Science of Moral-*

soning (the "tendency for individuals to utilize a variety of cognitive mechanisms to arrive, through a process of apparently unbiased reasoning, at the conclusion they privately desire to arrive at all along"[147]). When Galileo discovered the moons of Jupiter with his new telescope, cardinals in the Catholic Church refused to even take a look because they did not want their well-established belief system upset.[148] When William Harvey discerned how the circulatory system worked, overturning Galen's 1500-year-old theories, many doctors took the position that they would rather be wrong with Galen than right with Harvey.[149]

As noted elsewhere,[150] the self-serving bias often leads people, including lawyers,[151] to unconsciously make choices that favor themselves at the expense of others in ways that seem unethical to third parties. "[B]ecause self-interested goals are generated automatically, they occur before the effortful and slower process of deliberation gets underway. This starts a cascade reaction, in which the decision that is ultimately reached will often be based on self-interest rather than the dictates of professional responsibility."[152]

Self-interest remains hidden, lurking behind the scenes but influencing the result.

Three factors are primarily responsible. The first is the speed with which the different processes occur. Because self-interest is

---

ity, *in* THINKING: THE NEW SCIENCE OF DECISION-MAKING, PROBLEM-SOLVING, AND PREDICTIONS 356, 360–61 (John Brockman, ed., 2013) (discussing striking study illustrating the confirmation bias by Peter Ditto).

147.   Hanson & Kysar, *TBS I, supra* note 45, at 653; Graham et al., *supra* note 135, at 66.

> Because motivated reasoning is unconscious, people's claims that they are unaffected by bias or self-interest can be sincere, even as they make decisions that are in reality self-serving. For example, many physicians think they are immune to monetary influence, yet recent studies show that accepting industry hospitality and gifts has a significant subliminal effect on patient-care decisions. Similarly, studies have shown that research physicians with financial ties to pharmaceutical manufacturers are significantly more likely than independent reviewers to report findings that support the sponsor's drugs and less likely to report unfavorable findings; that investment managers' estimates of the probabilities of various events are significantly correlated to the perceived desirability of those events; that auditors' judgments are affected by the incentives offered; and that, at least in Britain, half the population believes in heaven, but only about a quarter believes in hell.

LEONARD MLODINOW, SUBLIMINAL: HOW YOUR UNCONSCIOUS MIND RULES YOUR BEHAVIOR 205–06 (2012).

148.   PATRICIA S. CHURCHLAND, TOUCHING A NERVE: THE SELF AS BRAIN 13–14 (2013) ("Deep resistance to knowledge that betokens a change in a whole way of thinking has a long history. Think only of the horror displayed by the cardinals in Rome when Galileo discovered the moons of Jupiter with his amazing new tool, the telescope. *The cardinals refused to even take a look.*") (emphasis added).

149.   *Id.* at 15.

150.   Robert Prentice, *Teaching Behavioral Ethics*, 31 J. LEG. STUD. EDUC. 325 (2014).

151.   Eldred, *supra* note 4, at 361 ("[E]veryone—lawyers and other professionals included—tend to be unaware of the ways in which self-interest exerts influence over the decision-making process.").

152.   *Id.*

processed fast [by the brain's System 1], it tends to occur prior to controlled processes associated with ethical deliberation. Thus, when there is a conflict between self-interest and professional duties, automatic processes can be expected to exert significant power over rational deliberation [by System 2].

The second factor contributing to the power of self-interest is the biased way that people tend to both seek out and interpret information when making decisions [which involves both the confirmation bias and motivated reasoning].

Third, and finally, people work to maintain a positive view of their own ethicality, resisting the notion that they can be corrupted by their own self-interest. Driven by a need to maintain a positive self-image, there is a tendency to perceive the self "in a positive light, even when evidence suggests otherwise." . . . . One manifestation of this phenomenon is the stubborn belief held by most people that they will not be influenced by self-interest, even when believing that others will be.[153]

Sometimes the impact of the self-serving bias is quite conscious. People intentionally choose an option that benefits them at the expense of others. But more important for present purposes is the fact that the self-serving bias can insidiously lead well-meaning people to make decisions that are indefensible from an objective third party's point of view. Ethical fading can occur,[154] but even if people do notice the ethical aspects of the issue, they often intuitively decide that the ethical thing to do just happens to be what benefits them personally.[155] Messick notes that "even if we are aware of the ethical aspects of a situation, we easily form self-serving interpretations of the nature of the ethical content."[156]

a. Can Individuals Resist the Self-Serving Bias?

Only if people are aware that their emotional responses may lead them to inappropriately self-serving judgments and actions can they guard against this common tendency. Thoughtful analysis and decision

---

153. *Id.* at 362–66 (quoting Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 37–38 (2007)).

154. Messick, *supra* note 64, at 95 ("Tenbrunsel and Messick have outlined several factors that lead to what we call *ethical fading*.").

155. MATOUSEK, *supra* note 138, at 113. *See also* Kath Hall, *Why Good Intentions are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making*, *in* REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 213 (Reid Mortensen et al. eds., 2010) (noting that "ethical decision making is influenced by a strong unconscious bias towards maintaining our self-interest").

156. Messick, *supra* note 64, at 95; Tenbrusel et al., *supra* note 100, at 3–4 ("It seems that people are subject to *bounded ethicality*; that is, our morality is constrained in systematic ways that favor self-serving perceptions, which in turn can result in behaviors that contradict our intended ethical standards."). *See also* MLODINOW, *supra* note 147, at 201 ("The 'causal arrow' in human thought processes consistently tends to point from belief to evidence, not vice versa.").

making are not always second nature to people, but they can be practiced and implemented.[157] Although many of the heuristics and biases that lead to bad ethical decision making are very stubborn, there is evidence that some of them can be debiased.[158] The self-serving bias is a particularly difficult one. It is obviously difficult for individuals to debias themselves from being self-serving because the brain often hides the bias from them. For that reason, people tend to doggedly hold to the notion that the self-serving bias affects others, but not them-

---

157. MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE 70 (2013). Although our focus has been on the power of the unconscious mind, we do not mean to suggest that such thoughts cannot be overruled. When it comes to seeking change, the reflective, conscious side of the brain—the side that is unique to humankind—is more than capable of doing the necessary work. Its power derives from its ability to observe itself and to use those observations to guide conscious action. The reflective aspects of our mind allow us to imagine a future that improves on the present state of affairs, and to achieve settled-upon and consciously chosen goals and values.

158. For example, there is evidence that just asking people to consider alternative options before making a decision can help reduce the hindsight bias. Lawrence J. Sanna & Norbert Schwarz, *Debiasing the Hindsight Bias: The Role of Accessibility Experiences and (Mis) attributions*, 39 J. EXPERIMENTAL SOC. PSYCHOL. 287 (2003); Lawrence J. Sanna et al., *When Debiasing Backfires: Accessible Content and Accessibility Experiences in Debiasing Hindsight*, 28 J. EXPERIMENTAL PSYCHOL: LEARNING, MEMORY & COGNITION 497 (2002). The hindsight bias is, of course, the tendency people have to conclude after events have happened that they could have predicted them beforehand. *See generally* PLOUS, *supra* note 25, at 35–37 (discussing the hindsight bias). And consider the overconfidence bias. There is strong evidence that most people are more confident in their own ethicality than is rationally justified. Studies show, for example, that the people tend to think that they are twice as likely to follow the Ten Commandments as others are, DAVID HALPERN, THE HIDDEN WEALTH OF NATIONS 113 (2010), and more likely to go to heaven than Mother Teresa, MICHAEL SHERMER, THE SCIENCE OF GOOD & EVIL 174 (2004). If people are overly confident, they may decide ethical issues without sufficient reflection and thereby err. Fortunately, there is evidence that overconfidence is one of the biases that can be minimized with training. *See, e.g.*, Stephen J. Hoch, *Counterfactual Reasoning and Accuracy in Predicting Personal Events*, 11 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY & COGNITION 719 (1985); Asher Koriat, *Reasons for Confidence*, 6 J. EXPERIMENTAL PSYCHOL.: HUMAN LEARNING & MEMORY 107 (1980); Catherine Hackett Renner & Michael J. Renner, *But I Thought I Knew That: Using Confidence Estimation as a Debiasing Technique to Improve Classroom Performance*, 15 APPLIED COGNITIVE PSYCHOL. 23, 30 (2001) (reporting results of experiments indicating that "[h]aving students provide confidence estimates significantly improves quiz performance and produces a decrease in overconfidence"). Research in accountability indicates that it can debias overconfidence and other cognitive biases. *See* Frank P. McKenna & Lynn B. Myers, *Illusory Self Assessments: Can They Be Reduced?*, 88 BRIT. J. PSYCHOL. 39 (1997). Among the articles cited by McKenna and Myers are: Philip E. Tetlock & Jae Il Kim, *Accountability and Judgment Processes in a Personality Prediction Task*, 52 J. PERSONALITY & SOC. PSYCHOL. 700 (1987); Philip E. Tetlock, *Accountability and the Perseverance of First Impressions*, 46 SOC. SCI. Q. 285 (1983); and Philip E. Tetlock, *Accountability: The Neglected Social Context of Judgment and Choice*, 7 RESEARCH IN ORG. BEHAVIOR 297 (Barry Staw & Larry L. Cummings eds., 1985).

