BEYOND TEMPORAL EXPLANATIONS OF CORPORATE CRIME

Robert A. Prentice*

TABLE OF CONTENTS

INTRODUCTION .................................................................397

I. HEURISTICS AND BIASES ..............................................400
   A. OBEDIENCE TO AUTHORITY .........................................401
   B. CONFORMITY BIAS ......................................................403
   C. INCREMENTALISM ......................................................406
   D. FRAMING ....................................................................409
   E. LOSS AVERSION .........................................................412

II. ETHICAL FADING (“BLIND SPOTS”) ..............................414

CONCLUSION .....................................................................421

INTRODUCTION

Professor Manuel A. Utset has developed a virtual cottage industry in producing articles regarding time-inconsistent preferences and their implications for the legal landscape.1 Although he has had help in this task,2 Professor Utset has led the way in informing the legal community of

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


2 There is now substantial psychological literature on present-based preferences, self-control problems, and related subjects. See, e.g., Colin Camerer et al., Regulation for
the valuable work produced by psychologists studying this aspect of human behavior. In recent articles, including his excellent piece in this journal, Professor Utset has focused on corporate criminal cases but also included “misconduct” of the type that could lead to civil fines imposed by government actors or damage judgments in private enforcement cases.

Professor Utset’s primary contribution in these recent articles on misconduct is to refine and extend the neoclassical economic theory of criminal misconduct that assumes that people are rational, value-maximizing actors who will decide to violate the law if (but only if) the


4 Manuel A. Utset, Corporate Actors, Corporate Crimes, and Time-Inconsistent Preferences, 1 VA. J. CRIM. L. 265 (2013) [hereinafter Utset, Corporate Actors].

5 Id. at 30.

expected benefits of the misconduct exceed the expected costs. Thus, as Professor Utset explains, in the neoclassical model, if the fine for speeding is $200 and Jo believes the possibility that she will be caught is 10%, the expected fine is $20. If the value to Jo of quickly getting to where she wants to go is less than $20, she will choose not to speed.

Professor Utset’s time-inconsistent model emphasizes that many people exhibit to varying degrees present-biased preferences and manifest self-control problems, which can lead to irrational decision making in the criminal and related domains. Utset posits a model based on assumptions that Toc and Tina both have a relatively modest long-term discount factor of 0.9 and that Tina has self-control problems and therefore has a short-term discount factor 0.5. They both are deciding whether to commit a crime that would provide them an immediate reward of $10, but trigger a delayed sanction of $15. Because the long-term sanction is monetarily larger than the long-term benefit, both Toc and Tina will intend to obey the law. But when it comes time to actually decide and act, Toc will continue to obey the law because it is in her long-term best interests to do so, but due to her self-control problem, Tina will apply an immediacy multiplier of 1/0.5 to the immediate benefit and perceive it as $20 which happens to be greater than the delayed, discounted, expected sanction of $13.50 (0.9 x $15). She will therefore commit a corporate crime, even though it is not in her long-term best interests to do so.

Although both the neoclassical model and Utset’s revision take into account both intangible benefits as well as monetary benefits, they

---


8 Utset, Hyperbolic Criminals, supra note 1, at 616.

9 There is evidence that self-control issues are not as important in white collar crimes as in “common” crimes.” See Sally S. Simpson, Low Self-Control, Organizational Theory, and Corporate Crime, 36 L. & Soc’y Rev. 509, 533–34 (2002) (finding that organizational factors are more important than individual factors such as self control in white collar cases).

10 Utset, Corporate Actors, supra note 4, at 30.

11 Intangible benefits would include the satisfaction that comes from gaining revenge. POSNER, supra note 6, at 219.
both stress the economic aspects of these decisions. In the main, Utset compares the rational monetary judgments produced by the neoclassical model with the irrational monetary judgments made by many people who exhibit time-inconsistent preferences.

There are many nonmonetary factors that affect people’s decision making. Indeed, although Utset recognizes the existence of cognitive biases and decisional heuristics which also affect these choices whether or not to engage in misconduct, he explicitly chooses not to discuss them.\textsuperscript{12} This is fair, for it is outside the scope of his project. However, these factors play such an important role in the decisions of people to commit corporate (“white collar”) crimes or engage in other misconduct that the purpose of this contribution is to emphasize that role and explore its implications.

\section{Heuristics and Biases}

Daniel Kahneman and Amos Tversky are the fathers of the “heuristics and biases” literature which ended any notion that it is safe to design policy based upon the assumption that people are rational decision makers.\textsuperscript{13} This necessarily brief article addresses a selection of these, such as obedience to authority.

\footnotesize{\textsuperscript{12} See Utset, \textit{Hyperbolic Criminals}, supra note 1, at 628--29.}

\footnotesize{\textsuperscript{13} See Amos Tversky & Daniel Kahneman, \textit{Judgment Under Uncertainty: Heuristics and Biases}, 185 SCIENCE 1124 (Sept. 27, 1974). This article is one of the most-cited in the history of the 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, \textit{Thinking, Fast and Slow} 8 (2011) [hereinafter Kahneman, \textit{Thinking}].}

A. OBEDIENCE TO AUTHORITY

Most people have a tendency to be obedient to authority. In trying to determine why so many seemingly normal German people became part of Hitler’s murderous death machine, psychologist Stanley Milgram famously discovered that even normal Americans can in very high percentages be induced to inflict substantial (perhaps even deadly) pain upon others just because some fellow in a white lab coat—whom they never met before and who has no real authority over them whatsoever— instructs them to.\(^\text{14}\)

