PSYCHOLOGICAL PERSPECTIVES ON THE FIDUCIARY BUSINESS

DONALD C. LANGEVOORT*

INTRODUCTION

Tamar Frankel's writings remind us of the difficulties that face a legal ethic of service to others – i.e., fiduciary responsibility – in a culture that celebrates personal wealth, achievement and consumption. There are many psychological aspects to this social dilemma, far more than I can address in this brief commentary. The one I want to take on here, however, seems particularly pernicious – that many segments of the "fiduciary business" offer extraordinary rewards to those skilled in and comfortable with the art and science of selling. Firms in intensely competitive markets select for those with an abundance of such skills and traits, and they don't search for that talent in seminaries or schools of social work. It thus is worth thinking hard about what the favored traits are in the fiduciary business and how they interact with – and easily frustrate – the law's efforts to insist on fiduciary responsibility from those who are, in heart and soul, salespeople.

One obvious setting here is the subject of so much of Frankel's writings, the securities industry.[1] For decades, regulation has treated the investment advisory business as a fiduciary profession, albeit sometimes with more rhetoric than real punch. In contrast, the status of broker-dealers has long been very muddled. There is a fiduciary-like dimension to their work, to be sure,

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* Thomas Aquinas Reynolds Professor of Law, Georgetown University Law Center.

1 *E.g.*, TAMAR FRANKEL, FIDUCIARY LAW 45-50 (2011).

but regulation has not yet been able to work through either the normative problem or the political thicket to achieve anything approaching coherence. The problem is that the brokerage business evolved in the last century as a sales business – generating transactions that, through commissions or mark-ups, produce a revenue stream for the registered representatives and their firms. This process requires good salesmanship, and that salesmanship usually comes in the form of "advice" and recommendations given to the customer. So any idea that the brokerage and advisory businesses were conceptually distinct was an illusion from the beginning, and bound to crumble entirely as the industry became more aggressive at closing sales and then – because of gradually diminishing profit margins from commissions due to deregulation and technological innovation – looked to relationship-building as a fee generator on its own. I have written about the regulatory implications of this transformation elsewhere,[2] as have Frankel and others.[3] The punch line is simple. You can't really expect to "fiduciarize" a business that is all about selling unless you are prepared to reorient its economic structure entirely, which – economically and politically – we are still far from willing or able to do with the securities industry. The Dodd-Frank legislative experience certainly shows that.[4] The legislation insists on conjoining the fiduciary responsibilities of brokers and advisers, but then explicitly sets forth limitations on SEC rulemaking relating to the sale of proprietary products and continuing duties of care, clearly showing Congress expected something short of true fiduciary responsibility.[5] There are worthy goals to pursue vis-à-vis brokers via the fiduciary label, but there will be significant elements of compromise in all of them.

Of course the securities industry is only one setting where the tension between the fiduciary ethic and incentives to sell are problematic. Business executives sell all the time and often treat their boards of directors and the shareholders to whom they owe their legal obligation as opportunities for managed expectations. The learned professions, medicine[6] and law, have sadly become sales-oriented as well. Law firm partners relish or (more often) lament

[2] *See* Donald C. Langevoort, *Brokers as Fiduciaries*, 71 U. PITT. L. REV. 439, 439-41 (2010).

[3] Frankel addresses this issue in Tamar Frankel, *Fiduciary Duties of Brokers-Advisers-Financial Planners and Money Managers* (Boston Univ. Sch. of Law, Working Paper No. 09-36, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446750; *see also* Barbara Black, *Brokers and Advisers – What's in a Name?*, 11 FORDHAM J. CORP. & FIN. L. 31, 34-35 (2005); Arthur B. Laby, *Reforming the Regulation of Broker-Dealers and Investment Advisers*, 65 BUS. LAW. 395, 298 (2010).

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of U.S.C.).

[5] *Id.* § 913, 124 Stat. at 1824-30.

[6] *See* Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 JAMA 252, 252 (2003).

the extent to which their work is now so much about business-getting and relationship management – euphemisms for sales and marketing.

I. THE MIND AND SOUL OF THE SUCCESSFUL SALESPERSON

My commentary here is about the connections between psychology and fiduciary duty, not policy-making as such. What I want to do is take a look into the "soul of the salesman" – an evocative phrase already claimed by another writer.[7] By that, of course, I really mean (with apologies to the theologically inclined) a look into the *mind* of the salesperson as he or she negotiates the reality of the fiduciary business, with all its stresses, pressures and the like, with particular attention to the moral and ethical dimensions of the underlying cognitive processes.

