Ethical Lawyering in a Morally Dangerous World

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I. INTRODUCTION

An important emerging trend in normative ethics is the attempt by philosophers to assimilate the findings of the empirical social sciences, particularly cognitive and social psychology, into ethical theory. One of the principal findings of recent social psychology has challenged a widely held assumption dear to philosophers and central to "folk" psychology—namely, that a person has a distinctive moral character that is causally connected with that person's actions across a wide variety of situations. People are praised as courageous, honest, or compassionate, or criticized as cowardly, dishonest, or cruel, and these evaluations are assumed to track stable, underlying dispositions that will manifest themselves in predictable behavior in the relevant situation. Thus, a compassionate person should stop and render aid to someone in need, and an honest person will not cheat on his taxes. As it turns out, however, there is quite a bit less correlation between dispositional differences among people and their behavior in various situations. A person who behaves honestly in one situation may be dishonest in another, and a person who others believe to be compassionate may fail to render aid to someone in need. Personality and character are not chimeras—people do differ in many respects and these differences do show up in the behavior they manifest. But in the aggregate, character is not robust. That is, it does not make the difference it is generally assumed to make, as compared with variations (sometimes seemingly inconsequential) in the situations with which people are presented. "Behavioral variation across a population owes more to situational differences than dispositional differences among persons." Nevertheless, folk psychology is well entrenched, and people continue to infer the existence of personality traits from behavior, and to assume that these traits play a more substantial causal role in action than they do.

While some academic moral philosophers have been investigating the relationship between character and behavior, law schools have redoubled their

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2. DORIS, supra note 1, at 24.

3. ROSS & NISBETT, supra note 1, at 77-78, 120-26.
efforts to improve the moral character of their graduates. Robert MacCrate states a view that I often hear expressed at conferences on legal ethics or professionalism: "[a]n essential part of the enterprise of preparing students for the practice of law is the inculcation of the fundamental norms of the profession. Can there be anything more important to an ordered society than how those charged with administering our legal system understand their professional responsibilities?" Improving students' understanding of professional responsibilities is one thing, particularly if the subject is conceived of as a body of law—the law governing lawyers—which presents no conceptual challenges different in kind from those associated with the law of contracts or corporations. Notice, however, that MacCrate cannot help using the language of character or personality. One objective of legal education must be to inculcate the appropriate dispositions in students, so that they comply with the fundamental norms of the profession. That one of the nation’s leading experts on legal education talks in terms of moral character shows the persistence of folk psychology in our assumptions about the relationship between character and behavior.

The story of John Gellene, as told by Milton C. Regan in Eat What You Kill, is a rich and nuanced case study of the effect of moral character and situational factors on the behavior of lawyers. At the risk of simplifying a complex narrative, the salient facts can be summarized as follows: Gellene was a partner in the corporate restructuring and bankruptcy department at Milbank Tweed, an old-line Wall Street firm that had recently implemented structural changes to make itself more entrepreneurial and profitable. The most far-reaching of these changes was to shift compensation and power to “rainmaker” partners who could develop new clients for the firm; partners without a base of clients became lower-status “service” partners, performing work for other partners’ clients, and therefore dependent upon others for their continued professional existence. Because bankruptcy work tends to be cyclical and episodic, Gellene was not well positioned to become a rainmaker, and found himself working in the shadow of Larry Lederman, a mergers-and-acquisitions lawyer who had been hired as a lateral from Wachtell Lipton. Lederman became Gellene’s political patron within the firm, keeping Gellene fed from his clients’ matters, and, in a tacit quid pro quo, Gellene would apply his legendary (and almost pathological) work ethic.