This may sound like the stuff of laboratory experiments, but it is repeatedly manifested in real world conduct. Vice Admiral Sir George Tryon, who wished during training maneuvers to teach his sailors the value of thinking for themselves, ordered a captain of another ship to follow a path which would obviously lead to a collision between their two ships. Rather than thinking for himself, the subordinate was so determined to please his superior that he did, indeed, run his ship into Tryon’s, costing the lives of Tryon and more than 350 members of his crew.\(^\text{15}\) Studies of airplane crashes indicate that many occur because of the hesitance of crewmembers to question the captain’s actions, even when they are obviously leading to disaster.\(^\text{16}\)

Turning to corporate crime, a recent empirical study indicates that CFOs are more likely to become involved in material accounting violations if the manipulations will benefit their CEOs than if they benefit themselves.\(^\text{17}\) In other words, CFOs do not manipulate primarily to profit personally but instead to please their superiors. Relatedly, studies show


\(^\text{15}\) Margaret Heffernan, *Willful Blindness: Why We Ignore the Obvious at Our Peril* 108–09 (2011).

\(^\text{16}\) *Id.* at 117.

that auditors who know that their supervisors desire them to accept their clients’ nonerror explanations for account balance fluctuations often adopt those explanations without even considering alternative possibilities.  

Thus, laboratory experiments, historical examples, and empirical studies indicate that people working within organizations will tend to feel a desire and indeed some pressure to please their superiors. This was illustrated starkly during the dot.com boom when stock analysts such as Henry Blodget repeatedly recommended that the investing public buy stocks that they said in private e-mails to colleagues were fecal material and worse. The analysts often admitted that they did not have the courage to stand up to their superiors. This pattern was repeated during the subprime mess as employees of ratings agencies gave positive ratings to extremely risky packages of mortgage-backed securities. One complained in internal e-mails that “[w]e rate every deal. . . . It could be structured by cows and we would rate it,” but kept on doing so under pressure from superiors.

Worse than knowingly committing crimes and other misconduct in order to please authority is to be so focused upon pleasing one’s bosses that the ethical and legal issues fade out of the picture altogether and are never meaningfully considered. This is the story of Egil (Bud) Krogh, a young White House staffer who was made co-director of the “Plumbers” unit with instructions to burglarize the office of Pentagon Papers leaker Daniel Ellsberg’s psychiatrist in order to gather evidence to discredit Ellsberg. Krogh was so focused upon pleasing his superiors, who were after all the right-hand men of the most powerful man in the world, that he

---


diedn’t even think of the ethical and legal dimensions of his actions until
the entire Watergate scandal started to unravel.22

Obedience to authority can cause people to make decisions that are
contrary to their long-term best interests, but that do not result from time-
inconsistent preferences or lack of self-control. And consider the
conformity bias.

B. CONFORMITY BIAS

Teenagers are not the only ones who are subject to peer pressure,
and just as most people have a tendency to defer to authority, sometimes
excessively, most people tend to conform to the ideas and habits of other
members of their in-group. Because of this tendency, corporate crimes
often happen not because people particularly make a conscious decision to
commit crimes but because they become part of a team which they are
more likely to help than to blow the whistle on if it is involved in
wrongdoing.

In almost any setting, people tend to take their behavioral cues
from others. When studying the conformity bias, Solomon Asch set up an
interesting experiment in which he asked which of three lines was the
same length as a fourth line. His subjects easily and accurately answered
the question until some were placed in an experimental condition in the
presence of six of Asch’s confederates who gave an answer that was
obviously wrong. Virtually all of the subjects then found it very painful to
give the obviously correct answer in contradiction of these strangers’
erroneous answers. Well more than half of the subjects gave a clearly
incorrect answer at least once.23 Obviously, the pressure to conform will
be much greater when the others in the reference group are not strangers
but are instead friends and coworkers and when the issue is not so clearly
black-and-white as it was in Asch’s experiment.

22 EGIL KROGH, INTEGRITY: GOOD PEOPLE, BAD CHOICES AND LIFE LESSONS

23 Solomon Asch, Opinions and Social Pressure, in READINGS ABOUT THE
A recent experiment found that college students were much more likely to cheat if they observed a member of their in-group cheating. This was especially true if the student wore a sweatshirt sporting the name of his college. But if he wore a sweatshirt from a rival college (the out-group), cheating went down.24

This incentive is very strong.25 As one financial professional noted in retrospect:

I was so motivated to gain acceptance. It wasn’t greed. I didn’t need anything. I had a car. A house. Once I had that, I had what I needed. It wasn’t about stuff. It was about my personal scoreboard with everyone else. Sometimes there’d be three days left in the month and I hadn’t hit last month’s target, so I’d push the envelope to do some things not always in the best interest of my client. I lost all morals, all ethics, in the interest of staying in the gang.26

24 Francesca Gino et al., Contagion and Differentiation in Unethical Behavior, 20 PSYCHOL. SCI. 393, 398 (2009). The most frightening example of the conformity bias leading to misconduct (to understate greatly the wrongs involved) is exemplified in Christopher Browning’s analysis of how “ordinary men” in their fifties and sixties became cold-blooded killers of Jews and others. During the first incident when they were ordered to kill Jews, their commandant told all members of Reserve Battalion 101 that they could take the day off. Virtually none did and the conformity bias played a big role in that. CHRISTOPHER R. BROWNING, ORDINARY MEN: RESERVE BATTALION 101 AND THE FINAL SOLUTION IN POLAND 71, 185 (1993).

