

INSIGHTS FROM PSYCHOLOGY: TEACHING  
BEHAVIORAL LEGAL ETHICS AS A CORE  
ELEMENT OF PROFESSIONAL  
RESPONSIBILITY

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ABSTRACT

*The field of behavioral legal ethics—which draws on a large body of empirical research to explore how subtle and often unconscious psychological factors influence ethical decision-making by lawyers—has gained significant attention recently, including by many scholars who have called for a pedagogy that incorporates behavioral lessons into the professional responsibility curriculum. This Article provides one of the first comprehensive accounts of how law teachers can meet this challenge. Based on an approach that employs a variety of experiential techniques to immerse students in the contextual and emotional aspects of legal practice, it provides a detailed model of how to teach legal ethics from a behavioral perspective. Reflections on the approach, including the encouraging response expressed by students to this interdisciplinary method of instruction, are also discussed.*

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## I. INTRODUCTION

There may be no area of legal education that is more maligned, or that has received more calls for reform, than the professional responsibility curriculum.<sup>1</sup> Described once as the “Cinderella” of the law school experience because it is often “tolerated, rarely loved,”<sup>2</sup> there has been no shortage of proposed fixes. Some have focused on methodological changes, for example, arguing that ethics be taught pervasively throughout the curriculum<sup>3</sup> or from a contextual perspective such as in specialized, semester-long classes that focus

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1. Many have noted the disrepute the professional responsibility curriculum suffers inside law schools. See Anita Bernstein, *Pitfalls Ahead: A Manifesto for the Training of Lawyers*, 94 CORNELL L. REV. 479, 502 (2009); Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 CLINICAL L. REV. 43, 43 (2009); Stephen Gillers, “*Eat Your Spinach?*”, 51 ST. LOUIS U. L.J. 1215, 1216-18 (2007). And yet, despite these many criticisms, professional responsibility may be more pertinent than any other subject to the daily lives of lawyers and, as a result, is one of the most important courses in law school. See, e.g., Gillers, *supra*, at 1220.

2. *Id.* at 1218.

3. See generally DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992). The benefits of the pervasive method are described in the influential Carnegie Report on Legal Education. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 151-52 (2007).

on particular subject matter.<sup>4</sup> Others have called for substantive curricular reform, for example, by focusing more explicitly on teaching moral reasoning,<sup>5</sup> teaching the foundations of virtue theory,<sup>6</sup> or teaching from a philosophical<sup>7</sup> or sociological perspective.<sup>8</sup> And then there are some who have synthesized many proposals for change arguing that unless ethics is taught pervasively, in context, and with an emphasis on how students develop and grow in moral capacity, then it will remain “a second class citizen” of legal education.<sup>9</sup>

While these suggestions deserve the attention they have received, this Article focuses on a different approach, one that is grounded in decades of empirical research from behavioral science. Recently dubbed “Behavioral Legal Ethics,”<sup>10</sup> the central idea is that unethical conduct is frequently the product of psychological factors that occur largely outside of the conscious awareness of the decision-maker. The result is that well-intentioned lawyers will often be unaware of how their behavior diverges from their own conceptions of themselves as ethical and honest people.

Recognizing the importance of teaching legal ethics from a behavioral perspective is nothing new. Indeed, more than a decade ago, one leading scholar stated rather bluntly: “[P]rofessional responsibility professors who ignore the psychological

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4. See generally Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998); Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 LAW & CONTEMP. PROBS. 193 (1995). One of the leaders in this movement, Fordham Law School, has offered a variety of context-specific courses, such as ethics in tax law, corporate law, and criminal law, among others. See Green, *supra*, at 372-73. Other forms of context-based instruction have also been developed. See, e.g., *id.* at 371-72 (describing week-long intensives, such as Duke’s intensive course on ethics in civil litigation).

5. See generally Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995). But see W. Bradley Wendel, *Moral Judgment and Professional Legitimation*, 51 ST. LOUIS U. L.J. 1071 (arguing that legal ethics instruction should not focus on improving general moral reasoning).

6. See generally Lorie M. Graham, *Aristotle’s Ethics and the Virtuous Lawyer: Part One of a Study on Legal Ethics and Clinical Legal Education*, 20 J. LEGAL PROF. 5 (1996).