6. Id. at 45-47.
7. Id. at 38.
8. Id. at 57.
9. Id. at 63-70.
to Lederman’s cases.

The complex entanglement of interests that eventually led to Gellene’s downfall centered around the reorganization of Bucyrus-Erie, a manufacturer of mining equipment. Through a series of leveraged-buyout transactions, Bucyrus’s interests were acquired by various investors, including investment bank Goldman Sachs and a “vulture fund” in which one of the partners was a former Goldman banker named Mikael Salovaara. Lederman had a longstanding relationship with both Goldman and Salovaara. Thus, when Gellene began representing Bucyrus in its Chapter 11 reorganization proceedings, he already had divided loyalties: his client was Bucyrus, but his professional survival was largely in the hands of a lawyer whose principal concern was with maintaining continuing relationships with repeat-player clients in the investment banking world, not with satisfying a one-shot reorganization client like Bucyrus. Additionally, Gellene’s firm was representing Salovaara in a partnership dispute as well as in a representation of a fund in an unrelated matter. Nevertheless, Gellene was bound by a clear legal requirement— in order to carry out its fiduciary duties as counsel for the debtor-in-possession, a lawyer or law firm must be disinterested in the sense of not representing any interest adverse to that of the debtor-in-possession. To enable enforcement of this provision, Rule 2014 of the Bankruptcy Rules requires disclosure of any “connections with the debtor, creditors, any other party in interest.” As Regan points out, the rule specifies “connections” not “conflicts of interest,” so it is broader in scope than the conflicts rules applicable to all lawyers. In the bankruptcy proceeding, Gellene failed to disclose his connection with a creditor, as Salovaara’s fund was a significant secured creditor of the debtor-in-possession, Bucyrus. Because Milbank might have an incentive to favor Salovaara’s position, to the detriment of other creditors or even the debtor itself, this information would have been critical to the bankruptcy judge in deciding whether to permit Milbank to serve as counsel to Bucyrus. To make a long story short, Gellene’s violation of the rule cost the firm $1.86 million in earned fees that it agreed to return to Bucyrus, and landed him in federal prison for bankruptcy fraud and violation of the false-swearing statute.

10. Id. at 72-82, 84-85.
11. Id. at 76.
12. Id. at 144-48.
15. REGAN, supra note 5, at 143-44, 210-11, 314-21.
16. Id. at 144-48.
17. Id. at 148, 308-09.
18. Id. at 231.
19. Id. at 272-73.
II. EXPLANATION: PERSPECTIVES FROM SOCIAL SCIENCE

The fundamental question at the center of *Eat What You Kill* is a seemingly simple one: Why would a highly successful Wall Street lawyer jeopardize his career by committing an act of serious dishonesty before a tribunal? A number of factors may seem to explain Gellene’s conduct, but upon reflection many of them turn out not to be plausible. Gellene was no dummy, having graduated Phi Beta Kappa from Georgetown, and having done well enough at Harvard Law School to be hired as a summer associate at Milbank Tweed and selected as a law clerk for the New Jersey Supreme Court. As he himself stated, “I’ve been recognized as a person with gifts of my intellect and my ability to deal with problems.”

To the extent that handling moral dilemmas is a cognitive task, requiring intelligence and problem-solving ability, Gellene was well equipped to perform it. Similarly, he was not in over his head in an unfamiliar area of law. One might understand an inexperienced lawyer failing to comply with the technical requirements of some unfamiliar rule. Gellene, however, was not merely an experienced lawyer, but an experienced *bankruptcy* lawyer, who was well aware of the requirements of Rule 2014. Moreover, the law governing disclosure of conflicting representations was not ambiguous or unsettled; the clear directive of the text of Rule 2014 is to disclose all the lawyer’s “connections with the debtor, creditors, and any party in interest.” Thus, Gellene’s conduct cannot be explained as the result of a good faith attempt to discern the law, which in hindsight proved to be erroneous.

Perhaps the most appealing explanation from the point of view of folk psychology was that Gellene was simply a dishonest person, and his non-disclosure was in keeping with his character. According to social psychologists, people are inclined to offer explanations for actions in terms of the disposition or personality of the actor. In Gellene’s case, there is some evidence that suggests he was habitually dishonest: he misrepresented his status as a member of the New York bar for eight years, when in fact he had not been formally admitted despite having passed the bar exam, and engaged in several other acts of dishonesty, such as retroactively reconstructing his timesheets and dissembling to the bankruptcy judge about his partner’s investment in a car service company. The trouble with this explanation is that people tend not to exhibit a great deal of cross-situational consistency in behavior. That is, someone who is dishonest in one situation is not substantially more likely than the population norm to exhibit dishonest behavior in a different situation.

