Enjoy the Little Things

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Emily Kadens, *Cheating Pays*, 119 **Columbia L. Rev.** 527 (2019).

According to Columbus, the protagonist of *Zombieland* (2009), "enjoy the little things" is Rule #32 for surviving a zombie apocalypse. Professor Emily Kadens' *Cheating Pays* explores the darker side of enjoying the little things against the backdrop of the 1622 trial of a London grocer, Francis Newton. Specifically, Professor Kadens argues that in the context of cheating by heavily networked commercial actors, it is the little things—small-scale but regular cheats in transactions with contracting partners—that pay off in the end. Small cheats are potentially more lucrative than large cheats because small cheats are unlikely to be discovered or may be discounted as mistakes even if discovered, the cheater can take steps to misdirect attacks on the cheater's reputation, and contracting partners are unlikely to take significant measures to punish the small-scale cheater even after the cheats are discovered.

In this sordid tale of petty lies, betrayal, and revenge, the villain was not particularly glamorous nor interesting in terms of the scale of his misconduct. Francis Newton was a successful grocer who routinely cheated customers and suppliers by subtly altering the length of balance scale arms, substituting low quality goods in sales to buyers, changing tare weight markings on shipping containers, and secretly attaching extra weights to scale platforms. These cheats presented lighter weights on goods sold by suppliers and heavier weights on goods sold to customers. Newton apparently carried on this scheme of regular, small-scale cheats for at least a decade before rumors of his dishonesty began to spread. Although earlier cheats had been discovered by others, it was not publicly sanctioned until Newton's enemies began a campaign to spread news of the cheats and ultimately bankrupted themselves bringing Newton to trial. Newton was found guilty of dishonest practices and forced to make a public apology and pay a £1000 fine. Nonetheless, Newton appears to have continued more-or-less successfully in business after that public punishment.

Professor Kadens uses this story to critique the standard trope in contract theory that fear of reputational harms will cause repeat players in business networks to resist the temptation to cheat their contracting partners. Ultimately, Kadens lays out a detailed, original, and powerful case demonstrating that while reputational concerns likely do curb large scale cheating, small-scale cheating by contract partners not only will likely go unpunished but also may not yield serious consequences for future dealings even when discovered and punished.

London grocers of Newton's time were members of a trade guild with the power to sanction individual grocers for wrongdoing. Grocers engaged in repeated transactions with their regular customers and suppliers, but those customers and suppliers also interacted with each other and with other grocers regularly. In this network, reputational information regarding individual players could be disseminated relatively inexpensively as actors within the network shared news and gossip about their dealings with each other.

In this context, theories of private ordering predict that actors in the network have strong incentives to deal honestly with each other. Any member of the network who believes their contracting partner has behaved dishonestly can punish that behavior by spreading the news of the cheating through the network. Consequently, assuming there are no extrinsic factors controlling morality such as ethical or religious beliefs, actors in such contexts will refrain from cheating behavior where the cost of cheating exceeds the benefits. Thus, in such a system, we might expect to see a retiring corporate officer embezzling $20 million if the officer has confidence in being able to relocate to a jurisdiction with no extradition treaty because the return on investment is significantly in excess of the expected loss from discovery. But such grand opportunities are rare, especially compared to opportunities for lower level cheats such as hiding personal expenses on a corporate credit card, selling misbranded products, or cheating customers and suppliers in calculating prices. In the latter situations, private ordering theories predict that the potential reputational costs (and expected losses discounted by the likelihood of discovery and punishment) of small order cheating just aren't worth it. In other words, potential cheaters should be guided by the maxim, "Go big or go home."

Kadens counters this narrative by observing that many factors make regular, small-scale cheating profitable.

> While private-ordering theories may accurately predict that fear of the loss of reputation will keep cheaters from committing big cheats, they do not have the same disciplinary power over small cheats. Cheaters are clever; victims can be ignorant of their victimization or unwilling to broadcast it; and gossip can be ambiguous. All of these real life factors render reputation an imperfect policing mechanism. As a result, low-level cheating may be—and indeed is—a common cost of doing business. Such low-level cheating certainly seems to have been embedded in the grocery market of early seventeenth-century England…. (P. 543.)

This article is an important insight into the limits of private ordering and insightfully analyzes the factors contributing to the success of dishonest actors even within a commercial network that should serve to impose reputational costs that should prevent cheating. As Kadens notes, it is unclear whether Newton was an anomaly or whether all actors in his network simply assumed that everyone engaged in small-scale cheating as a cost of doing business in that network. Newton's accusers, for instance, engaged in their own small-scale cheats. While such trade expectations may ameliorate the immorality of cheating within the network, it remains that cheating reduces economic efficiency and activity. To counteract this drain, however, regulatory and private contract solutions must account for the possibility that the cost of remediation may exceed the economic benefits. At the end of the day, we may be left with the conclusions that cheating will occur and that cheating pays for those who just enjoy the little cheats.

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