Deterring Both Spur-of-the-Moment and Carefully Planned Corporate Crimes

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Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 **Fl. L. Rev.** 87 (2014).

How many different law review articles cite work by Kahneman and Tversky, progenitors of law and behavioral economics? At least two thousand, two hundred and seventy-three (2,273).[1] And this does not include articles like Professor Baer's which do not cite Kahneman and Tversky, but cite law review articles which do. Law and behavioral economics is a law professor industry. And, why not? It doesn't require math and who doesn't like Brain Games?

How many different law review articles cite work by Oliver Williamson, progenitor of the new institutional economics? At least one thousand, two hundred and fifty-four (1,254).[2] Although smaller, this also reflects an industry which incorporates ideas of agency cost or of just opportunism, which Baer says is, "according to Oliver Wiliamson's famous definition, a form of self-interest seeking with guile" (P. 99.)

What is the overlap between these 3,527 articles? That is, how many articles cite both Kahneman and Tversky and Williamson? At most 82 (2.3%).[3] Of course, one might also ask what percentage of the smaller number of Williamson-citing papers cite Kahneman and Tversky, yielding a larger but still small number (6.5%). By and large, these appear to be two different lines of scholarship; two different industries.

Miriam H. Baer argues that both lines need to be considered concurrently. Why? The methods and structures of organizational compliance need to deter both deviance originating in individual departures from rationality (the law and behavioral economics line) and individuals whose rationality departs from that of the organization as an entity (the new institutional economics line). To complicate matters, in ways Professor Baer doesn't highlight, such deterrence also sometimes cut against each other. Call it "the lure of the taboo." Creating a culture that enshrines non-opportunistic values creates psychological pressures to evade. Sociologists talk about the normality of deviance, but you can just think of the attractiveness of shrimp to those raised in an Orthodox Jewish culture. (And let's agree to not discuss other taboos).

Professor Baer chooses to focus on one bias, the immediacy bias (exceedingly valuing present over future rewards), which yields a short-term perspective, and temporally inconsistent actions. This bias may result in spur-of-the-moment fraud, unlike the well-planned deceptions of opportunistic individuals.

Compliance measures aimed at preventing spur-of-the moment frauds will either accelerate sanctions or delay the desired gratification. Professor Baer insightfully points out how red-tape has the positive effect of deflecting spur-of-the-moment fraud by delaying or burdening the desired gratification (P. 110.)

Professor Baer continues in this article her earlier important contribution in distinguishing between a "policing approach" to compliance and an "architectural" one (see, Miriam H. Bear, *Governing Corporate Compliance*, 50 B. C. L. Rev. 949 (2009). She nicely has employees involved in designing architectural constraints to their opportunism by engaging them in identifying areas of operational and compliance risk.

She very nicely describes the limits of the policing approach, which so dominates our culture, not only corporate compliance. And, she urges an integrated effort combining both approaches.

Legal scholarship, in my opinion, too often is determined by theory. Like lemmings, the legal academy follow a theory craze, hence the thousand of articles in behavioral economics and in institutionalism. Articles are written which trace out the implications of a theory for situation after situation.

Situations, however, are not determined by theory. Theory is imbricated in situations. Multiple theories need to be applied to understand, let alone control, situations. A theory might be highly illuminative (as are Williamson's and Kahneman & Tversky's), but that which is illuminated by a single theory will likely not suffice to guide pragmatic action. What makes Professor Baer's article a treat is her recognition of this fact.

1. Lexis Advance Law Reviews and Journals Database (February 27, 2015). A search for "(kahneman /3 tversky)" of the WestlawNext Law Reviews and Journals Database found another hundred articles (2,373). [?]
2. Lexis Advance Law Reviews and Journals Database (February 27, 2015). A search for "oliver Williamson" OR "o. Williamson" OR "o. e. Williamson" of the WestlawNext Law Reviews and Journals Database found another hundred and thirty articles (2,384). [?]
3. WestlawNext Law Reviews and Journals Database (February 27, 2015). A search for "("oliver Williamson" OR "o. Williamson" OR "o. e. Williamson") AND (kahneman /3 tversky)" of the Lexis Advance Law Reviews and Journals Database found two fewer articles (80). [?]

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