selves.[159] Indeed, results of studies attempting to counter the self-serving bias are far from encouraging.[160]

The first step toward reducing the impact of the self-serving bias has to be to convince people that they themselves are vulnerable to this (and other) biases.[161] Education regarding the impact of the self-serving bias on ethical judgments might help. Obviously, people cannot protect themselves from a weakness that they do not know about.[162]

A starting point is to teach people that bias typically operates outside of conscious awareness. Doing so can help people to recognize their susceptibility to bias by preventing them from relying excessively on introspective evidence of bias. Furthermore, it can reduce the bias blind spot by helping people to realize that they are not likely to be any less biased than those around them. It can also inspire people to engage in efforts to overcome their biases. *Research . . . has suggested the promise of this strategy*.[163]

Educating people about this tendency can help them avoid errors.[164] As an example, an educational slideshow called "Why Lunch Matters" was designed to educate physicians regarding their vulnerability to pharmaceutical industry marketing practices aimed at taking advantage of their self-serving tendencies. The slideshow changed attitudes of physicians and medical students who viewed it.[165] So there is hope.

Another thing individuals who seek to act more ethically can do is pay close attention to company codes of conduct and professional codes of ethics, because these commonly focus upon eliminating, or at least reducing, conflicts of interest which give rise to opportunities for the self-serving bias to rear its ugly head. Also, if people will practice listing weaknesses in their own position or addressing alternatives to

---

159. Emily Pronin & Kathleen Schmidt, *Claims and Denials of Bias and Their Implications for Policy, in* Behavioral Foundations of Public Policy, *supra* note 17, at 195, 198 (Eldar Shafir ed., 2012) ("People view others as heavily biased by self-interest even when they deny that bias in themselves.").

160. *See, e.g.,* Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 11 Psychol. Rev. 781 (2004); Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 Law & Soc. Inquiry 913 (1997).

161. Sah & Fugh-Berman, *supra* note 56, at 666 (speaking of physicians).

162. Note that warning people of the racially-based results of their actions can cause them to reform their behavior. *See* Devin G. Pope et al., *Awareness Reduces Racial Bias* (Nat'l Bureau of Econ. Research, Working Paper No. 19765, 2013), *available at* ssrn.com/abstract=2370221 (analyzing a study involving basketball referees).

163. Pronin & Schmidt, *supra* note 159, at 211 (emphasis added). Cohen's work indicates that making people aware of their own lack of objectivity—of the impact of the self-serving bias—may enable them to assess new information more accurately. Perlman, *supra* note 3, at 406 (citing Eric Luis Uhlman & Geoffrey L. Cohen, *"I think it, therefore it's true": Effects of Self-perceived Objectivity in Hiring Decisions*, 104 Org. Behav. & Hum. Decision Processes 207 (2007)).

164. *See* Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. Experimental Soc. Psychol. 565 (2007) (educating people about limits of introspection reduced the blind spot bias).

165. *See* Adriane Fugh-Berman et al., *Why Lunch Matters: Assessing Physicians' Perceptions About Industry Relationships*, 30 J. Continuing Educ. in the Health Professions 197, 203 (2010).

their conclusions, there is evidence that the self-serving bias can be reduced.[166] Attorneys and others should obviously do this any time they perceive that they are in a conflict of interest situation.[167]

One suggestion goes a little further.

> To the extent that exposure to biasing information cannot be avoided, a modified form of the standard demand to be objective has merit. That modification involves asking people not to be assured of their own objectivity, but rather to be assured that *others* will see them as objective . . . . This instruction is intended to lead people to evaluate the ethicality of their decisions not by looking inward to determine whether they have been biased by self-interest, but by looking outward to determine whether others would have that opinion . . . . Due to the unconscious nature of bias, strategies that involve looking inward are likely to miss bias when it is present, whereas strategies that involve looking to outward behavior are more likely to catch it.[168]

Many ethical judgments are motivated by a need to preserve self-worth, so if people can come to understand that their identities do not turn on the outcome of a partisan dispute over abortion or capital punishment or the heliocentric nature of the solar system, then they can begin to assess information more accurately.[169]

b. Can Firms and Other Organizations Help Employees Minimize the Self-Serving Bias?

By putting in place conflict-of-interest policies, entire professions and individual firms can reduce the impact of the unconscious self-serving bias upon their members and employees. An overriding goal of the legal profession's Model Rules of Professional Conduct is to minimize

---

166.   *See, e.g.,* Babcock et al., *supra* note 160, at 916. Pronin and Schmidt suggest: [The self-serving bias can cause ethical blind spots. People believe, in part, that they are objective and others are infected with bias.] One obvious solution, then, is to encourage people to consider others' perspectives . . . . Successful perspective taking has been shown to have a variety of positive effects relevant to conflict. It can increase people's altruism toward others, improve relationship satisfaction, decrease stereotypes about other groups, reduce self-serving judgments about what is fair, and produce more effective negotiation outcomes. Unfortunately, solutions aimed at perspective taking can be difficult to implement successfully.

Pronin & Schmidt, *supra* note 159, at 208 (citations omitted). The article points out that poor implementation could leave things worse off rather than better off. *Id.* at 208–09. On the other hand, Babcock and Loewenstein had no luck countering the self-serving bias by merely informing subjects about it or having them write an essay arguing the opponent's case in the most persuasive terms they could. Babcock & Loewenstein, *supra* note 143, at 115.

167.   Unfortunately, this will not help them significantly in situations where they do not see the conflict. "Integrity does not help very much when you are in the grips of self-deception." Luban, *supra* note 38, at 68–69.

168.   Pronin & Schmidt, *supra* note 159, at 212.

169.   Perlman*, supra* note 3, at 404 (citing Geoffrey L. Cohen et al., *When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self,* 26 PERSONALITY & SOC. PSYCHOL. BULL. 1151 (2000)).

conflicts of interest.[170] Many, and perhaps most, of the provisions of the AICPA's Code of Professional Conduct for accountants are aimed at preventing accountants, especially auditors, from ever entering into relationships that would constitute a conflict of interest. Auditors cannot own financial interests in their audit clients, they cannot have separate employment relationships with audit clients, they cannot audit firms owned by their spouses, and so on.[171] Even if auditors believe, as most of them probably do, that they would not be influenced by the self-serving bias, they know that they must follow their profession's independence rules and this has to improve ethical conduct.

Studies show that medical schools' adoption of restrictions on gift-giving by pharmaceutical companies helped minimize the impact of Big Pharma's gift-giving practices on physicians who were going or had gone to those schools.[172] Sah and Fugh-Berman suggest more aggressive steps:

> Physicians must resist industry influence. A culture in which the acceptance of gifts engenders shame in physicians will make the practice of accepting gifts less common and mitigate the social norm of reciprocation. If a critical mass of respected physicians avoids being placed in positions of indebtedness to industry and if greater academic prestige accrues to an arms-length rather than to a close relationship with industry, then a new social norm may emerge that rejects transactions fraught with conflicts of interest. That norm would promote rather than undermine patient care and scientific integrity.[173]

Because the strength of the distorting effect of the self-serving bias is affected by the strength of the incentive—that is, the brain of someone with a million dollars on the line has a stronger incentive to unconsciously reach a self-serving conclusion than does the brain of someone with a thousand dollars on the line—firms should set reasonable rather than extravagant incentive structures for their employees.[174]

---

170. *See* MODEL RULES OF PROF'L CONDUCT pmbl. 9 (2011) ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.").

171. *See* CODE PROF'L CONDUCT (Am. Inst. CPAs 2014), *available at* http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/default.aspx.

172. David Grande et al., *Effect of Exposure to Small Pharmaceutical Promotional Items on Treatment Preferences*, 169 ARCHIVES INTERNAL MED. 887, 891 (May 11, 2009) (finding more favorable attitude toward drug by fourth-year medical students at school that exposed them to pharmaceutical company's promotional item than students at school that restricted exposure); Marissa King et al., *Medical School Gift Restriction Policies and Physician Prescribing of Newly Marketed Psychotropic Medications: Difference-in-Differences Analysis*, 346 BRIT. MED. J. 1 (2013) (finding that physicians who had graduated from a medical school after gifts were restricted prescribed certain drugs less than those who had graduated before).

