Good People, Bad Laws

Kenneth M. Davidson

Do not be deceived by the pale blue sky, fluffy white clouds and golden halo on the cover of Lynn Stout's book *Cultivating Conscience*. This is not a mushy, do-gooder guide to proper behavior. Stout, the Paul Hastings Professor of Corporate and Securities Law at UCLA, has crafted a calmly styled, no-nonsense, highly policy-relevant attack on what may be best described as an atavistic state of mind concerning bad behavior and the nature of punishment. Having assembled an arsenal of behavioral economics studies, evolutionary biology theories and life stories, Stout demonstrates that unselfish behavior is not only common but also necessary for societies to function. Laws that rely on punishment and deterrence, as most of ours still do, are necessary for a small category of people and certain types of actions, but they do not alone constitute a viable basis for regulating the vast range of human relationships. We can have a safer, more economically productive and more humane society if we jettison the antique view of human social nature that still informs our implicit assumptions about crime and punishment.

Stout's piñatas of choice to illustrate the old view are Justice Oliver Wendell Holmes, Jr., and the Chicago School economists. Along with much else he did, Justice Holmes's 19th-century "bad man theory of law" has had an enduring impact on American law:

> If you want to know the law . . . you must look at it as a bad man. . . . [T]he notion of legal duty . . . we draw from morals. But what does it mean to the bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.

Holmes extended this view to contract obligations, defining them as actions that harm other people or their property: "[T]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else."

Holmes's formulation provided a model for the cost-benefit calculations that are the theoretical foundation of Chicago School economic analysis. Judge, law professor and a prolific founder of the Chicago School, Richard Posner stated clearly his understanding of economics:

> to explore the implications of assuming that man is a rational maximizer of his ends [desires] in life, his satisfactions—what we shall call his 'self-interest'. . . . The concept of man as a rational maximizer of his own self interest implies that people respond to incentives.

Stout quotes Posner's Chicago colleague Steven D. Levitt, who said, "Criminals, like everyone else, respond to incentives." Gary Becker, their Nobel Prize-winning colleague, appears in the book, too, stating that criminal punishment "can be considered the price of an offense . . . for example, the price of stealing a car might be six months in jail." In other words, for the self-interested person, rational choices are dictated solely by personal gain. The effects of individual choices on other persons are irrelevant except to the extent they might provoke retribution by those harmed or by the legal agents of society in the name of persons harmed.

Stout rejects the proposition that law should be based on the assumption that we are in the main bad people who act solely on the basis of rational self-interest. She argues that this is a wildly incomplete description of human social life and blames it for creating generations of bad mental habits leading to misbegotten interactions of all kinds. Backed by hundreds of studies by behavioral economists, as well as evolutionary theory, anthropological studies and neuroscience, she claims that people often really are motivated by conscience, generosity and even altruism.

For example, Stout uses the work of Nobel Prize-winning behavioral economist Daniel Kahneman to show that conscience and related factors are frequently more important than self-interest in determining people's actions. She also describes a behavioral study called the Ultimatum Game. The game involves two strangers who do not meet or communicate during the game. One person is given $100 and told that he can keep all the money or divide it however he wishes with the second person, on the condition that the division of the money is acceptable to that person. If it is not acceptable, neither gets any money. If the rational self-interest model were the best description of human behavior, one would expect the first person to keep, say, $99 and give the second person $1, with both reasoning that even an unfair division is better than nothing. Of course, the actual results of the experiment tend to be dramatically different than this. Nearly all "recipients" reject an offer less than $25. Furthermore, most "donors" offer $40–$50. Almost all recipients accept offers of $40 or more.

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How can we explain these seemingly "irrational" results? Why would a donor give up $25 or more so that a totally unknown recipient will get a larger amount of money? The answer is clear: A moral principle, fairness, comes into play for most people that trumps self-interest narrowly defined.

Stout's conclusions based on these studies have three broad implications. First, most people agree on what constitutes a fair division, and most abide by that judgment. Second is what might be called the "virtue of spite", or the tendency to retaliate in response to unfairness. Although the recipient in the game gets nothing personally by rejecting an unfair deal, society as a whole benefits from that person's efforts to reinforce the principle that fairness is expected and that violators of it may suffer negative consequences. Third, some people, if not most, will act rationally, accepting an unfair division rather than punishing the "donor" for it.

Other studies have suggested that the likelihood that individuals will act in a fair manner depends upon the social context. Stout summarizes the elements as follows:

Justice Oliver Wendell Holmes, Jr.

> Unselfish prosocial behavior toward strangers, including unselfish compliance with legal and ethical rules, is triggered by social context, including especially: instructions from authority; beliefs about others' prosocial behavior; and the magnitude of the benefit to the others. Prosocial behavior declines, however, as the personal cost of acting prosocially increases.