7. See generally Nathan M. Crystal, *Using the Concept of “A Philosophy of Lawyering” in Teaching Professional Responsibility*, 51 ST. LOUIS U. L.J. 1235 (2007).

8. See Elizabeth Chambliss, *Professional Responsibility: Lawyers, a Case Study*, 69 FORDHAM L. REV. 817, 822 (2000).

9. See Russell Pearce, *Legal Ethics Must Be the Heart of the Law School Curriculum*, 26 J. LEGAL PROF. 159, 159 (2002).

10. See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1112-13 (2013).

underpinnings of moral reasoning are plainly guilty of educational malpractice.”<sup>11</sup> Others have voiced similar, albeit perhaps less stark, recommendations for a curriculum of legal ethics that incorporates an interdisciplinary approach based on behavioral science.<sup>12</sup>

Yet, despite these calls for a behavioral approach to the legal ethics curriculum, little has been written for law teachers who want to adopt such a pedagogy in their classrooms.<sup>13</sup> In part, this might be

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11. Mary C. Daly, *Teaching Integrity in the Professional Responsibility Curriculum: A Modest Proposal for Change*, 72 FORDHAM L. REV. 261, 268-69 n.37 (2003).

12. See Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639, 1668-69 (2015); Nancy Rapoport, *Changing the Modal Law School: Rethinking U.S. Legal Education in (Most) Schools*, 116 PENN ST. L. REV. 1119, 1152 (2012); Rhode, *supra* note 1, at 51; Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1585-86 (2009); Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043, 1045 (2007) [hereinafter *Teaching Legal Ethics*]; Richard W. Painter, *Irrationality and Cognitive Bias at a Closing in Arthur Solmssen's The Comfort Letter*, 69 FORDHAM L. REV. 1111, 1127 (2000). Scholars have also broadened this discussion, arguing for an infusion of psychology of lawyering throughout the law school curriculum. See Jean R. Sternlight & Jennifer K. Robbennolt, *Psychology and Effective Lawyering: Insights for Legal Educators*, 64 J. LEGAL EDUC. 365, 375-77 (2015); see also Robert C. Bordone, *The Lawyer as Bias Buffer or Bias Aggravator*, in IDEOLOGY, PSYCHOLOGY, AND LAW 448-49 (Jon Hanson ed., 2012) (arguing that, to be competent as future practitioners, law students ought to be familiar with the literature on cognitive biases and heuristics). Interestingly, some of the most extensive discussions regarding the need for a behavioral approach to ethics education come from business school professors rather than legal educators. See, e.g., Minette Drumwright et al., *Behavioral Ethics and Teaching Ethical Decision Making*, 13 DECISION SCI. J. INNOVATIVE EDUC. 431 (2015); Robert Prentice, *Teaching Behavioral Ethics*, 31 J. LEGAL STUD. EDUC. 325, 326 (2014); Michael B. Metzger, *Bridging the Gaps: Cognitive Constraints on Corporate Control & Ethics Education*, 16 U. FLA. J.L. & PUB. POL'Y 435 (2005). This is not surprising given that many of the primary researchers in the area teach in business schools.

13. This is not to say that the subject has been completely overlooked in the law school curriculum. For instance, two leading scholars who have written about behavioral science and legal ethics have integrated readings from the field into their well-known course book. See DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 448-56 (5th ed. 2009). And another casebook incorporates important findings from the much larger body of judgment and decision-making literature about factors that can influence ethical judgment. See generally DAVID MCGOWAN, DEVELOPING JUDGMENT ABOUT PRACTICING LAW (2d ed. 2013). Included in this approach are some exciting pedagogical methods—such as problems focusing on the power of the psychology of framing and explanations of prospect theory and loss aversion—that can help students understand aspects of behavioral science. *Id.* at 39, 58-60, 80-81; see also David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057 (2007) (explaining why

because, until recently, there has been no easily accessible, yet comprehensive, overview of the behavioral research that can act as a primer for those not familiar with the foundations of the science in the area. That has now changed with the publication of recent scholarship providing a broad account of the various psychological factors that influence ethical judgment and behavior of lawyers.<sup>14</sup>

As a result, the time is now ripe for a discussion on how best to teach behavioral legal ethics in the professional responsibility curriculum. This Article, a comprehensive account of how to integrate behavioral science into legal ethics education, is one of the first in that direction.<sup>15</sup> Drawing on my own experience, I describe a two-track approach in my survey course on legal ethics:<sup>16</sup> The first integrates the core tenets of behavioral science into classroom discussions, while the second utilizes a more in-depth examination of the subject matter through an extra credit assignment in which students read, comment on, and help produce a class blog developed for the course.

