

Good People and the Ethics of Quiet Egocentricity

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Date : September 17, 2018

Yuval Feldman, [The Law of Good People: Challenging States' Ability to Regulate Human Behavior](#) (2018).

The fascinating case made by Yuval Feldman's recent book is that most wrongdoing is done by good people who, too frequently, allow themselves to do wrong. We are egocentric; our brain works hard to promote self-interest whilst protecting the self-image that we are morally upright. And it does so quietly (my word, not Feldman's); much of the decision-making is done subconsciously, intuitively – albeit sometimes, importantly, with glimmers of recognition.

Feldman classifies us into three types: deliberate wrongdoers; situational wrong doers, subject to this quiet egocentricity; and the genuinely good. Even the latter are prone to moral blindspots. Concerned about the prevalence of the last two groups, Feldman makes a strong case for taking situational ethics more seriously. This allows a psychological engagement with sociological questions of structure and agency. Situational ethics sees anxieties about bad apples and bad barrels as being better understood as a concern with bad decisions; we are located in webs of design and accident. What Feldman wants is for regulatory design and jurisprudence to take bad barrels and bad decisions more seriously. The normative judgements that drive ex post punishment as a regulatory strategy are superseded by seeking improvements in behaviour before wrongs can manifest. Intentionality, he suggests, is “outdated.” (P. 40.)

My interest is narrower: how his insights apply to lawyers and their regulation. Much of Feldman's work is of general application to lawyers as ‘ordinary’ humans; but for me there were also many questions posed for lawyer exceptionalism. The book is a treasure trove of cognitive challenges especially relevant to lawyers. Might lawyers need to pay more attention to the objectivity illusion, given a naïve belief that they are trained to see facts from all sides? Does thinking like a lawyer encourage us to discount the impact of intuitions and emotions on our decision-making? How littered is our world with post hoc rationalisations for the misconduct, of ourselves or of clients? How varied are our moral identities and attentiveness? If tiredness and quick decision-making under pressure diminish ethics, how well are lawyers' working lives constructed for good decision-making? If collaborative rather than competitive environments encourage good conduct, what then of the cultures of law firms and law schools? And perhaps most fundamentally, if an appetite for ambiguity is strongly associated with conscious and unconscious unethicity, how should we see a central facet of lawyering: managing or exploiting the ambiguities of facts and law?

Feldman surveys a vast range of his own and others' work, teasing out the impact of our motivations and cognitive limitations on making ‘good’ decisions. He then turns to the crucial, but under-researched, field of solving or ameliorating these problems. He urges greater attention to the expressive function of law, the ways in which the choice of rules, and their framing, effect motivation and behaviour. Do the specifics of rules, their clarity, how punitive they are, even social identities revealed in phrasing, encourage good people to be better; do they even encourage bad people to refrain from punishable wrongs?

Designing decision processes, training and de-biasing, better conceived and delivered codes of ethics, may all challenge quiet unethicity. Similarly, group norms are generally thought to inhibit self-

interested behaviour, that is part of the point of the profession, but do the particular group norms of lawyers or law firms do that? Not enough, might be a fair, if trite, response. Feldman shows that it might be important to have more precise understandings of individual and group characteristics: how many lawyers are bad, or situationally vulnerable, or good but with blind-spots, for example? What are the expressive functions of lawyers' ethical rules?

The book is also a treasure trove of findings: a mixture of the important and the quirky. Carrying weights, washing hands, lowering lighting, and reducing glucose levels all have an impact on misconduct; at least in some experiments. So does making a decision in a room full of children's toys. The nudges, primes and self-deceptions are mainly, but not always, automatic. Feldman thinks about how to encourage more awareness of the risks of self-deception and begins a debate about how our rational models of ethics can influence our unconscious ones. In reminding the reader of the now familiar (but contested) System One and System Two thinking from Kahneman and Tversky, he focuses crucially on how individuals and regulators can heighten awareness, controllability and attention on ethical deficits.

Regulatory strategies may need to be developed for each of his three groups. Such strategies may be in competition with each other, or they may be capable of "acoustic separation" (see [Dan-Cohen 1984](#)): the intriguing idea that the same rules can send different messages to different audiences. Such work highlights fundamental dilemmas. Regulators need to be persuaded that poor conduct is widespread if they are to act against it, but signalling that misconduct is common encourages that misconduct. If I think tax avoidance is widespread, I am less likely to pay my taxes. If I fine the parents who pick up their kids late from nursery school, some of those parents will quietly redefine the payment as a tax, which they pay for the privilege of being late, and tardy pick-ups will increase. Heavy-handed regulation or the overuse of incentives and punishments may crowd out better behaviour. It may also signal distrust of the regulated community, diminishing levels of compliance. But contrarily it may sometimes be necessary punish overt unethical conduct severely. And Feldman notes times when getting the basics right is more important than behavioural sophistication: in one study, monitoring tax payer income does more to foster tax compliance than the working of motivational levers.

Feldman is rightly worried about the methodological limitations of behavioural ethics, and he is also right that there is nowhere near enough work to be confident about the underlying mechanisms behind these problems and the solutions to them. Many studies are small and experimental. Quirkiness is fun, but magic circle firms are not about to start building difficult-decisions suites stuffed with cuddly toys. Yet in these limitations is the central challenge: can ecologically realistic, methodologically robust, replicated studies develop our understanding of behavioural ethics further? Feldman and his collaborator's own studies are a rich resource here. Can regulators, or even lawyers and compliance managers, be encouraged to experiment with behavioural interventions? After all, lawyers need to be interested in both how rules work and how people behave ethically if they are to do their job effectively. Feldman's book shows us how important this could be.

Cite as: Richard Moorhead, *Good People and the Ethics of Quiet Egocentricity*, JOTWELL (September 17, 2018) (reviewing Yuval Feldman, **The Law of Good People: Challenging States' Ability to Regulate Human Behavior** (2018)), <https://legalpro.jotwell.com/good-people-and-the-ethics-of-quiet-egocentricity/>.