I am going to be extremely selective here. In thinking about the psychology associated with fiduciary behavior, we must also focus on the client's thinking – why trust is so readily reposed, what expectations are created, etc. We have learned quite a bit about this from recent research. For example, the disposition to trust varies both within and among populations, and the cultural and cognitive willingness to trust is positively associated with economic development and personal wealth.[8] But this is too big a topic on which to dwell extensively in this limited space, and so I only emphasize one point. The willingness to trust has an emotional, affective base, and certain motivating influences – fear and desire, especially – predictably induce higher levels of trust under the right conditions. We are motivated to trust those who promise us what we want, as well as those who hold out the promise of removing the anxiety associated with frightening choices.[9]

Firms in competitive markets whose business involves "selling" advice naturally become experts in what induces the willingness to trust and willingness to pay on the part of their customers and clients, as well as how to attract more clients. They invest heavily in consumer research. Here, we see the first glimpses of the tension between sales and fiduciary behavior, because the study of consumer behavior leads quickly to lessons about how to manipulate emotions and expectations to make people part more readily with their money.[10] Influence and manipulation are tools of deception, artful ways of bypassing the natural self-protective mechanisms most people have for looking out for their own best interests. The very moment the "fiduciary"

[7] GUY OAKES, THE SOUL OF A SALESMAN: THE MORAL ETHOS OF PERSONAL SALES 12-13 (1990).

[8] *See* Luigi Guiso et al., *Trusting the Stock Market*, 63 J. FIN. 2557, 2577-85 (2008).

[9] *See* Tiffany Barnett White, *Consumer Trust and Advice Acceptance: The Moderating Roles of Benevolence, Expertise, and Negative Emotions*, 15 J. CONSUMER PSYCHOL. 141, 141-43 (2005).

[10] For insightful elaborations on the fine line between salesmanship and psychological manipulation, see ROBERT CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 11 (rev. ed. 2007); ARTHUR A. LEFF, SWINDLING AND SELLING 5-6 (1976).

becomes interested in consumer psychology, he or she starts down a slippery slope, away from the ethical ideals of candor and respect for the integrity of the client and toward the objectification of the client as an excitable bundle of wants, hopes, and fears.

And it is that risk – perhaps a very real one – that I want to explore here. I will concentrate mainly, though not exclusively, on the securities business. Although I will pay specific attention to stockbrokers by way of example, there is nothing special about that particular business model in terms of the psychology of competitive success. High producing investment advisers are probably skilled salespeople, too, convincing clients to purchase the advice and then all the add-ons associated with the expensive "platinum" advisory package.

The remainder of this commentary will be about the mix of dispositional traits and situational influences (incentives) that produce the most successful salesmanship within a trust-based relationship. The common cultural stereotype comes readily to mind: sleazy salespeople who deliberately lie, mercilessly exploiting naïve consumers and living the high-life the lies produce. But here both economists and psychologists would rightly object. Without doubting that some sociopathic salespeople do deliberately prey on customers, they are most likely to take advantage of one-shot interactions, where reputational penalties do not readily attach when the customer later regrets the purchase. But these situations are far from common. And even in a relatively high trust society, the cultural stereotype of the salesman is sufficiently pervasive that most consumers suspect this risk and will not trust quite so blindly. They must first be disarmed, which is not particularly easy.

Nor, however, is it likely that this setting favors the naturally honest, candid fiduciary. A person's best interests are often served by not paying for certain things – i.e., things that aren't worth the money – yet salespeople succeed by selling them anyway. In the securities business, for example, there is no plausible evidence that being an active trader is profitable for most retail investors, but prompting vigorous investment activity makes brokers wealthy. Not surprisingly, high-cost mutual funds (in terms of loads, distribution fees, etc.) perform, on average, worse than lower costs ones with similar portfolios,[11] but brokers and their firms still do very well from the commissions. Competitive success does not come to those who sell only what their customers truly need.

In other words, the successful salesperson is the one who finds a way to disarm the suspicious customer, to turn hopes and fears into "needs," and then provides a compelling reason to close the transaction right away (the best salespeople, of course, are natural closers). With respect to repeat interactions, there must also be a way of deflecting responsibility if and when the transaction turns out poorly, lest there be reputationally harmful blame. As I

[11] See Daniel Bergstresser et al., *Assessing the Costs and Benefits of Brokers in the Mutual Fund Industry*, 22 REV. FIN. STUD. 4129, 4230 (2009).

have written elsewhere some time ago,[12] the securities business is particularly inviting to the adept salesperson. Emotional triggers abound, like greed and envy.[13] So do fear and anxiety, especially in today's world where retirement security and provision for family needs is increasingly a matter of personal financial planning, so that mistakes can be devastating. Product and market complexity make it difficult for even knowledgeable clients to discern their own best interest, and ambiguity and delays in feedback prevent the kind of reckoning associated with learning from experience.[14] Bull markets hide a multitude of salespersons' sins, because crashes and panics are exogenous events too easily associated with bad luck, not prior bad advice.[15] The broker who gets his clients into expensive, risky products as part of some fad or fashion – which we might define as the product of the collective effort of sales and marketing skill coupled with a favorable situation – can readily deflect personal responsibility when so many other brokers and customers were into the same thing – a variation on the psychological phenomenon of social proof.[16]