What follows is my account of teaching from this perspective. It is written primarily for two audiences: those who have little

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judgment and decision-making theory, including the literature on heuristics and cognitive biases, should be taught as part of the legal ethics curriculum).

14. See, e.g., Perlman, *supra* note 12, at 1668; Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective*, 15 NEV. L.J. 671 (2015); Robert A. Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35 (2015); Robbennolt & Sternlight, *supra* note 10; Kath Hall, *Why Good Intentions are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS (Kieran Tranter et al. eds., 2010). For a slightly earlier overview of research in the field, published in 2009 as a book review, see Levin, *supra* note 12. This is not to discount the large body of legal scholarship that, for some time, has addressed the psychology of ethical decision-making. But this earlier scholarship has focused largely on specific domains of lawyer decision-making—see, for example, *infra* notes 35-44 and accompanying text—rather than developing a comprehensive account of how psychology and related disciplines help to explain lawyer ethics. See Robbennolt & Sternlight, *supra* note 10, at 1112-13 (noting that, as of 2013, there had been no “comprehensive survey of the implications of psychology for legal ethics”).

15. Another approach developed by educators in Australia focuses on teaching behavioral legal ethics using a curriculum modeled after an approach originally created for business schools. See Vivien Holmes, *'Giving Voice to Values': Enhancing Students' Capacity to Cope with Ethical Challenges in Legal Practice*, 18 LEGAL ETHICS 115 (2015). For a more complete description, see *infra* notes 231-35 and accompanying text.

16. The three-credit course, taught during the second year, is a required part of the curriculum.

familiarity with the research on behavioral legal ethics but who are curious about whether and how to incorporate a behavioral approach into the professional responsibility curriculum, and those familiar with behavioral science who are seeking new ways to teach the material to their students. Part II describes this approach. It starts with a brief review of the literature for those who may need grounding in the subject and then turns to the mechanics of the course in some detail. Part III reflects on the experience, starting with student reactions to this method of instruction—which, on the whole, have been quite positive—suggesting that incorporating lessons from behavioral science can add a valuable dimension to the legal ethics curriculum. Also discussed is the importance of staying current on developments in the field of behavioral science, as well as some thoughts on other approaches and future directions in the field.

## II. TEACHING BEHAVIORAL LEGAL ETHICS

### A. Understanding Behavioral Science

Many who teach professional responsibility may have an understanding of behavioral legal ethics, so for them there is no need for a briefing on the literature in the field. For others who may need to develop a base of knowledge on the relevant science, there is a long list of available resources upon which to draw.

The best place to start is with the scholarship that provides an overview of the field. There has been some excellent recent writing in this area, such as the comprehensive account provided by Jennifer Robbennolt and Jean Sternlight in their seminal article *Behavioral Legal Ethics*,<sup>17</sup> which coined the name for this emerging subject.<sup>18</sup> In it, the authors survey many factors that can blind lawyers from seeing both their own ethical missteps and those of others. These include a discussion of the mental tricks and distortions that cause everyone, lawyers included, to make predictable errors in ethical judgment;<sup>19</sup> the dynamics between the ambiguous rules that regulate lawyer behavior, the social forces and pressures in law practice, and the nature of the adversarial system that can cause lawyers to act against their own ethics;<sup>20</sup> the psychological reasons why it is so easy

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17. See Robbennolt & Sternlight, *supra* note 10.

18. *Id.* For another excellent overview of the field, see Jennifer K. Robbennolt, *Behavioral Ethics Meets Legal Ethics*, 11 ANN. REV. L. & SOC. SCI. 75 (2015).

19. Robbennolt & Sternlight, *supra* note 10, at 1114-24.

20. *Id.* at 1124-53.

to rationalize misbehavior after it happens;<sup>21</sup> and what social science tells us about the best ways to resist and overcome these psychological roadblocks.<sup>22</sup> The connective tissue between these many factors is that they all work in subtle, often unconscious ways to permit people to live under the illusion of their own ethicality, making it difficult to perceive ethical lapses when they occur.