25 The strength of this influence is illustrated by Alan Funt’s 1970 movie, What Do You Say to a Naked Lady? Funt secretly filmed a man responding to a help-wanted ad. “He is directed to a waiting room occupied by men who appear to be other job seekers but are actually Funt’s confederates. At no apparent signal, these men stand and begin to disrobe. The hapless job seeker’s dismay is evident, but after a few moments, he too stands and disrobes. At scene’s end, the men are standing naked, apparently waiting for whatever comes next.” ROBERT H. FRANK, THE ECONOMIC NATURALIST’S FIELD GUIDE 140 (2009).

26 HEFFERNAN, supra note 15, at 129 (emphasis added).
To “hide and watch” is an evolutionarily successful strategy when entering a new environment with new actors. By so doing, one can learn the local culture and figure out what pleases and displeases the boss. But this imitation can be taken too far and people can give up their own individual ethical standards and even commit crimes in order to get along. One risk-management professional working at Enron before its collapse later said: “If your boss was [fudging], and you never worked anywhere else, you just assume that everybody fudges earnings….Once you get there and you realize how it was, do you stand up and lose your job? It was scary. It was easy to get into ‘Well, everybody else is doing it, so maybe it isn’t so bad.'”

Putting up a sign at the Petrified Forest that people should not pilfer the stones because several tons worth were stolen every year actually led to a tripling of pilfering because it sent a signal to park visitors that pilfering was culturally acceptable.

27 John A. Byrne, The Environment Was Ripe for Abuse, BUS. WK., Feb. 25, 2002, at 118. A popular exploration of the conformity bias has subjects sit in a room to fill out some forms and then send smoke into the room through a vent. If subjects are alone, generally around 75% of them will report the smoke. But, if two of the experimenter’s confederates are in the room, and appear unconcerned, only 10% or so will report the smoke. The other 90% will continue to fill out the forms and appear unconcerned. BIBB LATANE & JOHN M. DARLEY, THE UNRESPONSIVE BYSTANDER: WHY DOESN’T HE HELP? 44–54 (1970).

28 IAN AYRES, CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE 79 (2010). As Mitchell and Palmer point out:

Workplace contexts that emphasize unethical standards of behavior promote unethical behavior. Consistent with social learning theory (Bandura, 1977), employees look to others in their work environment to see what is considered appropriate work conduct. Social information processing theory makes similar arguments. According to this theory, individuals learn more about what is appropriate work behavior by watching coworkers and peers than by formal rules and procedures . . . Robinson and O’Leary-Kelly (1998) found that organizational newcomers who perceived coworkers acted unethically began to act similarly.

The influence of the conformity bias is so strong that it can blind people to the wrongness of their conduct. As Heffernan points out:

Ostracism makes individuals feel they lack purpose, have less control over their lives, are less good moral beings, and lack self-worth. . . . This is so fundamental a part of our evolutionary makeup that it is strong enough to make us give the wrong answers to questions, as in Asch’s line of experiments, and strong enough to make us disregard the moral lessons we’ve learned and absorbed since childhood. The carrot of belonging and the stick of exclusion are powerful enough to blind us to the consequences of our actions.29

The conformity bias can also manifest itself in “groupthink” in which groups of people make more extreme, and in some cases more unethical, decisions than any single one of them individually would have made.30

C. INCREMENTALISM

Although the slippery slope argument is often overused, it is undeniably true that people can slowly and incrementally become blinded to the wrongness of their conduct. Also called the boiling frog syndrome, under incrementalism newcomers to organizations (and others) are often gradually introduced to corrupt acts. Much “unethical behavior occurs when people unconsciously ‘lower the bar’ over time through small

---

29 Heffernan, supra note 15, at 133.

changes in the ethicality of behavior." The bar is often lowered so far that criminal acts occur.

Why did physicians who had taken the Hippocratic Oath and sworn to protect life become cogs in Hitler’s death machine? Interviews with those doctors indicated that they were generally introduced to the process slowly. They were not initially asked to perform the deed themselves. Rather, they were first brought to the place where the work was done. Then they were asked to sign a relevant document. Then they were to supervise a “mercy killing.” Only later were they asked to do themselves what they might have refused to do had they been asked in the beginning.

A similar slippery slope phenomenon played a role in the wrongdoing at the infamous Abu Ghraib prison in Iraq:

[A]fter four or five nights of running the M.I. 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.”


In her book about her experience as a whistleblower in the WorldCom debacle, Cynthia Cooper wrote that “[p]eople don’t wake up and say, ‘I think I’ll become a criminal today.’ Instead, it’s often a slippery slope and we lose our footing one step at a time.” CYNTHIA COOPER, EXTRAORDINARY CIRCUMSTANCES: THE JOURNEY OF A CORPORATE WHISTLEBLOWER 1 (2008).

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.”

And so it is that rather than making a significant, conscious decision to violate ethical and legal precepts, people more often slide down a slippery slope along with their co-workers.