173. Sah & Fugh-Berman, *supra* note 56, at 671.

174. Enron's extravagant bonus system provides a fine example of how excess compensation can lead to disaster. *See generally* Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 428–32 (2003).

Firms can encourage employees to see decisions from all points of view, taking into account both affirming and negative evidence. Importantly, given that the self-serving bias "typically operates nonconsciously, it is preferable to avoid exposure to biasing information rather than to try to correct for such exposure after the fact."[175]

C.   *Moral Intent*

Even if lawyers and others realize that they face an ethical issue and are capable of deciding which would be the most ethical choice among the available options, they must still want to do the right thing in order for ethical conduct to follow. "[M]ost research finds only a modest correlation between ethical reasoning and behavior. It is not enough for people to make a sound moral judgment."[176] They must also wish to act ethically.

Overall, there are certainly grounds to worry that not enough people have a sufficient degree of moral intent.[177] Behavioral ethics can make its best contribution focusing on the majority of people who do wish to act ethically. Although 1–2 percent of the populace may be psychopaths who do not care about doing the right thing,[178] most people want to and do think of themselves as good people. They want to act ethically. At least up to certain limits.

It is increasingly clear, however, that although most people wish to be ethical and think themselves to be ethical, most people also simultaneously lie a little and cheat a little almost every day.[179] "The empirical

---

175. Pronin & Schmidt, *supra* note 159, at 212. The authors go on to give this example: "The now widely used practice of having [symphony] musicians audition behind a curtain successfully removes this risk of [gender] bias (and, not incidentally, has led to dramatic advances for female orchestra players)." *Id.*

176. Rhode, *supra* note 66, at 26.

177.   Marie S. Mitchell & Noel F. Palmer, *The Managerial Relevance of Ethical Efficacy*, *in* Managerial Ethics: Managing the Psychology of Morality 89, 90 (Marshall Schminke ed., 2010) ("In a recent study of 1,200 American workers, 28% of the respondents said they would act unethically (i.e., lie, backstab, cheat) to save their jobs. Overall, this research suggests individuals lack the motivation to do what is right."). In another recent survey, 24% of Wall Street insiders declared that they would engage in insider trading to make $10 million if they could get away with it. Andrew Ross Sorkin, *On Wall Street, a Culture of Greed Won't Let Go*, N.Y. Times (July 15, 2013), http://dealbook.ny times.com/2013/07/15/on-wall-st-a-culture-of-greed-wont-let-go/.

178. Some estimates are higher. Stout believes that 4% of the populace are sociopaths who do not have a conscience. Martha Stout, The Sociopath Next Door 9 (2005).

179. Michelle Alexander, *Why Police Lie Under Oath*, N.Y. Times, Feb. 2, 2013, at SW4 ("Research shows that ordinary human beings lie a lot—multiple times a day—even when there's no clear benefit to lying. Generally, humans lie about relatively minor things like 'I lost your phone number; that's why I didn't call' or 'No, really, you don't look fat.' But humans can also be persuaded to lie about far more important matters, especially if the lie will enhance or protect their reputation or standing in the group."); Paul Babiak & Robert D. Hare, Snakes in Suits: When Psychopaths Go to Work 70 (2006) ("[T]o preserve our internal emotional balance and to avoid excessive anxiety, we *need* to believe that our positive self-evaluations are accurate, and we will invest energy in fighting doubts as they arise."); Gino, *supra* note 104, at 11 ("Virtually all of us have a strong desire to behave morally and to be viewed by others as honest. That's our plan: we want to choose the right path when facing complex ethical choices. And yet, as the results of these exper-

evidence seems to point to the conclusion that we lie and cheat much more often than we care to admit. At the same time, we strive to maintain a positive image of ourselves, and moral values are a central component of our self-image."[180] Ariely's studies show that "[e]ssentially, we cheat up to the level that allows us to retain our self-image as reasonably honest individuals."[181] Matousek offers this plausible explanation:

> Evolution prepared us humans to be devious, self-serving, and only half-honest, inclined to grab the lion's share of goodies without being thrown out of the group. Homo sapiens became wired for truthfulness only to the extent that it suited us, pleased others, and preserved our reputations. We are willing to break rules to benefit ourselves but only within limits we can justify. We are good and fair, most of the time—at least in our own minds—but that doesn't exactly make us straight shooters. . . . Our internal cop stops us only when we contemplate big transgressions.[182]

How is it that people can simultaneously do bad things, yet think of themselves as good people? In part, brains manage to manipulate frames of reference so that ethical considerations fade into the background; compartmentalize thoughts and actions so that the sometimes stark contrasts between people's images of themselves and their true conduct are not apparent; mold memories so that people remember having acted more ethically than they actually did; and create rationalizations.[183] All these are important, but due to space limitations this section focuses on rationalizations, which rank high among the most critical facilitators of unethical behavior.

1. Rationalizations

One of the major reasons why people make poor ethical choices and thereafter engage in unethical actions is their ability to rationalize.[184] It would be sensible to have discussed rationalizations in the Moral Awareness section above, because rationalizations can prevent people from seeing the ethical issues in a situation. As Luban pointed out: "In situation after situation, literally hundreds of experiments reveal that when our conduct clashes with our prior beliefs, our beliefs swing into conformity with our conduct, without our noticing that this

---

iments indicate, subtle factors can lead us astray."); DALE PETERSON, THE MORAL LIVES OF ANIMALS 175–76 (2011) (citing data that on average we tell one lie per person per day, and concluding that "the human capacity for antisocial deceit is almost bottomless and endless").

    180. GINO, *supra* note 104, at 203.

    181. ARIELY, *supra* note 101, at 23.

    182. MATOUSEK, *supra* note 138, at 113–14.

    183. *See generally id.* at 92–112.

    184. C. Daniel Batson, *Orchestrating Prosocial Motives, in* MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT AND POLICY, *supra* note 2, at 197, 208 (Deborah L. Rhode ed., 2006) ("Most of us are adept at rationalization, at justifying to ourselves—if not to others—why a situation that benefits us or those we care about does not violate our moral principles."); Greene, *supra* note 130, at 301 ("Rationalization is the great enemy of moral progress.").

is going on."[185] In other words, deeds that we might otherwise have condemned as unethical are, once we have done them, recategorized by our brains as just fine.[186] "Once invoked, the rationalizations not only facilitate future wrongdoing but dull awareness that the act is in fact wrong."[187] Sometimes people use rationalizations to convince themselves that they did not do anything wrong.[188]

But it is also reasonable to discuss rationalizations in this section, because rationalizations are the reasons people give themselves permission to act unethically. "I am an ethical person, but it is ok for me to act unethically in this instance, because . . . ." Most people are very creative rationalizers.[189] Lawyers can be particularly adept at the art.[190] Anand, Ashforth, and Joshi placed common rationalizations for corrupt behavior into six strategic categories.

The first category is *denial of responsibility* (ex: "What can I do? My arm is being twisted.").[191] So, people might find themselves saying: "I know this is wrong, but the senior partner has asked me to do it." They are consciously doing something unethical, but choosing to do it anyway because it's really someone else's responsibility, which substantially mitigates their feelings of guilt.[192]

The second category is *denial of injury* (ex: "No one was really harmed." "It could have been worse.").[193] So, people might find themselves saying: "I know this is wrong, but shareholders have diversified portfolios, so no one will really be hurt by a small lie, some earnings management, etc." They are consciously doing something wrong, but

---

185.   Luban, *supra* note 38, at 68.

186.   *Id.*

187.   Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 18 ACAD. MGMT. EXEC. 39, 41 (2004).

188.   *See* ABEL, *supra* note 127, at 28–29:

Whereas ordinary criminals are aware, and sometimes proud, of their outlaw status, white-collar criminals and disciplined lawyers vehemently deny their culpability. They point to their high social status and sterling character not just in mitigation of doing wrong but also as proof that they could never could have done wrong. They emphasize the rules they did *not* break. Some advance noble motives: embezzling to save the business (and their employees' jobs) or displaying excessive zeal on behalf of a deserving client. Deviants endlessly invent rationalizations: blaming victims (who sometimes cooperate by blaming themselves), insisting that no one was harmed or that the 'victims' could afford it, denying personal cupidity or gain, and offering restitution.

189.   DESTENO & VALDESOLO, *supra* note 97, at 39–40 ("[W]hen an incentive to commit an immoral act is salient, our rational minds are very good at coming up with reasons to justify it."). And the more creative people are, the more dishonest they are because of their special capacity for rationalizing. ARIELY, *supra* note 101, at 172.

190.   *See* REGAN, *supra* note 69, at 350–51 ("[L]awyers are especially adept at constructing rationalizations in support of certain preestablished positions.").