After gaining an overview of the science, an instructor may want to delve deeper into the research. Again, many resources are available. For those who want a broader perspective on the psychological components of ethical blind spots, there are a number of excellent, easily accessible works by some of the primary researchers in the field of behavioral ethics.<sup>23</sup> These include *Blind Spots* by Max Bazerman and Ann Tenbrunsel<sup>24</sup> and *Mistakes Were Made (but not by me)* by Carol Tavis and Elliot Aronson.<sup>25</sup> In addition, there are many excellent books that describe the extensive body of research on cognitive biases and heuristics—the area that undergirds much of the literature in behavioral ethics.<sup>26</sup> Two of the

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21. *Id.* at 1153-56.

22. *Id.* at 1156-81.

23. “Behavioral ethics,” which describes the field of study more generally, has been defined in various ways, all with slight variations of emphasis. *See* Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 90 tbl.1 (2012). For present purposes, I adopt a broad definition provided by two of the leading experts in the field who define behavioral ethics as “the study of systematic and predictable ways in which individuals make ethical decisions and judge the ethical decisions of others, ways that are at odds with intuition and the benefits of the broader society.” *Id.* at 90; *see also* Drumwright et al., *supra* note 12, at 451 (“Behavioral ethics focuses on understanding cognitive errors, social and organizational pressures, and situational factors that can prompt people who do not intend to do anything wrong to engage in unethical behavior.”).

24. MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT’S RIGHT AND WHAT TO DO ABOUT IT* (2012).

25. CAROL TAVRIS & ELLIOT ARONSON, *MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS* (2008).

26. The body of literature describing research on heuristics and biases is vast, but almost always comes back to the foundational work of Daniel Kahneman and Amos Tversky. *See, e.g.,* Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973). “Heuristics” describes the many mental shortcuts that humans employ to make decisions under uncertainty. “Biases” describes the ways in which these mental shortcuts produce judgments that deviate systematically from those that would result from pure rationality. *See* Thomas Gilovich & Dale Griffin, *Introduction – Heuristics and Biases: Then and Now*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 1-3 (Thomas Gilovich et al. eds., 2002). The application of the underlying research in the heuristics and biases literature to law, often described as “behavioral law and

most well-known are *Thinking, Fast and Slow* by Nobel award-winning psychologist Daniel Kahneman<sup>27</sup> and *Nudge* by two leading experts, Richard Thaler and Cass Sunstein.<sup>28</sup> Another excellent book, written specifically for the legal profession, is *Psychology for Lawyers* by Jennifer Robbennolt and Jean Sternlight.<sup>29</sup> These and other available resources<sup>30</sup> provide a thorough explanation of how human cognition causes systematic and predictable errors in judgment, including errors that produce unethical behavior.

A number of online resources are also available. For example, a treasure trove of behavioral research is posted on EthicalSystems.org, a site dedicated to promoting ethical conduct in the business community.<sup>31</sup> Another resource, Ethics Unwrapped, a project of McCombs School of Business at the University of Texas at Austin, contains excellent videos and other teaching materials to assist educators interested in integrating behavioral ethics into the

economics,” is also vast; indeed, the seminal work in the field has been identified as the most cited law review article in any subject from 1995-2011. See Russell Korobkin, *What Comes After Victory for Behavioral Law and Economics?*, 2011 U. ILL. L. REV. 1653, 1654-55 (2011).

27. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

28. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

29. This book provides a rich description of many other aspects of the psychology of lawyering, including many social forces that influence decision-making by lawyers. See, e.g., JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 115-40 (2012).