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20. *Id.* at 52.
21. *Id.* at 51.
22. ROSS & NISBETT, *supra* note 1, at 119-44.
“fundamental attribution error” by offering features of the actor’s personality as an explanation for her conduct, when in fact the more important causal factors were features of the situation that would have had a similar effect on other actors, with different personality traits. Putting it quite bluntly, one reviewer of the literature notes that relying on what people generally think of as stable personality traits as the basis for predicting behavior in different situations “yields hardly any improvement over guessing.” Thus, we are very likely on shaky ground when we attribute Gellene’s misconduct to his dishonest character, based on the prior instances of dishonesty.

According to a considerable body of research in social psychology, situational factors tend to overwhelm differences in individual personalities. Some of the experimental evidence for this claim has become publicly notorious, most notably the Milgram experiments on obedience to authority. One of the standard interpretations of the Milgram experiments is that any helpful, compassionate, or independent-minded character traits of the subject—that is, any dispositions that might have enabled them to resist the instructions to


28. Gilbert Harman, Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error, 99 Proc. Aristotelian Soc’y 315, 326 (1999). The social psychology critique of characterological ethics does not make the strong claim that individual personality differences do not matter at all, only that the magnitude of the effect of traits and dispositions is not nearly as large as people generally think it will be. One can quibble about how significant the cross-situational correlation must be before a feature of someone’s personality counts as a stable dispositional trait. See John Sabini & Maury Silver, Lack of Character? Situationism Critiqued, 115 Ethics 535, 540-44 (2005). However, even those who are somewhat skeptical of the situationist critique admit that this disagreement is one of degree, not of kind, and that an actor ought to be sensitive to situational features that may affect behavior and not rely entirely on his or her character to avoid wrongdoing. Id. at 561-62.

29. Briefly, the Milgram experiments, which have been repeatedly replicated in various forms with similar results, involved subjects who believed they were helping out with a study of the effects of punishment on learning. See Stanley Milgram, Obedience to Authority (1974). The subjects met the “learner”—actually a confederate of the experimenter—and went into another room where they were seated in front of a device with a large dial and told their task was to administer gradually increasing electric shocks to the “learner” if he made mistakes. The machine was labeled prominently with shock levels, from “slight shock” all the way up to “danger: severe shock” and finally to the ominously labeled “XXX.” The subjects did not know that the machine, the shocks, and the groans and protests of the “learner” were simulated. If the subjects expressed doubts, they were told firmly (but non-threateningly) that “the experiment requires that you continue.” The majority of the subjects (68%) obeyed the experimenter instructions all the way to the “XXX” level, despite the agonized screams they heard from the “learner.” As one moral philosopher notes, a substantial percentage of subjects “were willing to torture another individual to what seemed the door of death without any more direct pressure than the polite insistence of the experimenter.” Doris, supra note 1, at 42. Although nonprofessional observers tend to be the most surprised by the willingness of subjects to administer severe shocks, professional psychologists are the most impressed with the inability of people (including other psychologists) to predict, ex ante, the percentage of subjects who obeyed the instructions through to the bitter end. See Doris, supra note 1, at 100; Flanagan, supra note 1, at 295; Ross & Nisbett, supra note 1, at 55, 132; Harman, supra note 28, at 322; Sabini & Silver, supra note 28, at 546 (noting that people called upon to predict the behavior of subjects in the Milgram experiments “expected action to follow from beliefs, desires, and values—from character—but, for some reason, it did not”).
continue the experiment—were swamped by subtle situational factors such as the stepwise nature of the shocks, so that the subject starts out with relatively unobjectionable levels of harm, and only increases gradually to the more serious ones; the obstacle provided by the firm instruction of the experimenter, which interrupts the sequence between the subject forming an intention to discontinue participating in the experiment and actually carrying through on that plan; and the inability of the subjects to form a stable definition of the situation, because events unfolded that did not “add up” or make sense from the subject’s point of view.30

Other studies, much discussed by psychologists and empirically minded ethicists, support the similar conclusions. For example, in the revealing “Good Samaritan” experiment, the religious and ethical teachings that the students were mulling over made no difference to their likelihood of stopping to help; there was no significant difference between the groups assigned to talk about the Good Samaritan story and the topic unrelated to the obligation to help those in need.31 What did make a substantial difference was the degree to which the students believed themselves to be in a hurry. Only ten percent of the students who were told they were running late stopped to help, as compared with 63 percent of those who were told they had plenty of time to spare. Thus, the situational factor of being rushed played the only significant explanatory role in whether or not the students stopped to render assistance.