II. Competitive Pressures on People and Firms

So there is room to exploit in the securities business – more often in subtle ways than blatant ones – and there are rich payoffs from doing so. The question that goes to the heart of fiduciary psychology is who best thrives and survives in this competitive crucible. What bundle of cognitive dispositions, traits, training, and inducements offers the best Darwinian fitness? Of course, there will not be a single answer because niches exist with different clienteles and hence different constraints and opportunities.

In general, however, I want to follow the intriguing suggestion of many psychologists and evolutionary biologists that where success depends on the ability to deceive, the most successful are those who are first able to deceive themselves.[17] The intuition here is simple – the subject of the deception is most readily disarmed when the sender demonstrates none of the subtle cues or

[12] *See* Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 Calif. L. Rev. 627, 630-31 (1996)[hereinafter Langevoort, *Selling Hope*]; *see also* Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 Va. L. Rev. 1025, 1048-55 (2009).

[13] One of my favorite quotes, from Charles Kindleberger, is "[t]here is nothing so disturbing to one's well-being and judgment as to see a friend get rich." Charles Kindleberger, Manias, Crashes, and Panics: A History of Financial Crises 15 (4th ed. 2000).

[14] *See* Langevoort, *Selling Hope*, *supra* note 12, at 650.

[15] *Id.* at 639.

[16] *Id.* at 644.

[17] *See* Robert Trivers, *The Elements of a Scientific Theory of Self-Deception*, 907 Annals N.Y. Acad. Sci. 114, 115-16 (2000).

behaviors that signal dishonesty. And while there are some exquisitely skilled liars who can mimic the honest in pitch-perfect fashion, they are few and far between. Unless they are also sociopaths, skilled liars bear the weight of guilt and anxiety, which can become disabling over time. By contrast, the person who genuinely becomes convinced that what he is saying is not wrong sends no warning signals, and carries a lighter cognitive load through his or her professional and personal life.[18]

The most adaptive salespeople, in other words, are those who can use the kind of influence strategies that lead to high sales volume without troubling doubts about the legitimacy of what they are saying or doing. Indeed, I would generalize this evolutionary pattern to any form of fiduciary or advisory activity. And it strikes me that there are two different but related ways in which such cognition can emerge and flourish. One is structural, and goes to the organizational behavior of firms in the fiduciary business. In large firms, especially, there is a segmentation of knowledge as well as specialization of labor. Those who are busy with client contact (sales) lack the time and, in all likelihood, aptitude for research, product development, and the like. When a product is complex, the salespeople have to be educated about it, a situation that invites the developers to "sell" the salespeople in ways that produce perceptions – and probably misperceptions – about the product, that can then genuinely and without doubt be transmitted in the actual sales interaction with the customer. In other words, the most crucial step in the sales process may be influencing the salespeoples' own beliefs.

This suggests, ironically, that susceptibility to influence may go hand-in-hand with the ability to influence others. If so, firms in competition might well select for "influencability" among their financial advisers – people who are especially inclined to respect authority, not overly skeptical, and willing to take cues from others in like circumstances (i.e., conform to the attitudes and behaviors of other advisers at the firm). These are all traits associated with common and measurable personality types, and can be spotted through some fairly simple heuristics, such as willingness to join and thrive in hierarchical, authority-based organizations (boy and girl scouts, fraternities and sororities, sports teams, community groups).[19] These patterns play to the firm's advantage in another way as well, because potential clients often use those very same markers as measures of trustworthiness. As to IQ, the firm presumably wants advisers who are intelligent enough to learn fairly complicated material, but not so smart as to see through the firm's own influence tactics too readily or question the superior knowledge of those currently in authority.

[18] *Id.* at 115-19.

[19] *See* Leonard Berkowitz & Richard M. Lundy, *Personality Characteristics Related to Susceptibility to Influence by Peers or Authority Figures*, 25 J. PERSONALITY 306, 315 (1957).