191.   Anand et al., *supra* note 187, at 41–42.

192.   *See* Pamela R. Murphy & Brian W. Mayhew, The Impact of Authority on Reporting Behavior, Rationalization and Affect (Jan. 11, 2013) (unpublished manuscript), *available at* http://ssrn.com/abstract=2026449. *See* CYNTHIA COOPER, EXTRAORDINARY CIRCUMSTANCES: THE JOURNEY OF A CORPORATE WHISTLEBLOWER 363–64 (2008) (noting that this was one of the key rationalizations of important underlings in the massive WorldCom fraud).

193.   Anand et al., *supra* note 187, at 41–42.

choosing to do it anyway because the supposed slight harm makes it seem acceptable.[194]

The third category is *denial of victim* (ex: "They deserved it.").[195] So, people might find themselves saying: "I know this is wrong, but that client was so stupid he deserved to get ripped off." They are consciously doing something wrong, but choosing to do it anyway because some fault they attribute to the victim makes it seem to them that the victim deserves the harm.[196]

The fourth category is *social weighting* (ex: "Others are worse than we are.").[197] So, people might find themselves saying: "I know this is wrong, but other law firms do even worse things." They are consciously doing something wrong; however, by comparing themselves to people who do even worse things, they may appear almost heroic in their own eyes.

The fifth category is the *appeal to higher loyalties* (ex: "I would not report it because of my loyalty to my boss.").[198] So, people find themselves saying: "I know this is wrong, but I have a family to feed" or "I know this is wrong, but my firm really needs me to come through for it." They are consciously doing something wrong, but justify doing it just this one time because they elevate their loyalty to their firm or to their family to a preeminent position.[199]

---

194. After "blowing up" a client by inducing it to buy securities that his employer was trying to dump out of its inventory, erstwhile banker and current financial writer Michael Lewis rationalized: "There was a convenient way of looking at this situation. . . . Anyway, who was hurt besides my German? . . . The German's bank had lost sixty thousand dollars. The bank's shareholders, the Austrian Government, were therefore the losers. . . . *But compared with the assets of the nation as a whole, sixty thousand dollars was a ridiculously small sum.*" MICHAEL LEWIS, LIAR'S POKER 169 (1989) (emphasis added).

195. Anand et al., *supra* note 187, at 41–43. *See also* Jonathan Lowell, *Managers and Moral Dissonance: Self Justification as a Big Threat to Ethical Management?*, 105 J. BUS. ETHICS 17, 21 (2012) ("Self justification by blaming the victim is a mechanism well known to social psychologists, and particularly dissonance theorists.").

196. *See* ARIELY, *supra* note 101, at 178 (reporting results of an experiment finding that if given too much change, 45% of subjects returned the money, but if the clerk had been rude and thereby might be viewed as deserving mistreatment, only 14% of subjects returned money); DIANA B. HENRIQUES, THE WIZARD OF LIES: BERNIE MADOFF AND THE DEATH OF TRUST 335 (2011) (Ponzi schemer Bernie Madoff may have rationalized part of his actions because some of his victims were big clients who abruptly pulled money from his funds after the 1987 market crash).

197. Anand et al., *supra* note 187, at 41, 43. In responding affirmatively to a colleague's request to manipulate the Libor rate, a banker said: "Don't worry mate—there's bigger crooks in the market than us guys!" Floyd Norris, *After Fraud, the Fog Around Libor Hasn't Lifted*, N.Y. TIMES, Nov. 1, 2013, at B1.

198. Anand et al., *supra* note 187, at 41, 43.

199. In a classic example of this type of rationalization, B.F. Goodrich was trying to sell brakes for fighter jets to the Air Force. Unfortunately, the brakes repeatedly flunked safety tests. An engineer (Vandivier) went to see his boss (Gretzinger) who went to his superiors. "An hour passed and Gretzinger returned. Looking dejected, he said to Vandivier, 'I've always believed that ethics and integrity were every bit as important as theorems and formulas, and never once has anything happened to change my beliefs. Now this . . . *Hell, I've got two sons I've got to put through school. . . .*'" HOYK & HERSEY, *supra* note 88, at 58.

Francesca Gino notes that Yankee pitcher Andy Petitte managed to rationalize his cheating as necessary so that he could get back in the line-up and not let his team down,

Sixth and last in Anand and colleagues' categorization is the *metaphor of the ledger* (ex: "It's all right for me to use the Internet for personal reasons at work. After all I do work overtime.").[200] So, people find themselves saying: "I know this is wrong, but I am the most underpaid lawyer in my firm, so it is okay for me to pad my expense account." They know that it is wrong, but conclude that it is justified in this case, perhaps because of their perceived mistreatment at the hands of their victim.[201]

a.   What Can Individuals Do to Avoid Inappropriate Rationalizations?

People who are determined to live a moral life simply must pay attention to their own rationalizations. They must monitor themselves carefully. When people hear themselves saying these things ("It's not my fault;" "No one will really be hurt;" "He deserved it") to themselves or others, alarms should go off in their heads. These statements are nearly certain signals that unethical decisions are about to be made. With practice, people should be able to monitor themselves so they can more readily recognize when they are about to go off the ethical rails.

When individuals find themselves working in firms where others use these rationalizations, they must challenge the practices rather than simply acquiesce.[202]

b.   What Can Firms Do to Help Employees Avoid Inappropriate Rationalizations?

The main thing that firms can do in this arena is to educate employees regarding the ubiquitous use of rationalizations and to emphasize their commitment to ethical behavior by all their employees.[203] Anand and colleagues argue that "[e]mployee education and the establishment of independent ethics ombudspersons could go a long way toward protecting against the onset of rationalization/sociali-

---

"transform[ing] his cheating into the helpful actions of a player who cared deeply about his teammates." GINO, *supra* note 104, at 211.

> In wrapping up his book about lying in the business world, James Stewart wrote: To the extent that any of the characters in this book offered any justification for their lies, the most common was loyalty. Peter Bacanovic told Douglas Faneuil that he would never betray Martha Stewart. Scooter Libby may have lied to protect a White House besieged by criticism. Greg Anderson initially lied, and then refused to testify, even after being jailed, to protect Barry Bonds. Even Bernie Madoff lied after his Ponzi scheme collapsed to protect his collaborator DiPascali and, perhaps, his wife and family.

JAMES B. STEWART, TANGLED WEBS: HOW FALSE STATEMENTS ARE UNDERMINING AMERICA: FROM MARTHA STEWART TO BERNIE MADOFF 433–34 (2011).

200.   Anand et al., *supra* note 187, at 43–44.

201.   JACK ABRAMOFF, CAPITOL PUNISHMENT: THE HARD TRUTH ABOUT WASHINGTON CORRUPTION FROM AMERICA'S MOST NOTORIOUS LOBBYIST 214 (2011) (rationalizing his wrongdoing in part by emphasizing all of the charitable giving he was doing with the money he made).

202.   Anand et al., *supra* note 187, at 51.

203.   *Id.* at 51 ("Awareness and vigilance can prevent organizations from falling prey to the debilitating consequences of corruption abetted by rationalization and socialization.").

zation tactics."[204] Creating a pervasive culture of ethical behavior can have a significant beneficial impact upon the ethical decision making of individual employees.[205] The less room a situation provides for employees to rationalize their actions, the more likely they are to act ethically.[206]

Corporations must monitor the use of euphemisms by their employees and law firms must do the same regarding their attorneys, because this is a common way to rationalize wrongdoing by making it sound harmless.[207] The relabeled acts and consequences then become easier to justify in one's own mind. According to Anand and colleagues:

> One of the most extreme uses of euphemistic language is found in Lifton's description of the Nazi doctors who worked at Auschwitz. The doctors who selected prisoners for the gas chambers never used the word *death*; rather, "they called it going on a transport back to camp." Similarly, before the gas chambers were installed at Auschwitz, prisoners suffering from illnesses were routinely killed by injecting them with phenol. During this time, the killing process was referred to as euthanasia or as "preventive medicine": if people were sick and unlikely to recover in three weeks or so, they were better off being put out of their misery. . . . [E]uphemistic language enabled the doctors to engage in a denial of the victim and of responsibility because gassing and death were words that were never used; therefore the doctors could claim unawareness of those acts and perceive little conflict with the Hippocratic oath they had taken when they obtained their medical degrees.[208]

Training employees to monitor their own use of euphemisms can reduce unethical activity.[209] And "training employees to at least periodically think about a prospective action or decision from the perspective

---

204. *Id.*

205. Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. Chi. L. Rev. 4, 14 (2011), *available at* http://ssrn.com/abstract=2128806 ("In many contexts, seemingly modest differences in the social environment exert a large influence on outcomes even if they do not greatly alter material incentives. In addition, social norms have an independent effect: whether people smoke cigarettes, exercise, buckle their seat belts, text while driving, eat healthy foods, or enroll in a retirement plan is significantly influenced by the perceived norm within the relevant group.").

206. Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 Ann. Rev. L. & Soc. Sci. 85, 93 (2012).

207. Chambliss, *supra* note 69, at 50 (giving examples of euphemisms used by lawyers); Glover, *supra* note 6, at 301 (giving examples of use of euphemisms from U.S. bombing of Cambodia); Messick, *supra* note 154, at 98 ("bribes" are bad, but "considerations," "facilitation fees," and "priority access contributions" do not sound so bad).

208. Anand et al., *supra* note 187, at 47.

209. Max Nisen, *Why Good Employees Sometimes Do Bad Things*, Bus. Insider (Sept. 18, 2012; 10:31 AM), http://www.businessinsider.com/why-good-employees-do-bad-things-2012-9 ("Staying alert to these euphemisms and making ethical divisions crystal clear can arrest such behavior before it escalates.").

of customers, shareholders, and other constituents might help" them to realize that their actions might not pass the "headline test."[210]

2.   Contextual Pressures

The psychological evidence is clear that people's decision-making and actions are heavily affected by the situations in which they find themselves. A social psychology theory, situationism, "recognizes the strong effect that environmental influences can have on individual decision-making [and] challenges the dominant conceptions that human behavior results mainly from free will and internal disposition, with minimal impact from outside influences."[211] People may want to lose weight, but they are more likely to choose to eat candy that will have the opposite impact if that candy is nearby.[212] People may wish to stop drinking, but are more likely to choose to take a drink if they are surrounded by people who are drinking.[213] Contextual factors also impact ethical decision making and actions.

People may wish to do the right thing, but when under time pressure they are more likely to act unethically. In a famous experiment, seminary students were considerably less likely to act as the Good Samaritans they knew they should be when under time pressure than when not under time pressure.[214] And it is almost certain that they had no idea how the time pressure affected their decision making.

People may wish to do the right thing, but as noted earlier, if they find themselves in an organization where ethical standards are eroding, they will be more likely to choose to act unethically.[215] People may wish to do the right thing, but if they feel mistreated or ostracized, they will be more likely to act unethically.[216] People may wish to do the right thing, but if they are exhausted or if they have otherwise depleted their reserves of willpower, they are more likely to choose to do the

---

210.   Anand et al., *supra* note 187, at 48

211.   Caroline Forell, *McTorts: The Social and Legal Impact of McDonald's Role in Tort Suits*, 24 Loy. Consumer L. Rev. 105, 111 (2011).

212.   Kathleen D. Vohs & Todd F. Heatherton, *Self-Regulatory Failure: A Resource-Depletion Approach*, 11 Psychol. Sci. 249, 250 n.2 (2000).

213.   *See* Brian Borsari & Kate B. Carey, *Peer Influences on College Drinking: A Review of the Research*, 13 J. Substance Abuse 391 (2001) (breaking down peer pressure into its constituent units).

214.   *See* John M. Darley & C.D. Batson, "*From Jerusalem to Jericho*": *A Study of Situational and Dispositional Variables in Helping Behavior*, 27 J. Personality & Soc. Psychol. 100, 104 (1973).

215.   Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others' Unethical Behavior*, 45 J. Experimental Soc. Psychol. 708 (2009) (this study is about noticing misconduct in others).

216.   There are many studies indicating that ostracism has an adverse impact on people's prosocial behavior. *See, e.g.,* Jean M. Twenge et al., *Social Exclusion Decreases Prosocial Behavior*, 92 J. Personality & Soc. Psychol. 56 (2007); Kristen L. Sommer & Kipling D. Williams, *Social Ostracism by Coworkers: Does Rejection Lead to Loafing or Compensation?*, 23 Personality & Soc. Psychol. Bull. 693 (1997). However, there is also evidence that this impact will not occur if the ostracized individual has a long-term focus ("Hey, I still have to work with these people every day"). Daniel Balliet & D. Lance Ferris, *Ostracism and Prosocial Behavior: A Social Dilemma Perspective*, 120 Org. Behav. & Hum. Decision Processes 298, 305 (2013).

wrong thing.[217] People may wish to do the right thing, but if they can gain a lot by doing the wrong thing, they are more likely to choose to do the wrong thing and more likely to believe that it is a justified choice.[218]   People may wish to do the right thing, but if they face what they perceive to be a loss, they will be more likely to act unethically to avoid it than they would have been had they perceived the situation as a potential gain.[219]

These are just a few of the many contextual factors than can make it easier for well-intentioned people to make bad choices, but they are some of the more important ones.

a. *What Can Individuals Do to Minimize the Effects of Contextual Factors?*

Forewarned is forearmed. If tax lawyers and tax accountants can be educated to the fact that they are more likely to make ethical errors during a state of near exhaustion as they make the run up to April fifteenth, they can guard against this vulnerability.

If lawyers can be educated to the fact that if they find themselves in a firm where corners are routinely cut that they will be much more likely to start cutting bigger and bigger corners themselves, then they can guard against this risk. They can reread Clayton Christensen's book and remember that it is easier to act ethically 100% of the time than 98% of the time.[220]

If it can be brought home to people that they are more likely to lie, cheat, and steal if they find themselves in a work environment in which they believe they are being mistreated, perhaps they will be more able to heed commonsense advice: if you find yourself in such an environment, leave. That is better than lying or cheating.

Similarly, people can be educated about the enticements, conscious and unconscious, of a huge bonus and of the dangers posed when people face a perceived loss.

b. *What Can Firms Do to Minimize the Effects of Contextual Factors Upon Their Employees?*

Choice architecture can be used by businesses to improve their employees' moral behavior. People lie and cheat less in a clean envi-

217.   *See* Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORG. BEHAV. & HUM. DECISION PROCESSES 191, 199 (2011); Mark Muraven & Roy F. Baumeister, *Self-Regulation and Depletion of Limited Resources: Does Self-Control Resemble a Muscle?*, 126 PSYCHOL. SCI. 247, 255 (2000). *See also* CHARLES DUHIGG, THE POWER OF HABIT: WHY WE DO WHAT WE DO IN LIFE AND BUSINESS 137 (2012) ("Some have suggested [willpower depletion] helps clarify why otherwise successful people succumb to extramarital affairs (which are most likely to start late at night after a long day of using willpower at work).").

218.   *See* George Loewenstein, *Behavioral Decision Theory and Business Ethics: Skewed Trade-offs Between Self and Other, in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 214, 221 (David M. Messick & Ann E. Tenbrunsel eds., 1996) ("[P]eople tend to conflate what is personally beneficial with what is fair or moral.").

219.   Kern & Chugh, *supra* note 77, at 381.

220.   *See* MacFarquhar, *supra* note 117, at 26.

ronment than a dirty environment.[221] So firms should keep office spaces clean. People cheat less in a well-lit room than in a dimly-lit room.[222] So firms may add some windows. As noted earlier, people are more likely to act unethically if those around them are doing so,[223] so companies should consider instituting a zero-tolerance policy. Employees are more likely to act unethically if they are exhausted, time-crunched, or feel they have been mistreated,[224] so treating employees well is just good sense for the employer that wants to enjoy the many benefits of having an honest workforce.

The good news is that studies indicate that prosocial behavior is a trainable skill.[225] To the extent that a firm can train and incentivize its employees to act ethically, it can get them thinking of themselves as ethical people which can, in turn, lead to more ethical actions in a sort of virtuous circle. As Gneezy points out, the results of studies in psychology and economics "suggest that people may lack perfect information as to their moral type, such that prosocial behavior may lead them to update their view of themselves: If I behaved prosocially, I must be a prosocial kind of person—someone for whom prosocial behavior provides greater utility—and therefore I will behave more prosocially in the future."[226] Additionally, "[e]thical role models can also reinforce observers' efficacy, as well as the collective efficacy of the group, to act morally over time."[227]

D. *Moral Action*

Even if a person is aware of an ethical issue, correctly selects a defensible ethical choice, and has the desire to act ethically, that person may still be unable to translate all that into ethical action.[228] Hannah, Avolio, and May speak of *moral conation*, which they define as "*the capac-*

---

221. Kees Keizer et al., *The Spreading of Disorder*, 322 Sci. 1681 (2008).

222. Chen-Bo Zhong et al., *Good Lamps Are the Best Police: Darkness Increases Dishonesty and Self-Interested Behavior*, 21 Psychol. Sci. 311 (2010).

223. *See* Robinson & O'Leary-Kelley, *supra* note 71.