To these findings regarding the psychology of individuals, one must add insights into the psychology of people acting in groups. For example, in one of the famous Latané and Darley studies of helping behavior, 75% of subjects who were alone in a room filling out forms reported smoke billowing in through vents in the wall, while the number reporting dropped dramatically to 10% in the presence of two strangers (confederates of the experimenter) who seemingly acted unconcerned and continued filling out their forms.32 The group setting apparently inhibits helpful behavior through two mechanisms: diffusion of

31. See John M. Darley & C. Daniel Batson, From Jerusalem to Jericho: A Study of Situational and Dispositional Variables in Helping Behavior, 27 J. PERSONALITY & SOC. PSYCHOL. 100 (1973). In this experiment, students at Princeton theological seminary were told that they should prepare to preach a sermon on one of two topics—the job opportunities for ministers or the “Good Samaritan” story, in which an outsider to the community stops and renders aid to a person in distress. The students were then told either that they had plenty of time to walk to a different building to deliver their sermon or that they were in a moderate or a great hurry. (The “hurry conditions” were assigned in such a way that in each “hurry” group there would be students preaching on each of the two topics.) On their way to deliver the talk, the students encountered a person slumped in a doorway, apparently in distress—actually a confederate of the experimenters. The study is analyzed in Doris, supra note 1, at 33-34; Flanagan, supra note 1, at 301-02; Ross & Nisbett, supra note 1, at 48-49, 130-31; Harman, supra note 28, at 323-24; Sabini & Silver, supra note 28, at 557-59.
32. Bibb Latané & John M. Darley, The Unresponsive Bystander: Why Doesn’t He Help? 44-54 (1970). It should be noted that these studies were aimed at understanding the behavior of apartment dwellers who witnessed the murder of Kitty Genovese, who was beaten and stabbed for twenty minutes without any of the observers intervening or even calling the police. See Ross & Nisbett, supra note 1, at 41-44; Sabini & Silver, supra note 28, at 555.
responsibility (people assume someone else will take care of the problem, and that the presence of others means they won’t be blamed if no one takes care of it), and the effect of the presence of others on the process of interpreting ambiguous evidence (subjects who are initially confused about the smoke notice that others aren’t doing anything, so they reinterpret what they might have believed to be “dangerous” smoke as something innocuous). Moreover, once someone has publicly committed to a position, cognitive processes act to suppress information that tends to contradict that position. The “false consensus effect,” for example, operates to make people believe that others see the world in the same way that they do. In addition, when a person has actually acted in a way that is contrary to her antecedently held beliefs, rather than suffer the internalized sense of shame at having acted wrongly, the person will often unconsciously shift her attitudes into line with her actions, so that she now believes her actions were in accordance with her prior beliefs. Finally, in small, cohesive groups (such as litigation teams at law firms), the pressures to maintain unanimity and not disrupt intra-group solidarity may cause individuals not to question conclusions reached by others, even if they seem mistaken.

In addition to these generic “group effects,” there are distinctive pressures created by acting within larger organizational structures, such as business corporations and law firms. In a hierarchical organization, subordinate employees regard it as legitimate for supervisors to issue commands or directives; moreover, these directives may be ambiguous, so the subordinate has the task of interpreting them in line with what he believes the supervisor’s intent is. The incentive system set up by the organization rewards those employees who correctly interpret the cues of their supervisors without wasting the supervisor’s time asking for clarification. (In my experience at a law firm, associates acquired a positive reputation for being “self-starters” if they anticipated the desires of

33. DORIS, supra note 1, at 32-33; John M. Darley, How Organizations Socialize Individuals into Evildoing, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 17-21 (David M. Messick & Ann E. Tenbrunsel eds., 1996); see JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY 82-83, 103-05, 115 (1999) (discussing how fragmentation of responsibility played a role in enabling the area bombing of German cities and the atomic bombing of Hiroshima during World War II); Luban, supra note 1, at 283-84.