But there are obvious constraints on this selection strategy, which makes the problem harder than it looks. First, high conformists with relatively little intellectual curiosity and independence may do very well in lower and mid-level positions, but do not necessarily offer a deep pool of potential leaders for the firm. The firm does not want to exclude leadership talent via an overly rigid selection bias. Second, the firm wants people who will act fairly aggressively vis-à-vis customers when the opportunity arises, rather than with overabundant caution; too great a tendency to adhere to social norms of honesty and respect interferes with sales production. But a tendency toward *too much* opportunism threatens the firm, risking both external reputational harm and liability if it is detected, as well as internal destruction if the agent tries to take advantage of the firm itself or of fellow agents. The sweet spot is controlled aggressiveness directed externally, with strong loyalty ties internally.[20]

I have written at some length about this sweet spot, especially how it relates to the promotion tournament inside the firm, and what it means with respect to the culture and practice of compliance with law.[21] The important point – of great relevance to the fiduciary business – is that it inclines firms to prefer ethical relativists who are not only susceptible to the firms' justifications as to what to think and how to act but also adept at self-deception. That is to say, the likely survivors in high velocity, high pressure sales environments are those who think that what is most productive for themselves and the firm is also an acceptable thing to do. They are skilled rationalizers.

III. MORAL WIGGLE ROOM AND ETHICAL FADING

Firms have a large number of tools at their disposal to make rationalizations easy and convenient. Firms that need a high level of aggressiveness from their salespeople often inculcate loyalty norms – group bonding, including fraternity-like hazing activities – that produce strong in-group/out-group perceptions after the weak are weeded out.[22] They may go so far as to encourage perceptions that clients and customers are a distinct out-group that would try to take advantage of the firm if able, so that tit-for-tat is seen as legitimate. Sports and warfare imagery is common in these settings.[23] This

[20] Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 307-08 (2004).

[21] Most recently, see Donald C. Langevoort, *Chasing the Greased Pig down Wall Street: A Gatekeeper's Guide to the Psychology, Culture and Ethics of Financial Risk-taking*, 96 CORNELL L. REV. (forthcoming 2011) (manuscript on file with author) [hereinafter Langevoort, *Chasing the Greased Pig*]. In this same genre, see Donald C. Langevoort, *Opening the Black Box of "Corporate Culture" in Law and Economics*, 162 J. INST. & THEORETICAL ECON. 80, 86-87 (2006); Langevoort, *supra* note 20, at 307-08.

[22] *See* Langevoort, *Chasing the Greased Pig*, *supra* note 21 (manuscript at 7).

[23] *Id.* (manuscript at 27).

strategy, however, is probably not stable where customer relationships depend on trust and repeat-play, and so more subtle rationalizations need to be encouraged. For example, I have long been struck by an account of the training of life insurance salespeople wherein the employer stressed that life insurance customers simply cannot, psychologically, bring themselves to commit to the optimal level of insurance for their loved ones, so that it is the salesman's *moral mission* to push the customer in the right direction.[24] Once that idea is internalized, even blatantly manipulative sales efforts seem justified. To be sure, it takes a certain kind of person to readily buy into beliefs like these. But there is some truth to the idea, in financial services generally, that customers resist making good choices, so it really is fertile ground for bountiful rationalization.

The brokerage context offers another example. Take a familiar problem area noted earlier – brokers aggressively sell high-cost mutual funds to their customers, hiding from them the availability of much lower cost products that are just as good or better. But the load and/or distribution fees are what pays for the brokers' advice, so that the broker can, not unreasonably, believe that the customer has implicitly consented to pay more for the help. But that belief already introduces a non-fiduciary-like stance – that it's acceptable to conceal the availability of products that are in the clients' best interests – and, more importantly, has no obvious stopping point. Nearly anything for which the client can be induced to pay more can be construed as supporting high quality service, especially when the quality is mainly in the eyes of the seller.

While firms can and do provide a menu of rationalizations, it is in the mind of the salesperson that the real work gets done, mostly subconsciously. And the mind does not need someone else's menu to find what it wants. Thus I want to spend most of the remainder of my commentary considering some recent research by psychologists that relates to what is referred to as "moral 'wiggle room'"[25] or "ethical fading"[26] – the ways in which ethical lapses are either overlooked, reinterpreted or explained away. This is a sizable research program that is still in fairly early stages of development, so I will again be both selective and suggestive here, not pretending that we fully understand all the situational or dispositional triggers for these phenomena.

Some of these topics are by now well-traveled ground, illuminated by our rapidly increasing understanding of cognitive neuroscience.[27] It is roughly accurate to say that ethical or moral decision-making occurs in two different places in the brain, one driven by emotions, the other a more "rational"

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[24] *See* OAKES, *supra* note 7, at 49-57, 91.

[25] *See* Jason Dana et al., *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 ECON. THEORY 67, 69 (2007).

[26] *See* Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224-25 (2004).

[27] For a very helpful survey, see Jonathan Haidt & Selin Kesebir, *Morality*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 797, 801 (Shelly Fiske et al. eds., 5th ed. 2010).

deliberative process. The latter can override the impulses of the former – that is what we mean by moral reasoning. But the deliberative is the slower cognitive process, and so has the burden of overcoming the impulse.[28] This dual-process differential biases judgment in the direction of the initial impulse. Our cognitive hard-wiring generates familiar impulses with primal evolutionary sources: fear, greed, love, revulsion, envy, survival, self-interest, etc.