It starts small. Perhaps there is a shortfall in orders that will cause the company to miss analysts’ quarterly earnings estimates. The stock price will get hammered and the company may lose its best engineers if their stock options are underwater. So the VP of marketing persuades a customer to accept an early shipment of goods not needed until the next quarter. The manager robs Peter to pay Paul, assuming that he or she can make up the shortfall the next quarter. But the economy takes a downturn and orders are down again. So this time the manager ships a product to an independent warehouse and invoices a nonexistent customer. Before you know it, the company is doing what computer disk drive maker Miniscribe did: shipping boxes filled with bricks instead of disk drives to nonexistent customers.34


Consider when Enron CAO Rick Causey was trying to convince another executive to help him “delay recording losses”:

At one meeting, an executive recalled, Causey kept coming back to a dead deal and asking: Was it possible the deal was still alive?

It wasn’t, responded the executive.

“So, there’s no chance of it coming back?”

No.

“Is there even a little bit of a chance of it coming back?” asked Causey, “Do you want to look at it again?”

Finally, the executive would take the hint—and the deal was declared undead. Enron deferred the hit for another quarter. “You did it once, it smelled bad,” says the executive. “You did it again, it didn’t smell bad.”

If people repeatedly see ethical and legal issues of a certain type in the workplace, after a while they may become numb to them. Ethical numbing makes it less likely that these employees will even see the ethical aspect of an action.

D. Framing

If there is one overriding lesson of the heuristics and biases literature, it is that in decision making, context counts. Psychologists have long recognized that a simple reframing of a question can produce a totally different answer from the same respondent. People would rather buy


36 The process is similar to the “psychic numbing” that Sissela Bok has described that can arise from an intensely painful experience. SISSELA BOK, SECRETS 69 (1989).

potato chips labeled 75% fat-free than identical chips labeled 25% fat.\textsuperscript{38} They will rate a “Daily Salad Special” as healthier than an identical choice labeled “Daily Pasta Special.”\textsuperscript{39} Hamburgers made of meat labeled 75% fat-free actually taste better to consumers than identical hamburgers labeled 25% fat, according to taste tests.\textsuperscript{40} When Morton Thiokol’s general manager instructed engineers to “put on their management hats,” he reframed the decision whether to launch the \textit{Challenger} from one of safety to one of dollars and cents. The reframing caused the engineers to reverse their “no launch” decision, to bad effect.\textsuperscript{41}

Decisions made by business people are often significantly affected by how they are framed.\textsuperscript{42} For example, as it neared its end, Enron actually tried to effect savings by encouraging employees to reduce their expenses. An Enron employee later wrote that he intentionally violated the policy. From one point of view, this appears to be wrongdoing in flagrant disregard of company policy. However, in the employee’s mind, he deserved to stay in the most expensive hotels and to eat at the best restaurants because of how very hard he was working.\textsuperscript{43} Had he framed the issue in terms of the broader picture rather than his narrow self-serving interests, he might have chosen differently.

Along about the same time, a director on Tyco’s board, Frank Walsh, proposed, advocated, and voted for a particular acquisition in which he expected to receive a secret $20 million “finder’s fee.” When other board members learned of the fee, they felt betrayed, but Walsh’s

\begin{flushleft}
\begin{itemize}
  \item\textsuperscript{38} Ayres, \textit{supra} note 28, at 111.
  \item\textsuperscript{39} \textit{Study Finds Dieters Are Misled Easily by Loaded Wording Describing Foods}, \textit{L.A. TIMES}, Apr. 21, 2011.
  \item\textsuperscript{40} Wray Herbert, \textit{On Second Thought: Outsmarting Your Mind’s Hard-Wired Habits} 94 (2010).
  \item\textsuperscript{41} Allan J. McDonald, \textit{Truth, Lies, and O-Rings: Inside the Space Shuttle Challenger Disaster} 112, 228 (2009).
  \item\textsuperscript{43} Brian Cruver, \textit{Anatomy of Greed: The Unshredded Truth from an Enron Insider} 73 (2002).
\end{itemize}
\end{flushleft}
frame of reference was not the proper code of conduct for directors. He looked at it as an issue of comparative compensation; given the huge fees that the investment bankers were pocketing, he felt that the $20 million was actually low.\footnote{Mark Maremont, Executives on Trial: Tyco Jury Hears About Huge Fee, \textit{Wall St. J.}, Jan. 14, 2004, at C1.}

Officers at Enron were fixated on the company’s stock price. Enron’s credit rating and its officers’ bonuses were directly tied to stock price so officers had to think about maintaining or even raising it every single day.\footnote{Kurt Eichenwald: Conspiracy of Fools 430–32 (2005).} Because they focused so exclusively on stock price, they made less ethical and less lawful decisions than they would have made had they taken a different frame of reference.

In 1998, the accounting firm KPMG made a decision to promote tax shelters without registering them with the IRS. The firm did so after calculating that the “rewards of a successful marketing of the . . . product [and the competitive disadvantages which may result from registration] far exceed the financial exposure to penalties that may arise.”\footnote{Cassell Bryan-Low, KPMG Didn’t Register Strategy, \textit{Wall St. J.}, Nov. 17, 2003, at C1.} In other words, if KPMG did not register the tax shelters and “got caught,” it faced potential IRS penalties of only $31,000 in contrast to potential profits of $360,000 per tax shelter. Perhaps this decision was a naked determination to flout the law to gain profit in a manner consistent with the neoclassical model. But the \textit{Wall Street Journal} quoted KPMG employees’ descriptions of a business “culture that has focused on revenue growth.”\footnote{Id.} When revenue growth becomes the only metric by which a firm’s officers measure decisions, then ethics and legalities will not feature prominently in the decision making process. They will fade from view.\footnote{When questions are reframed from ethical questions to business questions, the reframing serves as an “ethical bleach” that can wash the ethical dimensions of the issue right out of the decision maker’s mind. Tenbrunsel & Messick, Ethical Fading, \textit{supra} note 37, at 233.}
E. LOSS AVERSION

Few frame changes affect decisions more than a change from a “gain” frame to a “loss” frame. This is because of the phenomenon of loss aversion, the notion that most people hate losses about twice as much as they enjoy gains. So, “[w]hen directly compared or weighted against each other, losses loom larger than gains.”49 Because of this asymmetry, people tend to choose to take larger risks in order to avoid a loss than they would take to achieve an equal gain. Loss aversion’s interaction with framing creates a volatile mix.