35. Darley, supra note 33, at 21-22; Luban, supra note 1, at 280-82.


38. See REGAN, supra note 5, at 323-24 (noting that in an organization, “ambitious subordinates often seek to anticipate what their superiors wish them to do rather than wait for explicit direction”); Darley, supra note 33, at 24-25 (“In a corporation, to wait to do something until one is ordered to do so can be thought of as a failure of initiative, or worse, a desire to put the superior on the spot.”).
partners and did not pester them for specific instructions.) By coupling tangible rewards with vague criteria for having “good judgment” or being “loyal” to the organization, an organization can “create[ ] an extremely powerful engine for socialization into immorality.”39 This is true even if the organization promulgates an official code that mandates action in accordance with high ethical standards, because this highly abstract directive must be interpreted in concrete situations by line-level employees who naturally interpret it in accordance with what they take to be their supervisors’ beliefs about what the code requires.40 These beliefs, in turn, are affected by informal norms that categorize beliefs as tough-minded, competitive, and entrepreneurial (good), or moralistic, fuzzy, and naive (bad).41

In a law firm, the clearest formal lines of authority run from senior partners down through associates and support staff such as paralegals and document clerks. In addition, however, there are informal structures of authority “made up of tacit norms and personal relationships.”42 Even at the level of partnership, some partners are more equal than others. In the case of Milbank Tweed, the recently adopted compensation structure had shifted power markedly in the direction of partners like Larry Lederman, who were rewarded for their lucrative relationships with clients like Mikael Salovaara who were likely to be frequent consumers of the firm’s legal services. Although some of the lawyers representing other clients in the Bucyrus bankruptcy believed that Lederman had ordered Gellene not to disclose the representation of Salovaara,43 the record does not clearly support either this inference or the contrary conclusion, that Lederman accepted Gellene’s judgment on the disclosure issue.44 Regan considers a third possibility, however, which is consistent with the research on decision-making in hierarchical organizations: “Lederman dealt with the Bucyrus matter in a way that Gellene construed as implicitly signaling that Milbank should not disclose its representation of Salovaara to the bankruptcy court”.45 As Donald Langevoort’s

39. Darley, supra note 37, at 46.
40. Id. at 40-41, 50; see Jackall, supra note 37, at 101 (“[M]orality does not emerge from some set of internally held convictions or principles, but rather from ongoing albeit changing relationships with some person, some coterie, some social network, some clique that matters to a person.”).
41. An important study of the informal norms of corporate litigators in discovery practice revealed that associates do not believe that the market rewards ethical lawyers, and that they face tacit pressures in their firms to be more aggressive. See 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, 778-79 (1998); see also Luban, supra note 1, at 279-80 (“In the business world, gaining a competitive edge is universally recognized as good rather than bad, and if it conflicts with Sunday-school morality, those around you will send mixed signals about which you’re supposed to obey.”).
43. Regan, supra note 5, at 307.
44. Id. at 308-13.
45. Id. at 313; see id. at 324 (“Lederman had already indicated to Gellene and [a Milbank litigation partner] that he saw no problem with Milbank’s representation of both Bucyrus and Salovaara. Relying on this and
analysis suggests, Gellene’s public commitment to the non-disclosure position would have made it very difficult for him subsequently to alter his position, particularly in light of evidence that Lederman approved of the decision. In light of the implicit norms favoring aggressive client development and opposing “moralistic” reasoning, Gellene might have believed his standing within the firm would be jeopardized by pushing Lederman too hard on disclosure.