People vary in their disposition and capacity for moral reasoning in the face of impulse, but the bias is against overriding. As Don Moore and George Loewenstein put it in a survey of the dual-processing literature as it relates to professional conflicts of interest, "[t]he consequence of this differential processing is that self-interest often prevails, even when decision makers consciously attempt to comply with the ethical mandates of their profession."[29] What I have suggested thus far is that the selection bias in the fiduciary business favors those able to rationalize the careful pursuit of self-interest and other competitively adaptive traits, masking the bad odor that comes from unabashed selfishness. Thus successful auditors are inclined to see what their clients want as within Generally Accepted Accounting Principles (GAAP) more easily than a more neutral observer would; likewise successful doctors are more likely to think a procedure or prescription is warranted when they will benefit from the intervention as opposed to having no stake in the outcome.[30]

More abstractly, the subject of trust and cooperation has been the subject of many laboratory experiments using a variety of techniques to tease out the role of altruism, fairness-seeking, and similar other-regarding impulses in economic settings. The so-called "investment game" is frequently used to study trust-like behavior.[31] One subject is given say $10, which can be kept or given to

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[28] *Id.* at 803-07.

[29] Don A. Moore & George Loewenstein, *Self Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 190-91 (2004).

[30] Ironically, having people disclose their conflicts of interest may give them greater moral wiggle room in some circumstances and cause the person to whom they make the disclosure to comply with their advice more strongly, in order to avoid signaling distrust and out of a desire to help the discloser. *See* Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1, 2-4 (2005); Sunita Sah et al., The Burden of Disclosure 3 (May 1, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/ sol3/papers.cfm?abstract_id=1615025. *But see* Bryan K. Church & Xi (Jason) Kuang, *Conflicts of Interest, Disclosure, and (Costly) Sanctions: Experimental Evidence*, 38 J. LEGAL STUD. 505, 526-28 (2009) (discussing diminished opportunism in the presence of accountability).

[31] *See* Joyce Berg et al., *Trust, Reciprocity, and Social History*, 10 GAMES & ECON. BEHAV. 122, 124-27 (1995). For a survey of the trust literature in economics, see Harvey S. James, *The Trust Paradox: A Survey of Economic Inquiries into the Nature of Trust and Trustworthiness*, 47 J. ECON. BEHAV. & ORG. 291 (2002). The legal literature here is growing. For important contributions, see Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV.

the other subject. If money is given, it is tripled. The second subject (the trustee) can then give some or all back to the first (the trustor).[32] The rational choice of the trustor is to keep the $10, because the trustee would be acting against interest in giving anything back. But in fact trustees do (and for many people are expected to) give back, leading to a surprisingly high willingness to trust. This result demonstrates the economic power of trust – both parties are made better off by the expectation of other-regarding behavior, and the frequency of cooperation is often used to show, rightly, the capacity of social norms – maybe innate morality – to trump the predictions that we all act like *homo economicus*.[33]

But the investment game has been manipulated in numerous ways that produce differing levels of trusting and greater selfishness. One of particular interest is the introduction of the possibility that, at the end of the game, the trustor will learn whether she gets something back but will not know whether this is the result of the trustee's choice or some exogenous force – e.g., luck.[34] Given the opportunity to hide behind the possibility that a return of nothing was just bad luck for the trustor, trustees predictably keep more for themselves, presumably rationalizing the outcome as fair in an uncertain world. The authors of one such study recently drew parallels to financial relationships between investors and securities professionals, because the financial markets generate a great deal of good and bad luck that obscures the value added by professional trustworthiness.[35]

IV. OTHER PSYCHOLOGICAL TRIGGERS

What we have covered thus far may seem fairly familiar and intuitive. We observe moral hypocrisy frequently enough. What may be less familiar are some other triggers of ethical fading and how they can lead actors to step over lines drawn by law or common conceptions of morality at the risk of considerable damage to themselves and their employers.

A. *Slippery Slopes*

It is common enough to say that ethical descent occurs one step at a time; backsliding implies a slippery downward slope. But the usual version of this scenario is a person who gives into temptation and cheats a little bit will be

1735, 1738 (2001); Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH U. L. REV. 1717, 1720 (2006).

[32] Berg, *supra* note 31, at 124-27.

[33] *Id.* at 137.

[34] Radu Vranceanu et al., *Trust and Financial Trades: Lessons from an Investment Game Where Reciprocators Can Hide Behind Probabilities* 6 (ESSEC Bus. Sch., Working Paper No. 10007, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1611666.