Famed psychologist John Darley believes that it is at the cover up stage that many actors who have almost inadvertently acted unethically first cross over to conscious wrongdoing so that they do not lose the status that they currently have.50 There is certainly experimental evidence to support this surmise. For example, one set of experiments found that subjects were more likely to be in favor of gathering “insider information” and more likely to lie in a negotiation if facing a loss rather than a potential gain.51

Studies show that even in the absence of a direct economic incentive, people are more willing to manage earnings when to do so would avoid reporting a loss, an earnings decrease, or a negative earnings surprise. In other words, most managers who commit fraud generally do not do so to raise their companies’ stock price beyond those of peers. Rather, they find themselves in situations where they expect large stock

49 KAHNEMAN, THINKING, supra note 13, at 282.


51 Mary C. Kern & Dolly Chugh, Bounded Ethicality: The Perils of Loss Framing, 20 PSYCHOL. SCI. 378 (2009). See also Jessie S. Cameron & Dale T. Miller, Ethical Standards in Gain Versus Loss Frames, in PSYCHOLOGICAL PERSPECTIVES ON ETHICAL BEHAVIOR AND DECISION MAKING 91 (David De Cremer ed., 2009) (finding that trying to avoid a loss will elicit more unethical behavior than will trying to secure a win).
price declines if they do not commit fraud.\textsuperscript{52} To avoid the loss, they begin the fraud, which usually starts small then grows incrementally.

Real world examples support these conclusions. Studies have found that the worst lies people tell tend to be to cover up other misbehavior.\textsuperscript{53} Thus, in a prominent accounting case, auditors discovered that they had not detected that their client had been embezzling. It is highly unlikely that these auditors would have consciously cast their lot with this fraudster in the first place, but when they learned of the fraud, of their own negligence, and of their potential liability, they did knowingly decide to help cover up the fraud in hopes of avoiding loss of their jobs and professional reputations.\textsuperscript{54}

It seems unlikely that former Baylor University basketball coach Dave Bliss would have stooped so low as to try to pin a drug dealing rap on a former player who had been murdered in order to get his coaching job in the first place. But in order to avoid the loss of that same job, he was willing to do so.\textsuperscript{55}

In an interview, Bernie Madoff indicated that he began his Ponzi scheme not so much to get rich as to avoid the loss of reputation he was facing:

\begin{quote}
He inched toward a smudged sketch of what he had done. "I believed when I started this problem—this crime—that it would be something I would be able to work my way out of, but that became impossible. The harder I tried, the deeper I dug myself into a hole." He was accustomed to making trading mistakes, he said. They were part of his business. He could forgive himself for those. But he had made more than a mistake in this instance, he’d
\end{quote}

\textsuperscript{52} Shane A. Johnson et al., \textit{Managerial Incentives and Corporate Fraud: The Sources of Incentives Matter}, 13 REV. FIN. 115 (2009).


\textsuperscript{54} See United States v. Simon, 425 F.2d 796 (2d Cir. 1969).

made “a terrible error in judgment. I refused to accept the fact—could not accept the fact that for once in my life I had failed. I couldn’t admit that failure and that was a tragic mistake.”

There are many other examples of seemingly irrational ways of thinking that affect humans when they make decisions to engage in misconduct or to refrain from doing so. However, the ones sampled in this section should provide a glimpse of factors that go beyond the rational decision making of Chicago Man and even beyond the temporally-challenged actor examined by Professor Utset.

II. ETHICAL FADING (“BLIND SPOTS”)

People respond to monetary incentives, so there is little doubt that the neoclassical economic model of criminal decision making has some important explanatory power. By tweaking that model with consideration of time-inconsistent preferences, Professor Utset increases that explanatory power significantly. And it is true that both these models supposedly take into account intangible benefits in addition to monetary benefits, and therefore would to some extent encompass the pleasure people feel when (for example) they obey authority and conform to their peers’ actions and expectations. Still, both models are limited because their common assumption—“that executives make explicit trade-offs between behaving ethically [and legally] and earning profits for their

-------------------

56 DIANA B. HENRIQUES, THE WIZARD OF LIES: BERNIE MADOFF AND THE DEATH OF TRUST 278 (2011). This is a common story. A CEO who went to prison for accounting fraud later said: “In early 1999, when things started to go wrong financially, I did some things to try to hide that fact. Those things were wrong. They were illegal. I did not do it to line my own pockets.” Mark Maremont, Rite Aid’s Ex-CEO Sentenced to 8 Years for Accounting Fraud, WALL ST. J., May 28, 2004, at A3.