30. There are other excellent books that describe many of the findings from behavioral research for a general audience. See generally THOMAS GILOVICH & LEE ROSS, *THE WISEST ONE IN THE ROOM: HOW YOU CAN BENEFIT FROM SOCIAL PSYCHOLOGY’S MOST POWERFUL INSIGHTS* (2015); NICHOLAS EPLEY, *MINDWISE: HOW WE UNDERSTAND WHAT OTHERS THINK, BELIEVE, FEEL, AND WANT* (2014); MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* (2013); FRANCESCA GINO, *SIDETRACKED: WHY OUR DECISIONS GET DERAILED, AND HOW WE CAN STICK TO THE PLAN* (2013); DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY* (2012). This last work by Professor Ariely has recently been made into a movie of the same name. See (DIS)HONESTY – THE TRUTH ABOUT LIES (The (Dis)Honesty Project 2015), <http://thedishonestyproject.com/film/> [<https://perma.cc/4J4K-YXXP>]. For those looking for more academic discussions of the field, see, for example, *HEURISTICS AND BIASES*, *supra* note 26; *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982).

31. See ETHICAL SYS., <http://ethicalsystems.org> [<https://perma.cc/R4FA-DJRC>] (last visited Sept. 23, 2016). Many of the primary researchers in the field of behavioral ethics are contributors to the EthicalSystems.org project. See *Who We Are*, ETHICAL SYS., <http://ethicalsystems.org/content/who-we-are#collaborators> [<https://perma.cc/M3EW-38Q7>] (last visited Sept. 23, 2016).

business school curriculum.<sup>32</sup> These and other resources,<sup>33</sup> while not generated specifically for the legal community, provide an excellent overview of the core aspects of behavioral ethics that can provide a foundation for anyone interested in learning about the research in the field.

Finally, for those who want a deeper psychological explanation specifically focused on legal ethics, there is a full body of legal scholarship. These works fall into roughly two categories. The first applies behavioral science research in various specific domains. So, for example, scholars have focused on many of the heuristics and cognitive biases that influence ethical judgments of lawyers in a variety of settings, including corporate lawyers,<sup>34</sup> criminal lawyers,<sup>35</sup>

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32. See *Ethics Unwrapped*, U. OF TEX. AT AUSTIN MCCOMBS SCH. OF BUS., <http://ethicsunwrapped.utexas.edu> [<https://perma.cc/TL6V-DXHT>] (last visited Sept. 23, 2016). For further details about the *Ethics Unwrapped* approach, see *infra* note 240 and accompanying text. A growing body of scholarship focusing on the role that behavioral ethics plays in the world of business is also available. For a sampling, see BEHAVIORAL BUSINESS ETHICS: SHAPING AN EMERGING FIELD (David De Cremer & Ann E. Tenbrunsel eds., 2012).

33. Other resources include high-quality (and free!) online courses. See, e.g., *Social Sciences*, COURSERA, [https://www.coursera.org/browse/socialsciences?languages=en&source=deprecated\\_spark\\_cdp](https://www.coursera.org/browse/socialsciences?languages=en&source=deprecated_spark_cdp) [<https://perma.cc/527VAWP4>] (last visited Sept. 23, 2016); *The Science of Everyday Thinking*, EDX, <https://www.edx.org/course/science-everyday-thinking-uqx-think101x-2> [<https://perma.cc/E3DZ-VTNX>] (last visited Sept. 23, 2016). Blogs and podcasts are also available on the subject. See, e.g., *Hidden Brain: A Conversation About Life's Unseen Patterns*, NAT'L PUB. RADIO, <http://www.npr.org/series/423302056/hidden-brain> [<https://perma.cc/X5PS-9A3F>] (last visited Sept. 23, 2016); YOU ARE NOT SO SMART, <http://youarenotsmart.com> [<https://perma.cc/FGX8-ABGK>] (last visited Sept. 23, 2016).

34. See, e.g., Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis*, 2012 WIS. L. REV. 495, 519 (2012) [hereinafter *Getting (Too) Comfortable*]; Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 159 (2011); Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 77 (1993).

35. Behavioral science has been applied to explain the conduct of prosecutors. See, e.g., DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006). Behavioral science has also been applied to explain the conduct of defense attorneys. See, e.g., Tigran W. Eldred, *Motivation Matters: Guideline 10.13 and Other Mechanisms for Preventing Lawyers from Surrendering to Self-Interest in Responding to Allegations of Ineffective Assistance in Death Penalty Cases*, 42 HOFSTRA L. REV. 473 (2013) [hereinafter *Motivation Matters*]; Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 340-44, 357-59 (2013) [hereinafter *Ethical Blindness*]; Tigran W. Eldred, *The*

solo practitioners,<sup>36</sup> and large firm lawyers.<sup>37</sup> Other scholars have broadened their perspective by focusing less on a particular practice setting and more on how the mechanics of decision-making raise fundamental questions about legal ethics theory.<sup>38</sup>