224. Unfairness in the workplace is a predictor of workplace retaliation by workers. Adam Barsky, *Investigating the Effects of Moral Disengagement and Participation on Unethical Work Behavior*, 104 J. Bus. Ethics 59, 60 (2011) (citing studies including Daniel P. Skarlicki et al., *Personality as a Moderator in the Relationship Between Fairness and Retaliation*, 42 Acad. Mgmt. J. 100 (1999)). *See also* Lars Hornuf, *Regulating Fraud in Financial Markets: Can Behavioural Designs Prevent Future Criminal Offences?*, 7 J. Risk Mgmt. in Fin. Inst. 192 (2014) (citing studies showing that employees cheat more if they feel they are being treated unfairly).

225. Helen Y. Weng et al., *Compassion Training Alters Altruism and Neural Responses to Suffering*, 24 Psychol. Sci. 1171, 1179 (2013) (summarizing studies and reporting results of own research indicating that prosocial behavior is a trainable skill).

226. Ayelet Gneezy, *Paying to Be Nice: Consistency and Costly Prosocial Behavior,* 58 Mgmt. Sci. 179, 180 (2012).

227. Sean T. Hannah et al., *Moral Maturation and Moral Conation: A Capacity Approach to Explaining Moral Thought and Action*, 36 Acad. Mgmt. Rev. 663, 681 (2011).

228. In her book and her videos, Mary Gentile has thought and written about this topic as much as anyone, and her work heavily influences the author's thoughts on the subject. *See* Mary C. Gentile, Giving Voice to Values: How to Speak Your Mind When You Know What's Right xii (2010) and videos at EthicsUnwrapped.utexas.edu. The author is the faculty director of this video project.

ity to generate responsibility and motivation to take moral action in the face of adversity and persevere through challenges."[229] They believe that moral conation requires moral ownership, moral efficacy, and moral courage.[230] Fortunately, lessons from behavioral ethics can bolster all three.

1. How Can Individuals Increase Their Chances of Acting Morally?

Moral Ownership. Hannah and colleagues define moral ownership as "*the extent to which members feel a sense of psychological responsibility over the ethical nature of their own actions, those of others around them, their organization, or another collective.*"[231] To create moral ownership, individuals must battle the forces that cause ethical blindness, for those forces allow them to fail to see the ethical issue that is right in front of them or to choose not to do the right thing because they are able to put responsibility on the boss, conclude that the victim "deserved it," conclude that the injury they cause is not significant, and so on. All the behavioral-based advice given earlier in this article as to how individuals can avoid ethical fading, make ethical choices, and ratchet up their moral intent should assist well-meaning individuals to increase their moral ownership.

Moral Efficacy. People may want to do the right thing, but choose not to because they think that their efforts will come to naught, perhaps because the situation seems hopeless or because they lack confidence in their own ability to act effectively.[232] If people want to do the right thing but fail to act because they fear that they will be ineffective, they should be educated as to the "power of one." Although it is natural for people in a large organization to feel isolated and lonely and therefore believe that they cannot possibly make a difference, they can come to understand that sometimes a single ordinary person *can* make a difference. Often people choose not to do what they think is right, even though they wish to, because they desire even more to please their superiors or to fit in with their co-workers. What they often do not realize is that their boss and colleagues may just be looking at things the wrong way and, if given a couple of good reasons to change their

---

229. Hannah et al., *supra* note 227, at 664.

230. *Id.* at 674, quoting S. Osswald et al., *What is Moral Courage? Definition, Explication, and Classification of a Complex Construct, in* The Psychology of Courage: Modern Research on an Ancient Virtue 94, 98 (C. Pury & S. Lopez eds., 2009) ("Before a person can act with moral courage, he or she has to perceive an incident as a situation of moral courage, and he or she has to take responsibility [i.e., moral ownership] and has to feel competent [i.e., moral efficacy] to act.").

231. *Id.*

232. Hannah et al. defined moral efficacy as "an individual's belief in his or her capabilities to organize and mobilize the motivation, cognitive resources, means, and courses of action needed to attain moral performance, within a given moral domain, while persisting in the face of moral adversity." *Id.* at 675. This definition seems a little narrow, focusing too much on the individual's beliefs regarding his or her capabilities (confidence) and not enough on the context of the situation.

minds, would do so.[233] People often do not realize that others may not have the courage to lead, but would have the courage to follow.[234]

Professor Gentile read more than a thousand essays by Columbia University MBA applicants who had been asked to write about whether they had in their professional lives been asked to do something that made them ethically uncomfortable and how they had dealt with the situation. According to Gentile:

> The first and largest bucket was people who said, "Yes, I encoun- tered this kind of a conflict, and it really bothered me. It didn't just roll off my back. But I didn't really think I had any option. So I just sucked it up and I did what they told me to do. I thought it was wrong, but I didn't feel like I had a choice." That was the largest group, a little less than half. Then there was a small group who said, "Yes, I encountered this kind of conflict. It bothered me so much I couldn't do it. But I also couldn't think of anything else to do. So I removed myself from the situation." Some of these people quit. Some of these people got themselves trans- ferred to another work group. But that was a very small group. About a third of the people were saying, "Yes, I encountered this. It bothered me, and I tried to do something." A small group of those said, "I tried and I failed." *But about a quarter of the whole group said, "I tried and, by my lights, I was successful."*[235]

People may be more willing to do the right thing if they learn that it often (not always) takes just one person to make a difference.[236]

---

233.   *See* JOHN C. MAXWELL, THE 21 INDISPENSABLE QUALITIES OF A LEADER 41 (1999) ("A show of courage by any person encourages others.").

234.   This "power of one" was amply demonstrated by two of the most important psychological experiments in this area. Stanley Milgram's famous experiment on obedi- ence to authority showed that nearly every subject, when instructed to do so by an author- ity figure with no real power, was willing to inflict apparently painful and injurious electric shocks upon another human being. *See* Stanley Milgram, *Behavioral Study of Obedi- ence*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963). But when a second confederate was added to the experiment and the confederate refused to follow instructions to shock the third party, then 90% of subjects similarly refused. EYAL PRESS, BEAUTIFUL SOULS: SAYING NO, BREAKING RANKS, AND HEEDING THE VOICE OF CONSCIENCE IN DARK TIMES 3 (2012). Solomon Asch's study of the conformity bias demonstrated that substantial percentages of people will give obviously wrong answers to simple questions when in the presence of a number of other people who give wrong answers. Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS 9, 31 (1956). But, again, when just one of the other people gave the correct answer, then virtually every one of the subjects did as well.

235.   *See* Mary C. Gentile & Jeffrey Hittner, *Giving Voice To Values: How to Speak Your Mind When You Know What's Right*, CARNEGIE COUNCIL (April 26, 2011), http:// www.carnegiecouncil.org/studio/multimedia/20110426/index.html#section-21474 (emphasis added).

236.   *See* Ervin Staub, *The Psychology of Rescue: Perpetrators, Bystanders, and Heroic Help- ers*, *in* RESISTERS, RESCUERS, AND REFUGEES: HISTORICAL AND ETHICAL ISSUES 137, 144 (John J. Michalczyk, ed. 1997) ("Each of us has the power not only to make decisions about what we shall do but to influence others."). Egil "Bud" Krogh, head of the "Plumbers Unit" that broke into the office of Daniel Ellsberg's psychiatrist believes that he alone might have been able to derail the bad acts that led to the Watergate scandal had he just asked the right questions to the right people. EGIL KROGH, INTEGRITY: GOOD PEOPLE, BAD CHOICES AND LIFE LESSONS FROM THE WHITE HOUSE 197 (2007). And it is possible that just

Sometimes people who want to do the right thing fail to act because they lack confidence about how to act. If they will study Gentile's Giving Voice to Values (GVV) curriculum, however, they may learn enough about how to act effectively that they will gain the confidence they need.[237] There is evidence that a course based on Gentile's materials can help people feel "greatly empowered" to speak up for what they think is right.[238]

Moral Courage. Even if people take moral ownership and believe they can be effective and have confidence in their ability to get their point across, they may still lack the grit to act. "Moral courage" has been defined as "strength of will . . . needed to face and resolve ethical challenges and to confront barriers that may inhibit the ability to proceed toward right action,"[239] and as "a commitment to moral principles, an awareness of the danger involved in supporting those principles, and a willing endurance of that danger."[240]

People may be too timid to stand up to superiors or peers. Albus Dumbledore told Harry Potter: "It takes a great deal of bravery to stand up to our enemies, but just as much to stand up to our friends."[241] Professor Gentile recommends at least two ideas in this connection. First, everyone should be thrifty and set aside "go-to-hell" funds.[242] It is obviously easier to screw up the courage to swim against the tide and do the right thing if one has the funds set aside to pay living expenses while looking for another job than if one owes money all over town.

Second, people should visualize and accept the fact that part of their professional journey may involve facing ethical dilemmas that will require them to make sacrifices in order to have the type of career, and consequently the type of life, of which they can be proud. Gentile notes that "[b]y anticipating or *normalizing* the idea that we will have to take risks—even career-threatening ones—in service of our values at some

---

one person raising objections at the right time might have successfully prevented the disastrous Bay of Pigs invasion launched in the early days of the Kennedy administration. DAWES, *supra* note 42, at 152.