This account still does not explain why Gellene did not simply reject the implicit demand by Lederman that he keep the relationship with Salovaara secret, even if it might have been difficult for him to do so. It is not much of an answer to moral blame to point out, “Someone told me to do it.” It is similarly not much of an answer to appeal to subtle situational factors by way of justification, even if they help explain the behavior. One should not read too much into the findings of social psychology that show little cross-situational effect of a person’s character. Even if character is not robust across situations, different people do behave differently in the same situation—after all, some non-zero percentage of subjects in the Milgram experiments refused to administer shocks, and there is no shortage of examples of genuine heroes within organizations who resist the express or implied pressure to ignore ethical concerns and get with the program. In addition, there are abundant empirical findings showing that people can perceive another person’s disposition to cooperate or defect from a cooperative solution, with enough accuracy to enable the parties to realize gains from mutually beneficial interactions. Thus, we can think of situations as “sources of pressure or temptation,” but not complete determinants of action. This observation suggests that we should be careful to distinguish the concepts of explanation and justification. The empirical project of explaining Gellene’s behavior is important and interesting, but it does not exclude the ethical project of ascribing responsibility for deviations from mandatory norms of behavior. As philosopher John Doris notes, social psychology “reminds us that the world is a morally dangerous place,” but this knowledge should not be exculpating—

perhaps other implicit signals, Gellene may have felt that he could anticipate what Lederman’s position would be on disclosure.”

46. Langevoort, supra note 34, at 103; see Luban, supra note 1, at 286 (an initial action “leads us to reformulate our self-concept in a way that rationalizes the action, and the new self-concept impels us toward further action of the same sort as its own vindication”).

47. Luban, supra note 1, at 295.

48. See, e.g., Bethany McLean & Peter Elkind, The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron 327-29 (2003) (relating story of Jordan Mintz, an in-house lawyer at Enron who objected to self-dealing transactions with Andy Fastow, and even hired an outside law firm to review them; remarkably, Mintz seems not to have suffered retaliation); Darley, supra note 33, at 24 (discussing case of quality control supervisor who persisted in raising concerns about Dalkon Shield and was eventually fired).


50. Luban, supra note 1, at 296.

51. Doris, supra note 1, at 146.
rather, as we improve our understanding of the situational forces that influence behavior, people will have fewer excuses for failing to comply with moral demands.\(^{52}\)

III. Justification: The Role of Ethics

A student reviewer of Regan's book takes him to task for conflating explanation with justification, arguing that "legal ethicists risk diluting this moral imperative [to obey the law] by appealing too strongly to context."\(^{53}\) This comment misses Regan's point, which is not to dilute the force of any ethical obligation, but to seek to understand how a smart, accomplished lawyer might have come to engage in flagrant wrongdoing. The message of the book is not, "what Gellene did is okay, because of such-and-such situational factors." Rather, it is, "be careful, because even well intentioned lawyers can find themselves in a position in which it is harder to do the right thing." Perhaps the reviewer’s concern is captured by the French proverb tout comprendre c’est tout pardonner— "to understand everything is to forgive everything." Suppose we construct a narrative explaining Gellene’s transgressions that is plausible and satisfying, in the sense that an observer could appreciate how someone could have behaved as Gellene did. If the narrative appeals to motivations and reasons that the observer could share, it seems superficially to build in a moral justification. This appearance is only superficial, however, and a plausible explanatory narrative can be consistent with the ascription of moral responsibility for one’s actions.\(^{54}\)

Understanding the connection between explanation and justification begins with the observation that, even though an account of someone’s actions is something that an observer can appreciate or endorse, it does not necessarily operate as an excuse. In the paradigmatic account of excuses in criminal law, one reason that circumstances can amount to an excuse is that the causal roots of the defendant’s actions are not to be found in her character, but in the situation. Consider George Fletcher’s example of a defendant asserting duress as a defense to a charge of theft:

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52. Id. at 153; see id. at 148 ("Those with knowledge of the Milgram paradigm... are perhaps unlikely to be obedient dupes in highly similar situations.").

53. Note, The Rule of Law, Not of Lawyers: Ethics and the Legal Profession, 118 Harv. L. Rev. 2422, 2426-27 (2005). This reviewer is not the only reader to have a similar reaction to explanations of wrongdoing that rely on the findings of cognitive and social psychology. One reader of Owen Flanagan’s Varieties of Moral Personality complained that, reading Flanagan’s book, it was hard to determine “what exactly the bearing of empirical psychological theories and observations on normative considerations and ideals is supposed to be.” David Carr, Book Reviews, 43 Phil. Q. 104, 105 (1993).