The second area of scholarship focuses on what is known as “situationism,” that is, the general notion that the subtle aspects of a situation often play a significant role in how decisions are reached.<sup>39</sup> In the ethical domain, most of this work has focused on two related situational variables that have received extensive scrutiny: the power of an authority figure to command obedience and the power of a group to exert pressure on an individual to conform to the group’s perspective.<sup>40</sup> Relying on classic studies on obedience and conformity from social psychology, these scholars have explored situational variables in various settings, including how subordinate attorneys can be expected to respond to the cues they receive from their superiors<sup>41</sup> and how newly minted attorneys can be expected to respond to various social pressures.<sup>42</sup> Other scholars have focused on specific practice settings, for example, exploring how conformity and obedience pressures influence the relationship between corporate clients and their attorneys,<sup>43</sup> or how social influence affects the conduct of government lawyers.<sup>44</sup>

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*Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 74-76 (2009) [hereinafter *Psychology of Conflicts*].

36. See generally Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309 (2004).

37. See, e.g., Nancy B. Rapoport, “Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 42 (2014).

38. See, e.g., Perlman, *supra* note 12.

39. See LEE ROSS & RICHARD NISBETT, *THE PERSON AND THE SITUATION: PERSPECTIVES OF SOCIAL PSYCHOLOGY* 8-11 (1991); see also THOMAS BLASS, *THE MAN WHO SHOCKED THE WORLD: THE LIFE AND LEGACY OF STANLEY MILGRAM* xxii (2009) (noting that situationism is the “defining theoretical stance of contemporary social psychology”).

40. See Catherine Gage O’Grady, *Wrongful Obedience and the Professional Practice of Law*, 19 J.L. BUS. & ETHICS 9, 19 (2013).

41. *Id.*; see also Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 452 (2007).

42. See O’Grady, *supra* note 14, at 682-84.

43. See, e.g., Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1003-04, 1008, 1044-45 (2005); see also Kim, *supra* note 34, at 150, 159, 161.

44. See, e.g., Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 41-42, 47 (2009); see also Cassandra Burke

In sum, there is a wealth of excellent scholarship that can help any instructor learn about the psychological dimensions of ethical judgments that lawyers make. The next step, which is just emerging, is how to teach this material as part of the ethics curriculum.

## B. Teaching Methodology

The perspective I have taken over the last two years teaches behavioral science as a core aspect of my ethics class.<sup>45</sup> The approach works on two tracks. The first integrates many of the central concepts from behavioral science into classroom discussions using a variety of techniques that have proven effective in other contexts to increase student engagement—such as participatory exercises that allow students to experience firsthand some of the illusions and cognitive biases well-documented in the behavioral research, role-plays and simulations to immerse students in some of the contextual and emotional dynamics that can influence ethical behavior, and the use of multimedia (especially video) that explore many of the core concepts in the area.<sup>46</sup> To set a foundation for these discussions and exercises, before the first class of the semester I require students to read a summary chapter on behavioral legal ethics from *Psychology for Lawyers*.<sup>47</sup> This primer, an excellent introduction to the subject, sets the stage for what follows.

Recognizing that there is only limited time per class to cover the core ethics curriculum, as well as to explore the insights that behavioral science has to offer, the second track takes place outside of the classroom and focuses on a companion blog created for the

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Robertson, *Beyond the Torture Memos: Perceptual Filters, Cultural Commitments, and Partisan Identity*, 42 CASE W. RES. J. INT'L L. 389, 395-96 (2009).

45. For a short summary of this approach, see Tigran W. Eldred, *Teaching Behavioral Ethics Across Disciplines*, ETHICAL SYS. (Dec. 29, 2014), <http://www.ethicalsystems.org/content/teaching-behavioral-ethics-across-disciplines> [https://perma.cc/CY35-AB94].

46. See *infra* notes 196-203 and accompanying text. Because of time constraints, I try to limit discussions of the psychology of decision-making to 5-10 minutes of the 75 minutes available per class session. So far, I have found that class discussions of behavioral legal ethics have not detracted in any significant way from teaching the doctrinal aspects of the course.