237.   A big part of the Giving Voice to Value program helps people understand how they can be more effective by framing arguments properly, by recruiting supporters, and by practicing speaking out. *See* GENTILE, *supra* note 228, at 72–222.

238.   Stacie Chappell et al., *A Required GVV Ethics Course: Conscripting Ethical Conversations*, 8 J. BUS. ETHICS EDUC. 308, 316 (2011) (quoting student); Claudia J. Ferrante et al., *Giving Voice to Values and Ethics Across the Curriculum at the United States Air Force Academy, in* EDUCATING FOR VALUES-DRIVEN LEADERSHIP 183, 193 (Mary Gentile ed., 2013) ("[W]e found that the GVV program is a great addition to that curriculum and does an excellent job of helping cadets deal with the tension between authority and autonomy that sometimes exists in organizations that require a high level of obedience along with a need to voice their values when necessary."). Videos based on Gentile's Giving Voice to Values program are available at: ethicsunwrapped.utexas.edu. The author is the faculty director of this *free* ethics video series that is also available on YouTube.

239.   Leslie E. Sekerka et al., *Facing Ethical Challenges in the Workplace: Conceptualizing and Measuring Professional Moral Courage*, 89 J. BUS. ETHICS 565, 566 (2009).

240.   RUSHWORTH KIDDER, MORAL COURAGE 7 (2005) (emphasis omitted).

241.   J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 306 (1997).

242.   GENTILE, *supra* note 228, at 78.

point in our work lives, we expand our vision of what degree of freedom we have in our decision making."[243]

Just as people may improve their golf swing or their free throw shooting by a process of visualization, there is at least anecdotal evidence that people can improve their chances of acting ethically by "pre-scripting"—by thinking in advance about ethical issues they may run into in their careers and thinking carefully about how they intend to respond to them.[244]

Gentile's key point in this area is that the "single most striking difference" between those who lived their values and those who simply knuckled under was that those who acted "had said something, at some point, out loud and to someone outside their own heads. This single act makes the decision more real, less hypothetical, less easily avoided."[245]

2. How Can Firms Increase Their Employees' Chances of Acting Morally?

The behavioral ethics and related literature teaches that there are steps that organizations can take to improve simultaneously their employees' moral ownership, moral efficacy, and moral courage, thereby improving the odds that their employees' moral intent will translate into moral action.

Moral Ownership. If, for example, employees routinely see their peers, and especially their superiors, act in an ethical fashion, they will be more likely to take ownership of their company's ethical issues themselves. Because most adults do not have adequate moral compasses and look to others for guidance, it is natural that in the workplace they look to top managers who can have a big impact on employees' ethical decision making by being paragons of integrity themselves.[246] An ethical culture is critical and leaders must walk the walk because humans are even more likely to model or reciprocate *un*ethical or *un*fair behavior than ethical or altruistic behavior when they see it around them.[247] But

---

243. *Id.*

244. *See id.* at xxxii; Prentice, *supra* note 150, at 359. Although pre-scripting can definitely help people act consonant with their ethical standards, it is no guarantee, obviously, in part because the sorts of factors that lead people to predict that they will act with moral courage are not necessarily the same factors that help people actually act with moral courage. *See* Anna Baumert et al., *Interventions Against Norm Violations: Dispositional Determinants of Self-Reported and Real Moral Courage*, 39 PERSONALITY & SOC. PSYCHOL. BULL. 1053, 1063–64 (2013).

245. GENTILE, *supra* note 228, at 58. There is evidence that even a private promise to oneself can have an impact on future conduct. *See* Katherine L. Milkman et al., *Using Implementation Intentions Prompts to Enhance Influenza Vaccination Rates*, 108 PROCEED. NAT. ACAD. SCIENCES 10415, 10418 (2011).

246. Russell Cropanzano & Fred O. Walumbwa, *Moral Leadership: A Short Primer on Competing Perspectives, in* MANAGERIAL ETHICS: MANAGING THE PSYCHOLOGY OF MORALITY 21, 27 (Marshall Schminke ed., 2010).

247. David De Cremer, On Understanding the Human Nature of Good and Bad Behavior in Business: A Behavioral Ethics Approach 14–15 (Oct. 23, 2009) (unpublished manuscript), *available at* ssrn.com/abstract=1538728 (citing paper by De Cremer & Aquino).

it is not only leaders; the moral behavior of a single co-employee can affect the behavior of a worker,[248] particularly if the two have anything at all in common, even just sharing a birthday or first name.[249] It truly takes a village to create such a desirable ethical culture.[250]

Codes of conduct do not inevitably improve behavior, but they often do. And studies from the behavioral ethics field can give employers guidance as to how to best draft and implement such codes.[251] For example, as codes get more complex, employees may act more unethically because they rationalize that if a particular bit of wrongdoing were so bad, it would be mentioned in the company's code of conduct. Everything not explicitly banned, and firms cannot ban everything, becomes fair game.[252] So, simpler and clearer is often better.

Hannah and colleagues suggest that a firm's organizational reward and control systems can boost moral ownership, noting that "[t]hese systems can signal what is valued in organizations, and research has shown that although individuals may initially comply with norms for strategic self-presentation, over time, such norms can cause identity changes that can impact the individual's sense of responsibility to take moral action."[253] In other words, as noted earlier in connection with prosociality, after a period of acting with integrity just because it is expected, employees begin to act with integrity because they come to think of themselves as the type of people who act with integrity.[254]

---

248. Bazerman & Gino, *supra* note 206.

249. Francesca Gino & Adam D. Galinsky, *Vicarious Dishonesty: When Psychological Closeness Creates Distance from One's Moral Compass*, 119 ORG. BEHAV. & HUM. DECISION PROCESSES 15, 16 (2012).

250. Studies have been done in this area.

> One important implication for management is to focus on the ethical messages that are sent from *multiple* social actors in the organization. . . . Indeed, although ethical leaders want employees to report unethical conduct because it is simply the right thing to do, their efforts can fail if these employees do not believe their coworkers are ethical. Thus, employees must receive clear messages from leaders and from peers that reporting unethical conduct will be supported. This in turn suggests that 'it takes a village,' not merely an ethical leader, to encourage employees to report unethical conduct.

David M. Mayer et al., *Encouraging Employees to Report Unethical Conduct Internally: It Takes a Village*, 121 ORG. BEHAV. & HUM. DECISION PROCESSES 89, 101 (2013).

251. Lorenzo Sacconi et al., *Behavioral Business Ethics as a Method for Normative Business Ethics* 7–8 (EconomEtica, Working Paper No. 42, 2012), *available at* http://ssrn.com/abstract=2116519 ("[B]ehavioral business ethics is making important contributions relating implementation of corporate ethical codes and policies, and governance structures. New insights into people's motivations in different contexts will help managers to design incentive structures and other institutional mechanisms to make corporations more ethically effective.").

252. De Cremer, *supra* note 247, at 15.

253. Hannah et al., *supra* note 227, at 680–81 (citing Linda Treviño et al., *A Qualitative Investigation of Perceived Executive Ethical Leadership: Perceptions from Inside and Outside the Executive Suite*, 56 HUM. RELATIONS 5 (2003)).

254. Ting Zhang et al., *Morality Rebooted: Exploring Simple Fixes to Our Moral Bugs* 108 (Harv. Bus. Sch., Working Paper No. 14-105, 2014), *available at* http//ssrn.com/abstract=2427259 ("One long-term solution of reducing dishonesty at the individual level is reminding individuals of their personal moral self-concept (i.e., how individuals view and perceive themselves) since it is a crucial determinant of future engagement in unethi-

Moral Efficacy. If employees see other employees' efforts to do the right thing bearing fruit, they are more likely to believe that they themselves can have an efficacious impact by stepping up to the plate. "Ethical role models can . . . reinforce observers' efficacy, as well as the collective efficacy of the group, to act morally over time."[255] Studies further show that leaders who are willing to make sacrifices for the enterprise have the best chance to promote compliance and cooperative behavior among subordinates.[256]

Solid reward and control systems can not only improve moral ownership, as noted above, they can also create feelings of efficacy. Whatever systems are put in place, they should be installed through fair procedures and embody fair process. Tom Tyler's work has long demonstrated that procedural fairness spins off a variety of good behaviors[257] and leads employees to accept existing moral rules.[258]

The worst way to attempt to instill an ethical culture is to put in a system of sanctions, and then fail to enforce them. Imposing a system of sanctions can undermine genuine trust among people, but this can be manageable if the sanctions work effectively. However, if the sanctions are not fairly and generally imposed or if they are later abandoned, the trust level among people is likely to fall below what existed before the sanctions were originally put in place[259] and feelings of moral efficacy are likely to plummet. Haidt says: "[T]he most important principle for designing an ethical society is to *make sure that everyone's reputation is on the line all the time*, so that bad behavior will always bring bad consequences."[260] The most important principle for designing an ethical firm is to ensure the same thing.[261]

---

cal behavior. Having a strong moral self-concept or identity compels individuals to behave ethically.").