[35] *See id.* at 14-15.

inclined, if successful, to cheat a little bit more and so on.[36] The message, of course, is don't start, even a little. While there is something to this analysis, it misses the psychological complexity and nuance of the slippery slope. It is likely that the first step down the slope wasn't perceived as cheating in the first place. It could have been be an innocent error in judgment or even a rational bet that turned out to be unlucky, done for the best of utilitarian reasons. Or perhaps deliberate corner-cutting was necessary under the circumstances to achieve a larger, legitimate end. Especially when people are overconfident or overly optimistic, as many businesspeople tend to be, this will happen often enough. I have described this elsewhere as the "optimism-commitment whipsaw."[37] But the unexpectedly bad outcome is threatening and the mind readily rationalizes concealing it and trying to make up for the harm in some other way. But if that doesn't work, the harm is bigger, and the hole deeper. It probably takes a number of iterations and a run of bad luck for any conscious awareness of wrongdoing to emerge, if it ever does.[38] The adept rationalizer may never come to such awareness, even when facing jail. And even awareness may not stop successive rationalizations, particularly those when the actor determines that greater harm to innocent third parties may result from confessing than from continuing the cover-up. Psychologists also tell us that moral self-restraint is a wasting asset; restraint early on makes it harder to resist when pressure comes around a second time and so on.[39]

We can present many anecdotal stories of financial fraud through this lens – Bernie Madoff certainly comes readily to mind.[40] A recent empirical study of financial misreporting by Catherine Schrand and Sarah Zechman differentiates between self-serving (e.g., compensation-driven) and overconfidence-based explanations for earnings management as an antecedent to financial fraud and finds the latter to be commonplace.[41] They place this in the context of the slippery slope – overly optimistic forecasts that justify minor accruals that are not adjusted or corrected even in the face of mounting evidence that the optimism was unwarranted, and so magnify in impact.[42] I would add that the

[36] This is true in the perception of others' behavior as well. *See* Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others' Unethical Behavior*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 708, 709 (2009).

[37] Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 147 (1997).

[38] *Id.* at 166-67.

[39] *See* Nicole L. Mead et al., *Too Tired To Tell the Truth: Self-Control Resource Depletion and Dishonesty*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 594, 594 (2009).

[40] *See* Robert Frank et al., *Madoff Jailed After Admitting Epic Scam – Disgraced Financier Tells Victims He Is Sorry and Ashamed*, WALL ST. J., Mar. 13, 2009, at A1.

[41] *See* Catherine M. Schrand & Sarah L.C. Zechman, *Executive Overconfidence and the Slippery Slope to Fraud* 11-12 (Chicago Booth Sch. Of Bus. Research Paper No. 08-25, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265631.

[42] *Id.* (manuscript at 3).

too late realization that revealing improper accounting would hurt innocent company employees and current shareholders can fuel the internal perception of additional rounds of concealment as the right thing to do.

B. *Hyper-motivation*

Central to the success of any business is employee motivation, which comes in both soft and hard forms. The soft forms come from team-building, leadership inspiration, the inculcation of identity, and the like. The hard forms come through promotion and compensation incentives. In intensely competitive markets, firms put high power into both forms and use both carrots and sticks – playing extensively to the elemental emotions of greed and fear. In the securities business we are familiar with both; outlandish bonuses, sales contests with lavish prizes, etc., on the winners' end; ruthless shaming and firing of losers on the other end.

These emotions prompt ethical rationalization. In an interesting paper on "hypermotivation" directed at misbehavior in both business and academia, Scott Rick and George Loewenstein tie this behavior in part to loss aversion.[43] There is abundant evidence in behavioral economics of peoples' asymmetric reactions to risks involving losses and gains – we will generally be much more aggressive to protect what we have than we would to gain the equivalent amount. If so, then financial firms that place advisers in jobs and then threaten to take those jobs away for underperforming, even if only by comparison to others (the so-called "rank and yank" philosophy), are inviting very aggressive myths and rationalizations – especially on the part of those who fall behind.[44]

C. *Hyper-competition*

Intense competition itself produces troubling behaviors apart from the obvious incentive structure thereby created. A line of research on auction behavior suggests that people will often put aside rational assessment in order to win the prize, including the willingness to incur costs greater than likely benefits.[45] This can be attributed to any number of possibilities – status-seeking, for example, or loss aversion when the subject has assumed psychological ownership of the prize. Judgment is clouded in the face of strong rivalry.

There is a possible connection here to the hormonal influence of testosterone. Relatively high levels of testosterone are associated with status-

[43] Scott Rick & George Loewenstein, *Hypermotivation*, 45 J. MARKETING RES. 645, 645 (2008). For a similar point, see Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition:* Corporate Irresponsibility *and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 973-74 (2002); Langevoort, *supra* note 20, at 308.

[44] *See, e.g.*, Daniel J.H. Greenwood, *Enronitis: Why Good Corporations Go Bad*, 2004 COLUM. BUS. L. REV. 773, 830.