47. See ROBBENOLT & STERNLIGHT, *supra* note 29, at 385-416. This chapter is a shorter version of their longer work, *Behavioral Legal Ethics*, which provides more extensive discussion in its footnotes of much of the primary research in the field. See *supra* note 10. The American Bar Association, which publishes *PSYCHOLOGY FOR LAWYERS*, has made this chapter available free of charge to interested law professors to use in their curriculum. For more information, contact the publisher.

course, entitled *Understanding Behavioral Legal Ethics*.<sup>48</sup> Each week of the semester, I add one or two posts to the blog that dovetail with the material discussed in class. These posts allow for a deeper understanding of behavioral concepts, while also providing links to many of the core readings and additional multimedia material that explore the subject. In my first two years teaching in this manner, I decided to make participation in the blog voluntary and available for extra credit. If students decide to participate, they are required to read the blog regularly and to post at least three substantive comments during the semester. Some students gain additional credit by choosing to write a blog post on any topic relevant to behavioral legal ethics.<sup>49</sup>

What follows is a discussion of this approach, along with other suggestions for materials and methods that could complement it. While not every component of the course is described, I have attempted to provide enough detail that anyone interested would have a general roadmap of the approach. Nor do I attempt to cover all (or even most) of the social science that relates to judgment and decision-making—that would require its own dedicated course, if not more.<sup>50</sup> Instead, as will be seen, the focus is on some of the more significant behavioral insights documented in the empirical research.

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48. This blog is created using Wordpress.com—a free, easy-to-use blogging program that makes it simple for anyone who is interested to create a blog. I have decided to make the blog private, meaning that only my students have access to it, which preserves student privacy and also allows for a freer discussion than might occur if the blog was open to public viewing. An earlier iteration of the blog was created on another platform, Blogger.com, which is also an easy program to use that is available free of charge for anyone interested in blogging.

49. In my most recent experience of teaching the course (Spring 2015), I wrote 20 blog entries on a wide variety of topics, such as blind spots, the above-average effect, situationism, ethical fading, priming, fast thinking and conflicts of interest, and moral psychology, among others. For a sampling of the types of entries I post to the blog, see Tigran Eldred, *Teaching BLE: Ethical Fading*, BEHAVIORAL LEGAL ETHICS (Oct. 14, 2014), <https://behaviorallegalethics.wordpress.com/2014/10/14/teaching-ble-ethical-fading> [<https://perma.cc/GUF7-8MPC>]. By the end of the semester, there were 67 comments on these entries. In addition, 13 students contributed their own blog entries for additional extra credit.

50. Excellent resources are available for teaching a law course on professional judgment and decision-making. See, e.g., PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 3 (2010); see also Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 749 (2003) (advocating the use of case studies to teach students about the science of professional judgment and decision-making).

### 1. *Introducing Naïve Realism, Fast Thinking, and Blind Spots*

I start the semester by confronting an important psychological conundrum: As a general matter, people erroneously assume that their conscious experience is a full and accurate account of the world as it “really is,” without realizing the limitations of their own cognitive processes.<sup>51</sup> This phenomenon, which psychologists call “naïve realism,”<sup>52</sup> is so ingrained that it is the source of much conflict: When people disagree, they often ascribe bias to each other, while believing themselves to be objective.<sup>53</sup> This form of reasoning presents an obvious challenge to a behavioral approach. If the goal of the course is to help students understand that much of their own ethical decision-making occurs from systematic and implicit biases, then the first task must be to encourage them to consider and confront their own misperceptions.

My effort to address naïve realism starts in the first class, when we watch a video of the “Checkershadow illusion,”<sup>54</sup> which compares

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51. See Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781, 783 (2004) [hereinafter *Objectivity*]; see also Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in *HEURISTICS AND BIASES*, *supra* note 26, at 636, 640 [hereinafter *Understanding Misunderstanding*].