Instructions from authority can promote moral or immoral behavior, depending on the nature of the instructions. Beliefs about others' behavior can also affect the expected fairness of their actions. For example, Stout notes that teachers of economics describe people as motivated primarily by self-interest, which may explain why "economics majors are famous for cooperating less in [behavioral studies] than non-economic students do." Empathy is also commonly observed to vary according to magnitude, as between merely giving directions to persons who are lost on one extreme to throwing a life preserver to a drowning person on the other.

Yet another set of behavioral studies that Stout describes adds to the insight that shared values and social context matter. One study, which has been replicated, concerns a common problem faced by day care centers. For various reasons, some parents tend to be late picking up their children and thereby inconvenience day care personnel, most of whom have after-work commitments. In the study, they worked with behavioral economists to impose a new rule that in effect fined parents who were late picking up their children on the grounds that it was unfair to expect the staff to stay late. To the surprise of some, the effect of the fine in this and succeeding studies was to increase the number of parents who were late in picking up their children. How to explain this?

The effect of the fine appears to have changed certain parents' perceptions. What had been a personal commitment to pick up their children at a designated time became for some an economic exchange in which the parents could trade tardiness for money. The fines were then abolished and the parents were told that the purpose of their being on time was to free up the staff at the designated time, not to earn additional money for the day care center. The percentage of parents who were late then declined, but remained higher than it was before the fines were instituted.

This study has potentially critical implications for designing social policy. It suggests that Stout's three prosocial factors—authority, or the day care center's rules about the pick-up time; conformity, or the well-founded belief that most parents picked up their children on time; and empathy, or the recognition that lateness imposed an unfair burden on the staff—could be easily overcome by a rule that seemed to change the context of the relationship between the parents and the day care staff. Moreover, once changed, it was not easy to reestablish the foregoing level of prosocial behavior.

History supports the study's conclusion that the prosocial behaviors that make civilization possible can be undermined by anti-social mass messaging. In other words, behavior and how behavior is perceived form a recursive process, giving rise to self-fulfilling, or self-denying, prophecies. To the extent that we arrive at the conclusion that people are basically selfish and unreliable or that groups of people are not worthy of trust or respect, we undermine the possibility of civilized society. If, say, too many voices assert that taxes are government theft, then people are less likely to pay them. If we treat alien residents in the United States as if they are more likely to be criminals, the alien population is less likely to cooperate with law enforcement officials. And so on.

Stout is convincing on this central point, that prosocial behavior is both common and critical to flourishing societies, from primitive hunter-gatherers to industrial and post-industrial societies. She might have based her argument on an historically deeper analysis of Holmes's antecedents, and she might have extended her example set into other kinds of legal questions, but she limits herself apparently in order to make her argument succinct and appealing to non-lawyers. Her strongest evidence for the ubiquity of necessary prosocial behaviors comes from her analysis of contract law.

Chicago School economists often cite contract law as being the basis of civilized society, on the grounds that contracts represent a means through which people define mutual obligations. While the notion that "we get what we pay for" may sufficiently describe buying apples at the grocery store, it has little relevance to most written contracts. Stout points out that contracts for future performance that incorporate standards like "due care", best efforts" and so forth are common even though they are logically impossible to define except by reference to an understood context of social or moral standards. The future contains so many possibilities that a contract that attempts to define all foreseeable contingencies would fill mountains of paper yet still necessarily be incomplete. The fact that we regulate relationships by such ill-defined obligations demonstrates that conscience, morality, trust and commonly held values are not only real but necessary for successful social interactions.

Stout points to ominous signs that prosocial values in our society take a hit not just from the actions of celebrity miscreants like Bernie Madoff and other corporate thieves but also from the everyday words and behaviors of economists and politicians. She also tries to point the way back to a healthier, less deculturated public weal, urging new laws and public policies to reinforce prosocial factors. For example, we might use tort law to declare it unlawful to harm others as a result of failing to exercise due care. It is better to emphasize that speeding, disobeying traffic signs and driving while drunk are socially unacceptable behaviors than it is to focus on violators having to pay damages to persons harmed for laws or contacts breached. Similarly, Stout argues that maintaining the appearance that norms are not commonly flouted enhances compliance with those norms—an observation made famous by James Q. Wilson's "broken windows" theory of policing.[1]

If these seem like minor actions that are unlikely to have major effects, compare contract and tort law to immigration law and criminal laws against gambling, drug use and prostitution. There are more than ten million illegal immigrants in the United States, more than twenty million illegal drug users, and an even larger numbers of persons who gamble in office pools, friendly card games and engage in other technically unlawful betting activities. Laws against such activities are only erratically enforced because there is little social consensus about their appropriateness, a situation that creates a breeding ground for law enforcement and judicial corruption. If, as Stout says, "good laws make good people", it follows that bad laws can make bad people and undermine trust in the institutions that make genuine society possible. "Conscience exists", she insists. "It is both a powerful force and an endemic one. It can be destroyed, to our collective loss. But conscience can also be cultivated. Law plays a vital part in that process."

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[1]See Wilson and George L. Kelling, "A Quarter Century of Broken Windows", *The American Interest* (September/October 2006).

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