54. See Darley, supra note 33, at 34-35 (noting that a careful and sympathetic explanation in terms of the psychology of individuals acting within organizations “can lead to a perception [which must be rejected] that since we can understand the decisions taken by all participants, sympathize with their plight, and even realize that we might not have acted so differently, no ethical transgressions have been committed”).
Although her will is nominally expressed in opening the safe, that action says nothing, or very little, about her as a person. She does not express the personality or character of a thief in permitting the gunman to take the money. . . . The true cause of her action is not her personality, her traits of character, but the gun pointed at her head.55

In Fletcher’s account of moral responsibility, in cases in which we believe it would be unreasonable or unfair to hold a person to what would otherwise be a moral requirement, we say that the “true” cause of someone’s actions is not that person’s character.56 This evaluation in the language of character is something of a legal fiction, because in actuality the notion of moral responsibility is what underlies the analysis.

The central question for readers of Eat What You Kill—whether the story of Gellene’s case shows that the true cause of his actions lies not in his character but in insidious situational forces that he was powerless to perceive or resist—can be understood as a question of the fairness of holding him to an otherwise applicable moral demand, notwithstanding the presence of contextual factors that might have made it difficult to comply. In the concluding chapter of the book, Regan is quite clear that Gellene’s violation of the disclosure rules was not excused by the situation.

If Gellene wanted to avoid admitting to himself that he was prepared to act unethically, he needed a way to frame the situation in different terms. At a minimum, he had to neutralize the moral significance of his choice so that he could convince himself that he wasn’t acting unethically.57

This is not the language of excuse or justification; the moral evaluation of Gellene’s conduct is still that his actions were unethical. A justification, by contrast, changes the bottom-line evaluation, so that we conclude that a person did not act unethically. In the remainder of the chapter, Regan does offer a sophisticated explanation of Gellene’s conduct, starting with the working hypothesis that Gellene was not “simply an amoral actor indifferent to ethical demands.”58 Someone who is not indifferent to ethics may still commit unethical acts, and it is useful to understand how this can occur. In this way, Gellene’s story serves as a “cautionary tale”59 to other lawyers, not an apologia for wrongdoing.

It may be objected that this analysis puts the evaluative cart before the explanatory horse. Regan begins with the reasonable hypothesis that Gellene was

55. George P. Fletcher, Punishment and Responsibility, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 514, 521 (Dennis Patterson ed., 1996).
56. Id. at 521-22; see DORIS, supra note 1, at 129-30 (setting out conditions for attribution of moral responsibility).
57. REGAN, supra note 5, at 325 (emphasis added).
58. Id. at 350.
59. Id. at 351.
not amoral, and suggests an explanation on that basis, reasoning to the conclusion (correct, in my view) that Gellene deserves moral blame. As a result, it may seem that the analysis was loaded up from the start, and the reader never had a chance to consider whether Gellene's conduct was justified. But what would an effective justification look like? The simple answer is that it would have to move beyond the empirical evidence of how people actually do behave and engage with the normative question of how people ought to behave. A justification would show that it was actually right for Gellene not to disclose the relationship with Salovaara, not merely that it would be hard for someone in Gellene's position to comply with the disclosure requirement. I do not mean to suggest that it is a simple matter to construct an account of what moral demands are legitimate, in view of situational pressures. For example, being situated in a culture that legitimates wrongdoing not only makes it difficult for an individual to perceive the wrongful nature of his actions, but also pointedly raises metaethical questions about how moral demands can be justified, apart from prevailing cultural norms.60

Although this is obviously not the place to get into debates in metaethics between cognitivism and non-cognitivism, expressivism and realism, and whatnot, I think the burden of proof is on anyone who would attempt to argue that Gellene was permitted to avoid disclosure in this case. While it is true that on some accounts (which I believe to be wrong),61 lawyers are arguably permitted to manipulate legal texts and exploit ambiguity in favor of their clients' interests, no theoretical account of legal ethics endorses violation of clear, unambiguous legal norms without some fairly compelling moral justification. As for the moral justification for ignoring the law, it is difficult to see what it could be. Regan provides a remarkably sympathetic outline of the best moral justification for disobedience that Gellene might offer: Hypertechnical application of conflicts rules to bankruptcy practice disproportionately burdens large, sophisticated law firms with diverse practices, and does not lead to any corresponding benefit to the courts, in terms of the loyalty or independence of counsel for debtors-in-possession.62 Moreover, providing full disclosure simply gives ammunition to adversaries in a contested proceeding to file disqualification motions for the sole purpose of harassment and running up costs. As Regan rightly notes, however, this argument is nothing more than a self-serving rationalization that Gellene would have seen as such had he stopped to think carefully about the matter.63

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60. See, e.g., Michele Moody-Adams, Culture, Responsibility, and Affected Ignorance, 104 ETHICS 291 (1994).