[45] *See* Deepak Malhotra, *The Desire To Win: The Effects of Cognitive Arousal on Motivation and Behavior*, 111 ORG. BEHAV. & HUM. DECISION PROCESSES 139, 139 (2010).

seeking and dominance behaviors, and the willingness to engage in conflict to achieve those goals.[46] This has been used to explain "win at all cost" behavior in the corporate setting, although testing for hormonal influences in the field must, as a practical matter, be via proxy. There is evidence, for example, of younger CEOs behaving more combatively in merger and acquisition contests than their older peers due to hormonal influences.[47] Selection biases in hiring can easily introduce greater collective levels of testosterone – the gender effects here are apparent, although there is also evidence that dominance behaviors on the part of women can be predicted by high testosterone levels relative to other women. Favoring those who have shown competitive success in the past – high school and college athletes, for example, or high level student government officers – would probably have this effect even when the firm has no well-articulated explanation for its hiring preference. Once hired, high-testosterone individuals are probably favored in promotion tournaments where the metric is the competitor's portfolio of wins in a sequence of challenges.[48]

Unfortunately, high testosterone levels do not fit well with fiduciary characteristics like empathy and moral decision-making. Emerging research on the subject suggests that testosterone buffers emotional constraints on aggression and risk-taking, leading to a more "cold" utilitarian calculus and a greater willingness to do harm to gain a preferred outcome.[49]

D. *Power*

An important line of psychological research considers the effects of gaining power – i.e., dominance in a relationship – on trustworthy behavior. Put simply, persons in power are better at deception, arguably because deception is taxing on a person's emotional makeup, but the positive attributes of power – positive affect, increase in cognitive function and physiological resistance – buffer that stress.[50] In other words, connecting back to the evolutionary account noted earlier, having power allows a person to lie more effectively by

[46] *See* Maurice Levi et al., *Deal or No Deal: Hormones and the Mergers and Acquisitions Game*, 56 MGMT. SCI. 1462, 1462-63 (2010).

[47] *Id*. at 1463.

[48] For an interesting illustration of this, see J.M. Coates & J. Herbert, *Endogenous Steroids and Financial Risk Taking on a London Trading Floor*, 104 PROC. NAT'L ACAD. SCI. (PNAS) 6167, 6167 (2008). On lawyers, see James M. Dabbs et al., *Trial Lawyers and Testosterone: Blue Collar Talent in a White Collar World*, 28 J. APPLIED SOC. PSYCHOL. 84, 85-86 (1998).

[49] *See* Dana R. Carney & Malia F. Mason, *Decision Making and Testosterone: When the Ends Justify the Means*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 668, 668-69 (2010). As the authors point out, the ends need not necessarily be immoral. *Id.* at 670.

[50] *See* Dana R. Carney et al., *People with Power are Better Liars* 1 (2010) (unpublished manuscript), *available at* http://columbia.academia.edu/DanaCarney/Papers/260216/People_With_Power_Are_Better_Liars.

blocking the non-verbal cues that signal deception, putting their victims off-guard.[51] Power also seems to increase hypocrisy – insistence on adherence to strict norms by others, while enjoying far greater nimbleness in justifying one's own departures on utilitarian or other rationalized grounds[52] – and optimism and risk-taking.[53] Of course, power may be gained in the first place by those skilled at rationalization and willing to take risks, in which case there is a dynamic feedback loop that is likely to generate increasing hypocrisy and hubris over time.

E. *Institutional Pressures*

One of the most famous findings in social psychology literature, associated with the work of Stanley Milgram, is that people are susceptible to acting improperly – even abusively – when directed by a person in authority.[54] Ample evidence suggests that agents act more opportunistically than principals do under the same conditions,[55] presumably because they treat this as their assigned role. While authority may be part of this tendency, there are interesting related possibilities. If, for example, bonding and other loyalty-inducing mechanisms within an organization succeed at generating strong identification with the institution among its agents,[56] that feeling of loyalty creates its own pressure to rationalize opportunism toward clients and customers. A sense that the organization is being threatened, whether by competitors or other external forces, will readily justify aggressiveness in the service of one's friends, colleagues, and those who share the same identity, and a strong affective sense that this loyalty is noble rather than selfish. Organizational team-building, in other words, may shift the agent's feelings about appropriate behavior from one of simple vertical obedience – which, as Milgram and others point out, can be distressing even if powerful – to a more horizontal, less distressing, willingness to "take one for the team" without much guilt at all.[57] The pull of loyalty creates internal conflict that can easily exploit moral wiggle room.[58]

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[51] *See supra* notes 17-18 and accompanying text.

[52] *See* Joris Lammers et al., *Power Increases Hypocrisy: Moralizing in Reasoning, Immorality in Behavior*, 21 PSYCHOL. SCI. 737, 738 (2010).