57 See generally Robert A. Prentice, Teaching Ethics, Heuristics, and Biases, 1 J. BUS. ETHICS EDUC. 57 (Spring 2004) (discussing several additional problems with rational decision making in ethical situations).
organizations—is incomplete.”58 Neither model sufficiently considers the factors discussed in the previous section that arise from the findings of behavioral psychology, cognitive science, and related fields.

One of the best explanations for why people tend to engage in misconduct inconsistent with their view of themselves as ethical actors derives from the work of Tenbrunsel, Messick, Bazerman, and colleagues who are the key developers of the notion of “ethical fading” or ethical “blind spots.”59 The most important point to remember is that psychological factors can cause ethical (and legal) considerations to fade from view, leading people to almost unconsciously engage in (frequently criminal) misconduct.

Brain research indicates that the human mind is good at not seeing what it doesn’t want to see or hearing what it doesn’t want to hear.60 People focus instead upon what they do wish to see and hear.61

58 MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT 4 (2011) [hereinafter BAZERMAN & TENBRUNSEL, BLIND SPOTS].

59 Id. at 7 (“The notion that we experience gaps between who we believe ourselves to be and who we actually are is the problem of bounded awareness [which] refers to the common tendency to exclude important and relevant information from our decisions by placing arbitrary and dysfunctional bounds around our definition of a problem.”); Ann E. Tenbrunsel et al., The Ethical Mirage: A Temporal Explanation as to Why We Aren’t as Ethical as We Think We Are (Harvard Business School Working Paper, No. 08-012, 2009), http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1326942_code698198.pdf?abstractid=1010385&mirid=1 [hereinafter Tenbrunsel et al., Ethical Mirage]; Tenbrunsel & Messick, Ethical Fading, supra note 37, at 233. That ethical fading has a temporal aspect should please Professor Utset.

60 Thus, an interesting study that tracked subjects’ eye movements found that when prudish subjects were shown a picture that included a nude female breast, they tended not to even look at it, did not notice it, and could not recall it, whereas less prudish people did see and recall it. Lester Luborsky & Barton Blinder, Looking, Recalling, and GSR as a Function of Defense, 70 J. ABNORMAL PSYCHOL. 270, 277 (1965).

61 When people run across information that supports their pre-existing beliefs, the pleasure centers of their brains light up like a drug addict getting a fix. DREW WESTEN, THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION (2007).
Furthermore, people tend to be overconfident regarding their morals.\footnote{62 BAZERMAN & TENBRUNSEL, BLIND SPOTS, supra note 28, at 1 ("[W]e are unaware of the gap between how ethical we think we are and how ethical we truly are."); KAHNEMAN, THINKING, supra note 13, at 258 ("Psychologists have confirmed that most people genuinely believe that they are superior to most others on most desirable traits.").} An impossibly high percentage of people believe that they are more ethical than their competitors, than their co-employees, and than other reference groups.\footnote{63 Marianne M. Jennings, Ethics and Investment Management: True Reform, FIN. ANALYSTS J., May/June 2005, at 45.} More than 90% of Americans, when quizzed, say that they are satisfied with their character.\footnote{64 Id.} In surveys, people were more certain that they would go to heaven than Mother Teresa,\footnote{65 See generally MICHAEL SHERMER, THE SCIENCE OF GOOD & EVIL 178 (2004).} and 61% of doctors believed that the “freebies” given out by pharmaceutical companies affected the judgment of other physicians while only 16% believed that their own judgment was similarly affected.\footnote{66 David W. McFadden et al., The Devil Is In the Details: The Pharmaceutical Industry’s Use of Gifts to Physicians as a Marketing Strategy, 140 J. SURGICAL RES. 1, 2 (2007) (citing Mary-Margaret Chren, Interactions Between Physicians and Drug Company Representatives, 107 AM. J. MED. 182 (1999)). In a similar study, people asked to predict whether financial incentives would influence decisions to donate blood overestimated the impact that the incentives would have on other people’s decision making but actually denied that it would have any influence on their own decision making. Dale T. Miller & Rebecca K. Ratner, The Disparity Between the Actual and Assumed Power of Self-Interest, 74 J. PERSONALITY & SOC. PSYCHOL. 53, 60 (Jan. 1998).} 

Consistent with the \textit{fundamental attribution bias}, people tend to believe that other people do bad things because they are bad people but believe that they themselves are good people and will therefore do good things.\footnote{67 William D. Casebeer, The Stories Markets Tell, in MORAL MARKETS 3, 10 (Paul J. Zak ed., 2008).} Therefore, people tend to predict that they will act more ethically (and therefore more legally) than they actually will. They will persist in their misprediction even after being given more and more specific
evidence about the actions of people in general.\textsuperscript{68} Situational factors such as peer pressure and incrementalism can overwhelm people’s desire to be ethical and legal actors and they will fail to recognize their bounded ethicality.\textsuperscript{69}

Additionally, people tend to remember having acted more ethically than they actually did.\textsuperscript{70} Most people want to believe that they are ethical and their brain helps them out by reconstructing memories\textsuperscript{71} that are consistent with that belief.\textsuperscript{72} When people recall good and bad things they have done in their past, they tend to recall bad things they did a long time ago and good things they did more recently. This allows them to construct a narrative of having learned from their mistakes and being on an ethically favorable trajectory.\textsuperscript{73}

When people actually take action, they tend not to act as ethically as they would have predicted or as they will likely later remember having

\begin{quote}
\textsuperscript{68} Nicholas Epley & David Dunning, \textit{Feeling “Holier Than Thou”: Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?}, 79 J. PERSONALITY & SOC. PSYCHOL. 861, 872 (2000) (“Although they were given increasing amounts of information about how other people react to the situation under consideration, participants continued to persist in the belief that they would act in kind and generous ways.”).

