From Group-Think to Thinking about Groups

Author : Robert Rosen

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Yuval Feldman, Adi Libson and Gideon Parchomovsky, *Corporate Law for Good People*, 115 **Nw. U. L. Rev.** (2020), available at SSRN.

Corporate law has incorporated some of the sociology of organizations. Often, this is by incorporating the concept of an organization having a culture. The organization's culture organizes thought by individuals within the organization both by incorporating norms of satisficing and stimulating groupthink. In compliance, "tone at the top" is thought to be necessary. And, the concept of the organization shaping decisions within it explains why pervasiveness replaces *mens rea* for corporate criminal liability.

For many, organizational sociology is too vague. After all, in 1949, Clyde Kluckhohn demonstrated 73 different meanings that are attached to the concept of "culture." Although the effects of organizations are apparent, the mechanisms by which organized experience frames individual decision-making are more difficult to understand. This is especially true in a culture, like ours, that prizes the self-determination of individuals.

Enter Corporate Law for Good People by Yuval Feldman, Adi Libson and Gideon Parchomovsky. Committed to methodological individualism, this essay explores individual behavior that is other-regarding and applies this psychology to corporate law. One of the pleasures of this article is its relentless adoption of one species of psychological analysis. It replaces the economically-rational individual with one whose self-interest incorporates a concern for others. The other genius of this article is its unflinching incorporation into corporate law of the results of this perspective.

For example, the authors suggest that board decision-making ought to adopt a "two-tier structure." First, a single board member ought to make a decision about an issue. Not knowing how others would react, the single board member would be more free to consider the issue in all its complexity. The entire board would be presented with the single board member's recommendation, but having a decision already made would lessen "the dishonesty that group deliberation generates" and potentially create dissonance with the norms of the board as a whole, thereby improving corporate decision-making. For the same reason, they criticize Van Gorkum's reliance on lengthy deliberations in itself as a solution to problems of bias.

Psychology is brought to bear to answer the question: Why do people commit wrongs for the corporation even if it hurts themselves? The answer lies in understanding why people do things for their team that they wouldn't do for themselves. To do that, the authors explore research that they label the field of "behavioral ethics," although it actually is a subset of writing about the genesis of ethical (and non-ethical) behavior. The key finding of the research that they review is "that transgressions are easier to justify when they benefit other parties." For example, a lawyer will act on behalf of her client in ways that they might deplore in others.

The article illuminates what has been forgotten in the Caremark line of cases. Chancellor Allen began with the question of board liability for "unconsidered inaction" and the Delaware Supreme Court ended with a rule of liability for failing to respond to red flags flying. In contrast to the Court, the article explores the "'automatic' mechanisms" that lead to unconsidered and unethical omissions.

The article then turns to consider situations in which the corporate actor wants "to be sensitive to the interests of others, and, in many cases, actually act according to those principles." In these situations, sanctioning misconduct, without precisely defining what constitutes misconduct *ex ante*, will not deter because the actor has the conscious belief that they are in the right. Increasing vagueness in what is in others' interest, such as replacing shareholder primacy with a stakeholder account, will only increase wrongdoing because it allows "agents more interpretive leeway that may be used to further their own self-interest," although they consciously are pursuing the others' interests.

Paying attention to the disjunction between conscious and less than conscious reasoning leads the authors to recast the understanding of "independence" in the context of board members and other professionals. Understanding oneself as "independent," the authors conclude from psychological studies, "does not provide immunity against wrongdoing, but… may even entice wrongdoing by encouraging the agent to believe that she is immune from the influence of subtle conflict-of-interest[s]."

The authors justify imposing liability on the corporation for the actions of its agents because the agents are justifying their misconduct on the grounds that it is in the interests of the corporation. This is true even when the wrong-doing also personally benefits the wrong-doer because "there is a greater tendency to promote one's self-interest when it also benefits others."

On point after point, the authors have us reframe what we thought we knew about corporate behavior. They prove again and again what Louis Auchincloss knew when he told us that friendship in corporate life is often a way to later get the "friend" to do the unethical. But the authors take this insight into reconceiving corporate law.

As lawyers we know that we become vulnerable by taking on clients: We may forget our ethics in advancing client interests. The authors, however, emphasize that in asserting that our decisions are dominated by our clients, we also can hide to ourselves how we are pursuing our self-interests, such as running up the bill in order to better serve the client. We think of ourselves as "good people" but are being biased in ways that may serve ourselves more than our clients.

Although the article is full of insights, there is a cost in reducing sociological phenomena to individual ones. They praise requiring managers to certify that they didn't manage earnings because it reframes "a passive behavior into an active one." Perhaps, but many corporate cultures transform that certification into being understood only as "I trust my subordinates."

There also is a cost in taking literature on bias in decision-making on behalf of others as constituting the field of "behavioral ethics." First, even if we reduce ethics to "other-regarding actions," that we can criticize these actions reveals that we have not subsumed ethics to these behaviors. Second, psychology has produced much more than an account of biases (and diseases). For example, positive psychology is not in evidence in this article. While professionals can hide to themselves how their supposed independence is working at the expense of their clients, professionalism also may augment dignity, bravery and persistence, habits of the heart that can stimulate ethical activity. Of course, these criticisms are beyond the scope of this article, so they do not lessen its own charm.

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