[53] *See* Cameron Anderson & Adam D. Galinsky, *Power, Optimism, and Risk-taking*, 36 EUR. J. SOC. PSYCHOL. 511, 516 (2006). In turn, this pattern may connect to testosterone or other physiological effects. *See* Carney & Mason, *supra* note 49, at 668.

[54] Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 377-78 (1963).

[55] *See, e.g.*, John R. Hamman et al., *Self-interest Through Delegation: An Additional Rationale for the Principal-Agent Relationship*, 100 AM. ECON. REV. 1826, 1843 (2010).

[56] *See* George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, J. ECON. PERSP., Winter 2005, at 9, 20.

[57] *See* Milgram, *supra* note 54, at 378.

[58] *See* John M. Darley, *The Cognitive and Social Psychology of Contagious*

F. *Abundance*

The trappings of wealth in one's surroundings can lead to a higher level of unethical behavior, presumably by triggering the emotions of envy and greed.[59] And making money – the metric of social comparison in any setting, organizational or otherwise – by itself seems to trigger more selfish, less other-regarding behavior.[60] In turn, visible manifestations, or probably even circumstantial evidence, of dishonesty if not promptly sanctioned, can become contagious.[61]

G. *Cognitive Load and "Busyness"*

When persons are busy and under stress, they rely more on feelings and heuristics. It becomes harder to notice signs of trouble, and moral decision-making tends more toward easy rationalization when people tire of struggling to do the right thing.[62]

CONCLUSION

To be sure, I have only scratched the surface of the relationship between psychology and ethical decision-making, and we have to remember how situational and contingent these forces are. And I have largely ignored the counter-forces in favor of trustworthiness – particularly reputational incentives for personal, cultural, and strategic reasons, as well as conscience. These surely have some force. What I want to suggest, however, is that firms in the fiduciary business can, by happenstance or design, become cauldrons of influences and emotions that motivate insiders to behave opportunistically while deflecting guilt.

Just imagine: a firm hires and promotes people who are aggressive, ambitious, and habitual winners, yet who are also willing to take direction and be team players. Especially during good economic times, the firm smiles on the lucky risk-takers. Losers are booted out while survivors are lavished with money, prizes, status, and power. The fast-paced firm culture celebrates success in emotional ways that emphasize the superficial conjunction of doing good and doing well. Customers, it says, should understand that quality comes at a price. The work takes place at a very high velocity and pace, and information is compartmentalized so that troubling aspects of products being

Organizational Corruption, 70 BROOK. L. REV. 1177, 1190-91 (2005); Milton C. Regan, *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 968-70 (2007).

59 *See* Francesca Gino & Lamar Pierce, *The Abundance Effect: Unethical Behavior in the Presence of Wealth*, 109 ORG. BEHAV. & HUM. DECISION PROCESSES 142, 152 (2009).

60 *See* Kathleen D. Vohs et al., *The Psychological Consequences of Money*, 314 SCIENCE 1154, 1154 (2006).

61 *See, e.g.*, Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 397-98 (2009).

62 *See* Mead et al., *supra* note 39, at 596 (2009).

sold are inaccessible and easy to ignore. Such a firm, I suspect, is inviting extraordinarily deep rationalization and ethical fading. With luck, however, it is also likely to be very successful in a competitive marketplace precisely because of that energy, focus, and motivation.

But of course you do not have to imagine at all, because anyone can recognize in my description some of the best-known firms in the fiduciary business. The message in all this is closely tied to what Tamar Frankel has been saying for some time. Of course, our social culture should be less enabling of the pursuit of success and material wealth that ignores so many serious externalities. But, in the meantime, we need a system of regulation that does not rely on soft reminders of fiduciary status, because people who have rationalized that what they are doing is, or feels, right will not notice. Because of this reality, I am less enamored with the expressive function of law than some others, especially if we try to fool ourselves into thinking that grand legal expressions can shame the self-righteous into mending their ways. I prefer tough enforcement. Yet tough enforcement can be an illusion, too, unless there are skilled, motivated enforcers with ample resources, and there are sufficient reasons for concern about each of those aspects in both the public and private litigation domains. For reasons of psychology as well as economics, then, there simply is no easy solution to the fiduciary problem so long as it remains deeply embedded in the sales business.[63]

[63] My preference would be to insist that firms in the fiduciary business be required to develop and file comprehensive internal plans for how they intend to prevent incentives and competitive zeal from interfering with the fiduciary obligations they owe those to whom they provide advice. These plans should also designate the surveillance and compliance procedures, and chain of command for ensuring that this actually happens. Regulators should be willing and able to discipline those in the chain of command if there is substantial evidence of non-compliance with the firm's own plan. *See* Langevoort, *supra* note 2, at 455-56.