\textsuperscript{69} Tenbrunsel et al., Ethical Mirage, \textit{supra} note 59, at 3.

\textsuperscript{70} Terence R. Mitchell et al., \textit{Temporal Adjustments in the Evaluation of Events: The “Rosy View,”} 33 J. EXPERIMENTAL SOC. PSYCHOL. 421, 442 (1997) (finding that people tend to remember past experiences as “rosier” than they actually were).

\textsuperscript{71} “Memory is reconstructed, not a faithful replay of the past. As a reconstruction, memory is prone to distortions, omissions, and deletions of details as well as construction of entire events that never occurred.” \textit{HANDBOOK OF BEHAVIOR, FOOD AND NUTRITION} 1645 (V.R. Reedy et al. eds., 2011) (citing F.C. BARTLETT, \textit{REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY} (1932)).

\textsuperscript{72} BAZERMAN & TENBRUNSEL, BLIND SPOTS, \textit{supra} note 28, at 73 (“Our memory is selective; specifically, we remember behaviors that support our self-image and conveniently forget those that do not.”).

\textsuperscript{73} Benedict Carey, \textit{Why All Indiscretions Appear Youthful}, N.Y. TIMES, Oct. 5, 2010, at D1 (“The main finding is that if I ask you to tell me about a positive moral memory, you’ll tell me something recent,” Dr. Escobedo said. ‘If I ask you to tell me about bad moral memory, you’re going to give me something from much further in the past.’”).
done. Why not? An important part of the ethical fading notion is that all people have both a “should self” and a “want self,” the figurative angels and devils sitting on their shoulders urging them to act ethically (the angelic should self) or to pursue their desires (the demonic want self).\textsuperscript{74} When people predict whether they will act ethically or remember whether they have acted ethically, they are focusing on the ethical dimension of an issue. However, when it is actually time to act, the visceral needs of the want self often dominate.\textsuperscript{75} The decision makers want a job, or a raise, or a promotion—and when they focus on these needs or desires the ethical and legal dimensions of a choice can fade into the background and not even be noticed...as happened with Egil Krogh as he endeavored to please his bosses in the White House or to Mr. Ruderman as he sought to be a good team member. Ethical fading is also the story of Milgram’s experiments, where most participants did not consciously decide to be sadists, but instead focused too narrowly on following the instructions of an authority figure without stepping back to analyze their situation as involving an ethical choice.\textsuperscript{76}

Thus, most members of a group of young women instructed to imagine being asked sexually harassing questions by a male interviewer predicted that they would take action against the interviewer by refusing to answer the question or confronting him. However, when a similar group of young women were actually subjected to these questions in what they thought was a real job interview, none of them took either action. Their body language clearly indicated that they knew the questions were inappropriate, but their want self (“I want this job”) caused any “should” considerations to fade into the background.

\textsuperscript{77} In one study, professors asked accounting students whether they would return compensation wrongly paid to them as employees. Then, the professors gave the students points that they did not deserve on their grades and subtly called their attention to it. The students could have given the extra points back, and some did. But there was no correlation between those who predicted that they would act honestly in the work place and those who actually did act honestly in a similar setting in the classroom.\textsuperscript{78} In other words, many students predicted that their should self would dominate, but when it was time for action the want self (“I want this better grade”) took over.

Another study of nurses found that when members of one group were asked whether they would follow a physician’s instructions to give a patient an injection of an obviously excessive dose of a drug that was not on the hospital’s approved list, virtually all said that they would not. But when a second group of nurses were actually given such instructions, virtually every one of them was prepared to do so.\textsuperscript{79} When it was time to act, their want selves (“I want to please my superior”) took over, meaning that the first group of nurses had completely mispredicted how they would respond to a doctor’s instruction.

Yet another study found that people over-predicted the likelihood that they would give to a worthwhile charity when compared to how they acted when actually given the opportunity to donate. While they were able to accurately predict the altruistic actions of others, they consistently and

\textsuperscript{74} Tenbrunsel et al., Ethical Mirage, supra note 59, at 3–4.

\textsuperscript{75} George Loewenstein, Out of Control: Visceral Influences on Behavior, 65 ORG. BEHAV. & HUM. DECISION PROCESSES 272 (Mar. 1996) (finding that immediately experienced visceral factors such as hunger, thirst, and sexual desire; moods and emotions; and physical pain can crowd out virtually all goals other than mitigating the visceral factor). Loewenstein also found that people tend to ignore the impact that visceral factors they will experience in the future will have upon their decision making, reinforcing the point made above that people tend to overestimate how ethically and legally they will act in the future.