61. For an overview of the “law as price” or Holmesian bad man view of legal normativity, and my criticism, see W. Bradley Wendel, Professionalism as Interpretation, 99 NW. U. L. REV. 1167 (2005).

62. See Regan, supra note 5, at 327-44.

63. Id. at 338, 342-43.
may have been difficult and psychologically stressful for Gellene to do this, but sometimes ethics requires people to make hard decisions, and to take actions that cause them anxiety.

The other possible exculpatory story would rely on causal determinism—i.e., the claim that Gellene literally could not have acted otherwise because situational factors ruled out the possibility of contrary action. Again, the debate here is far too complex to be summarized briefly, but I believe John Doris is correct that the findings of empirical social psychology do not necessarily imply “hard” causal determinism. Rather, the empirical findings problematize certain attempts by philosophers to solve the ancient puzzle of free will versus determinism. One promising strategy for preserving notions of moral responsibility is to focus on the agent’s endorsement of or identification with reasons for acting. The empirical studies show, however, that people tend to lack introspective access to their true motivational economy. Thus, Gellene might sincerely believe that he was motivated to act in accordance with legal demands, but was unconsciously pulled in the direction of non-compliance. As Doris notes, though, this observation might merely have the effect of shifting the locus of responsibility attribution, from the motives underlying the act itself to second-order intentions like plans or policies, which order and structure behavior. People should be responsible for avoiding temptation, particularly in situations in which they know it would be nearly impossible to resist wrongdoing. There may be cases in which people truly are swept along by a tide of events over which they had no control, and in these cases the appropriate moral response might be exculpation, or at least ambivalence. Gellene’s downfall is plainly not such a case. He willingly placed himself into situations, such as dependency on Lederman, which he knew or should have known would make it difficult for him to make independent ethical judgments. Whatever exculpatory claim Gellene might want to make about the situational pressures created by the Bucyrus bankruptcy, he did make a relatively unpressured decision to opt into an area of practice in which he would foreseeably encounter these sorts of pressures. Thus, we are warranted in continuing to attribute responsibility to Gellene, at least at the level of the decision to engage in bankruptcy practice, with its attendant temptations, without sufficient resources of character to resist the pressure.

64. Id. at 343, 350.
66. DORIS, supra note 1, at 132-33.
67. Id. at 144. The terminology of second-order volitions is from Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. Phil. 5, 11 (1971).
IV. Conclusion

It would be unfortunate if the findings of social psychologists were interpreted as setting up an excuse for unethical behavior. Situational pressures may indeed increase the cost of complying with moral demands. In the bankruptcy case at the heart of Eat What You Kill, the firm was in a position to make more money by not disclosing the representation of Salovaara,\(^6^8\) as long as it didn't get caught. (Non-disclosure ultimately cost the firm its entire fee for representing Bucyrus.) In light of Gellene's dependency on his professional patron Lederman, it would have been difficult for Gellene to set aside these financial realities and reason to the correct conclusion, that the firm was required to disclose the relationship with Salovaara. The structural pressures created by the incentive structure in place at Milbank help explain why Gellene committed such a flagrant legal and ethical wrong, but justification is another matter entirely. Ethics is not supposed to be easy in every case. It may be a struggle to do the right thing, supported by whatever resources one can muster from one's character or situational factors. In these terms, one of the significant contributions of this book to the field of legal ethics is to highlight for lawyers the subtle situational forces that make compliance more difficult, so that suitably motivated lawyers may take steps to counter their effects. The cautionary tale of John Gellene serves as a warning that lawyers may not become complacent about the effects of their environment on their ability to maintain their ethical commitments.

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\(^{68}\) REGAN, supra note 5, at 321-22.