255.   Hannah et al., *supra note* 227, at 681.

256.   De Cremer, *supra* note 247, at 19 (citing research by De Cremer, Dave Mayer, Marius van Dijke, Barbara Schouten, & Mary Bardes).

257.   Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 Personality & Soc. Psychol. Rev. 323 (1997).

258.   Tom Tyler & David De Cremer, *Ethics and Rule Adherence in Groups*, *in* Psychological Perspectives on Ethical Behavior and Decision Making, *supra* note 77, at 215, 228 (David De Cremer ed., 2009).

259.   Laetitia B. Mulder et al., *Undermining Trust and Cooperation: The Paradox of Sanctioning Systems in Social Dilemmas*, 42 J. Experimental Soc. Psychol. 147 (2006).

260.   Haidt, *supra* note 132, at 74 (emphasis in the original).

261.   Consider whistleblowing, which can be extremely helpful in reducing frauds and other unethical activity:

An obvious strategy [for companies that wish to encourage whistle-blowers] to reduce such barriers is to reduce the ambiguity about what is and is not permitted in an organization and to have policies to clarify reporting channels when gray activity is observed. Anonymous hot lines are a possibility, as is outsourcing the reporting system to independent agencies that are empowered to investigate the allegations. To combat the perception of futility, organizations need to have some effective responses to allegations of wrongdoing. At a minimum that will require launching investigations of any reported misconduct, all charges, reporting the findings to the whistle-blower, and providing some positive recognition to the person making the allegations regardless of the outcome. Such policies can reinforce the moral courage that is often required to stand up and make a clear and public ethical judgment.

Moral Courage. An excellent code of ethics and a set of incentives conscientiously enforced that punishes unethical behavior and rewards ethical behavior should help create a culture in which leaders as well as others in the organization act ethically, in part because they come to think of themselves as part of an organization where that is where such things are done and to think of themselves as the kind of people who act ethically. Creation and maintenance of such a culture cannot help but reduce employees' worries that they will suffer adverse consequences if they act ethically. Reduction of that fear will necessarily foster moral courage.

Conclusion

Teaching a little Kant and Bentham is a great idea, but there is little established correlation between being able to engage in insightful moral reasoning and actually acting more ethically.[262] Teaching law, accounting, and medical students their profession's code of conduct is a similarly excellent idea, but, again there can be a significant gap between knowing the rules and living them. Behavioral ethics, properly taught, can help close that gap.[263]

People make mistakes. During World War II, American pilots suffered with disconcerting frequency "wheels-up" crashes during landings because they would retract the wheels instead of the flaps. The military brought in psychologist Lt. Alphonse Chapanis to solve the pilots' problem. Were they too tired? Too distracted? Chapanis quickly figured

---

Messick, *supra* note 154, at 110.

262. *See* Ruodan Shao et al., *Beyond Moral Reasoning: A Review of Moral Identity Research and Its Implications for Business Ethics*, 18 Bus. Ethics Q. 513, 513 (2008) (noting "that the strength of the association between moral reasoning and moral action is small or moderate, meaning that other mechanisms must be involved in moral functioning."); Carmen Tanner & Markus Christen, *Moral Intelligence—A Framework for Understanding Moral Competences*, *in* Empirically Informed Ethics: Morality between Facts and Norms 119, 123 (Markus Christen et al. eds., 2014) ("research has found only disappointing correspondence between moral judgment and behavior").

263. *See* Jonathan Haidt, *Can You Teach Businessmen to Be Ethical?*, Wash. Post (Jan. 13, 2014), http://www.washingtonpost.com/blogs/on-leadership/wp/2014/01/13/can-you-teach-businessmen-to-be-ethical/ ("It's time for business schools to get more sophisticated about moral psychology . . . . A set of best practices for business schools might therefore be the following: update courses on business ethics to include a more realistic portrayal of human psychology, taking seriously the limits of reasoning. Add a course on ethical systems design. Initiate a school-wide effort to strengthen the culture of professionalism and integrity within the MBA program itself. This combination would train both rider and elephant, and it would teach students how to create better paths when they go forth after graduation."); Simone Schnall, *A Sense of Cleanliness*, *in* Thinking: The New Science of Decision Making, Problem-Solving, and Prediction 215, 221 (John Brockman ed., 2013) ("So if you pay attention to where your decisions are coming from or what might be influencing them, you might be able to control some of these effects."); Alina Tugend, *In Life and Business, Learning to Be Ethical*, N.Y. Times (Jan. 10, 2014), http://www.nytimes.com/2014/01/11/your-money/in-life-and-business-learning-to-be-ethical.html?_r=0 (The work of leading researchers in behavioral ethics is discussed and concludes that "[t]rying to become more ethical—or teaching people how to—would seem doomed then. But that's not true. It's just that how we teach ethics has to catch up with what we know about how the human mind works.").

out that the problem existed for only two kinds of planes where the cockpit design placed identical-looking controls for the wheels and the flaps side by side. By merely placing a rubber wheel at the end of one of the controls he enabled pilots to tell which lever they were touching and solved the problem.[264] Realizing the contextual cause of the pilots' mistakes, the military's small change in choice architecture solved the pilots' problems. When it is known why people make the mistakes that they do, both they and their employers can take steps to minimize mistakes. It appears that even when the mistakes are ethical in nature, this principle remains true.

Using the principles of behavioral psychology and related fields, marketers have changed human behavior in order to increase sales and governments have changed individuals' behavior to advance policy goals. Using these same principles, individuals and organizations should be able to alter human behavior to increase ethicality.

For individuals, the most important thing is probably education. Most people understand that it takes lots of study, work, and practice to be good lawyers, good doctors, and good investment bankers. But they tend to simply assume that they are good people, so the ethics stuff they run into will take care of itself. If people realize that most of their ethical judgments are made intuitively and are not always optimal, they can intentionally activate their cognitive systems and oftentimes reach a better, more thoughtful decision.[265] And if people can be educated regarding their vulnerability to various cognitive shortcomings, they can also guard against them. As Brink notes:

> [K]nowledge is power. Once people recognize ways in which they are prone to situational influences, they may be better at resisting them. Indeed, it is precisely here that the positive potential of recognizing the role of situational factors can be empowering. In this connection, Milgram [who ran the most famous experiments ever done on people's tendency to be overly obedient to authority] notes that some subjects later reported having become more aware of their susceptibility to influence by authorities and better able to resist authority when it conflicts with conscience as the result of the experiment.[266]

---

264. SENDHIL MULLAINATHAN & ELDAR SHAFIR, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 167–68 (2013).

265. Neeru Paharia et al., *Sweatshop Labor Is Wrong Unless the Shoes are Cute: Cognition Can Both Help and Hurt Moral Motivated Reasoning*, 121 ORG. BEHAV. & HUM. DECISION PROCESSES 81, 81 (2013):

> Some scholars have suggested that cognitive processes lead to superior ethical decision making whereas intuitive processes may be more vulnerable to self-interest and motivated biases. In one recent study, authors found that when individuals had more time for cognitive deliberation they were less likely to lie in a deception game, while in another study, authors found that when cognitive resources were available, participants were less likely to cheat. These findings suggest that cognition can help people be moral in their judgments and actions.

266.

Brink, *supra* note 64, at 130.

How big an impact can behavioral ethics have? We will probably never know with any meaningful level of certainty. It would be very difficult to conduct a fully controlled field study comparing employees who had studied behavioral ethics and employees who had not. Members of the two groups would have had entirely disparate career trajectories, different supervisors, different opportunities to profit from cheating, and the like, making side-by-side comparisons impractical. Nonetheless, this article presents persuasive reasons to believe that if companies can use the principles of behavioral psychology to change consumers' behavior and thereby increase sales and governments can use those same principles to change citizens' behavior and thereby advance policy goals, then individuals and their employers can use related principles of behavioral ethics to improve ethical behavior in the workplace and in society. There is no magic bullet for the human condition so expectations must be tempered,[267] but any improvement should be welcome.

---

267. As this article was heading to press, two of the leading lights in behavioral ethics, Max Bazerman and Francesca Gino, along with Ting Zhang, put out a preliminary paper that makes many of the same arguments made in this paper about the potential of behavioral ethics to "fix our moral bugs," but is also quite realistic in setting out limitations of the approach as well. *See* Zhang et al., *supra* note 254.