\textsuperscript{76} Pat Werhane et al., Social Construction, Mental Models, and the Problem of Obedience (forthcoming).
inappropriate, but their want self (“I want this job”) caused any “should” considerations to fade into the background.\footnote{Julie A. Woodzicka & Marianne LaFrance, \textit{Real Versus Imagined Gender Harassment}, 57 J. SOC. ISSUES 15, 28 (Spring 2001).}

In one study, professors asked accounting students whether they would return compensation wrongly paid to them as employees. Then, the professors gave the students points that they did not deserve on their grades and subtly called their attention to it. The students could have given the extra points back, and some did. But there was no correlation between those who predicted that they would act honestly in the work place and those who actually did act honestly in a similar setting in the classroom.\footnote{Sanja Gupta, Donna J. Cunningham & Avinash Arya, \textit{A Study of the Effect of Age, Gender & GPA on the Ethical Behavior of Accounting Students}, 12 J. LEGAL, ETHICAL & REG. ISSUES 103 (2009).}

In other words, many students predicted that their should self would dominate, but when it was time for action the want self (“I want this better grade”) took over.

Another study of nurses found that when members of one group were asked whether they would follow a physician’s instructions to give a patient an injection of an obviously excessive dose of a drug that was not on the hospital’s approved list, virtually all said that they would not. But when a second group of nurses were actually given such instructions, virtually every one of them was prepared to do so.\footnote{Charles K. Hofling et al., \textit{An Experimental Study in Nurse-Physician Relationships}, 143 J. NERVOUS & MENTAL DISEASE 171 (Aug. 1966).} When it was time to act, their want selves (“I want to please my superior”) took over, meaning that the first group of nurses had completely mispredicted how they would respond to a doctor’s instruction.

Yet another study found that people over-predicted the likelihood that they would give to a worthwhile charity when compared to how they acted when actually given the opportunity to donate. While they were able to accurately predict the altruistic actions of others, they consistently and
substantially overestimated their own when the want self (“I want to keep my own money”) came to the fore. 80

Batson created an experiment where subjects thought they were going to perform one of two tasks, one of which was much more unpleasant than the other. Batson was really studying how the subjects made the decision to allocate those tasks to themselves and to a second participant who supposedly had not yet arrived. The subjects were told that most people flipped a coin in order to decide how to allocate the tasks and they were given a coin with which to do so. Half of the subjects assigned the task without flipping the coin and 90% of those gave the unpleasant task to the later-arriving participant. Half did flip the coin; they also gave the other participant the unpleasant task 90% of the time, meaning that they tended to ignore the results of the coin flip. People who had earlier described themselves as more concerned about caring for others and about issues of social responsibility were more likely than others to flip the coin in order to allocate the tasks (consistent with their should selves), but just as likely to ignore the result of the flip (consistent with their want selves). In other words, they over-predicted how ethically they would act. 81

Relatedly, evidence regarding people’s judgments shows that opinions regarding the ethicality of certain actions changes with whether the people are engaged in that action or would like to be. 82 If someone wants to engage in insider trading and has an opportunity to do so, he or

80 Epley & Dunning, supra note 68, at 873 (finding that participants “consistently, and grossly, overestimated the likelihood that they themselves would act in a selfless and altruistic manner, whereas the predictions made about others tended to converge more closely with reality”).


82 Lisa L. Shu et al., Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting, 37 PERSONALITY & SOC. PSYCHOL. BULL. 330 (2011) (finding that when people are in environments that allow them to cheat, they tend to view cheating as less morally problematic).
she will almost automatically view insider trading as not as unethical an action as an objective third party might.\footnote{Celia Moore, \textit{Moral Disengagement in Processes of Organizational Corruption}, 80 J. BUS. ETHICS 129, 132 (2008) (noting that “individuals will go to great lengths to change their attitudes to fit with their behavior”).}

\section*{Conclusion}

As Nobel laureate Daniel Kahneman recently pointed out, “life is more complex for behavioral economists than for true believers in human rationality.”\footnote{Kahneman, \textit{Thinking, supra} note 13, at 412.} To effectively model human decision making and behavior for policymaking purposes, legislators and regulators must have a more accurate model than the useful\footnote{Even Kahneman admits that for some purposes the simple neoclassical model is preferable. \textit{Id.} at 282.} but oversimplified neoclassical version developed by economists. Professor Utset’s refinements that add temporal dimensions are an important step in the right direction. However, by basing his argument largely upon the assumption of rational decision making by wrongdoers, Professor Utset continues to paint an incomplete picture of human behavior because “most instances of corruption, and unethical behavior in general, are unintentional, a product of bounded ethicality and the fading of the ethical dimension of the problem.”\footnote{Bazerman & Tenbrunsel, \textit{Blind Spots, supra} note 58, at 19.}

Concepts such as obedience to authority, conformity bias, framing, and ethical fading can help us understand why people not suffering from time-inconsistent preferences or self-control problems can still make decisions that are not in their long-term best interests. By taking into account other important developments in behavioral psychology and related fields, a modest portion of which are surveyed briefly in this article, the goal of developing an accurate model can be more closely approached. But even these refinements will leave policy makers somewhat short of the mark, for numerous other relevant factors, such as
the personalities of individual decision makers, must also be accounted for. Of course, when all these factors are accounted for the messiness of real life becomes apparent and the true difficulties of making policy in the real world are exposed. Despite the best efforts of religious and governmental officials over the centuries, wrongdoing, including corporate crime, continues and will not disappear any time soon.

---

87 See Drew Feeley, Note, Personality, Environment, and the Causes of White Collar Crime, 30 L. & PSYCHOL. REV. 201, 202–04 (2006) (discussing the role of personality in the commission of white collar crime and citing numerous sources and noting that “[t]he two traits most often linked to economic crime are the neurotic and the positive extrovert”).

88 See generally DAVID EAGLEMAN, INCognito 180 (2011) (discussing the “irreducible complexity” of human behavior).