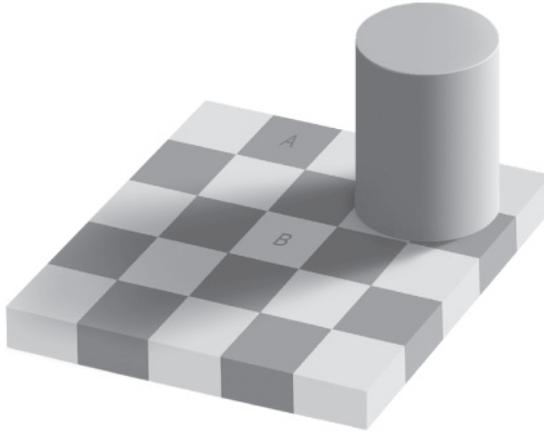
52. See *Objectivity*, *supra* note 51, at 783; see also ROBBENOLT & STERNLIGHT, *supra* note 29, at 21 (“Th[e] naïve realism results in the ‘feeling that [our] own take on the world enjoys particular authenticity, and that other actors will, or at least should, share that take, if they are attentive, rational, and objective perceivers of reality and open-minded seekers of truth.’” (quoting *Understanding Misunderstanding*, *supra* note 51, at 646)); BREST & KRIEGER, *supra* note 50, at 264-65 (describing the elements of naïve realism).

53. See *Objectivity*, *supra* note 51, at 781-83. As one expert has stated, “If I could nominate one candidate for “biggest obstacle to world peace and social harmony,” it would be naïve realism because it is so easily ratcheted up from the individual to the group level: My group is right because we see things as they are. Those who disagree are obviously biased by their religion, their ideology, or their self-interest. Naïve realism gives us a world full of good and evil, and this brings us to the most disturbing implication of the sages’ advice about hypocrisy: Good and evil do not exist outside of our beliefs about them. JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* 71 (2006). At an individual level, this phenomenon is known as the “false consensus effect,” which is the tendency people have to overestimate the degree to which others will share their views and to ascribe differences in opinion as evidence that others are biased by ideology and self-interest. See ROBBENOLT & STERNLIGHT, *supra* note 29, at 23.

54. Brusspup, *Incredible Shade Illusion!*, YOUTUBE (Aug. 11, 2011), <https://www.youtube.com/watch?v=z9Sen1HTu5o> [<https://perma.cc/CVS8-D6SS>]. For proof that checks A and B are the same shade of gray, see Edward H. Adelson,

the shades of gray in checks A and B (the static version of which is replicated in Diagram 1).

**Diagram 1**



Many of my students seem flabbergasted—at first blush, it seems almost impossible to believe that checks A and B are the same shade. Of course, they are.<sup>55</sup> At this point in the semester, my only goal is to illuminate how perception, in this case visual, can be misleading, so students can start to appreciate how they cannot always trust all of their own experiences.<sup>56</sup> As a result, I do not press too hard, other than to raise the possibility that people make systematic errors in judgment in a wide variety of domains.<sup>57</sup> I also emphasize how this

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*Proof of Checkershadow Illusion*, MIT, [http://web.mit.edu/persci/people/adelson/checkershadow\\_proof.html](http://web.mit.edu/persci/people/adelson/checkershadow_proof.html) [<https://perma.cc/F4CB-K3YQ>] (last visited Sept. 23, 2016).

55. The scientific explanation for the checkerboard illusion involves how the visual system detects shades and color. Because measuring light from the surface (known as luminosity) is insufficient to account for effects of shadows, the mind uses tricks to measure and compensate for shadows—a remarkably effective system, but one that is also prone to error. For a full explanation, see Edward H. Adelson, *Why Does the Illusion Work?*, MIT, [http://web.mit.edu/persci/people/adelson/checkershadow\\_description.html](http://web.mit.edu/persci/people/adelson/checkershadow_description.html) [<https://perma.cc/F297-UBYQ>] (last visited Sept. 23, 2016).

56. See KAHNEMAN, *supra* note 27, at 26-28.

57. For instructors who care to engage in a more detailed classroom discussion of naïve realism, one excellent way might be to explore the findings by Dan Kahan and colleagues in their study of the videotape that the Supreme Court, in *Scott v. Harris*, said “speak[s] for itself” about whether the police used excessive force during and after a high-speed car chase that injured the plaintiff. 550 U.S. 372, 378-80 n.5 (2007); see also Dan Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009). In the study, the researchers showed the videotape to 1,350 study

illusion reveals an important aspect of what Daniel Kahneman calls “fast thinking”; namely, that because these types of errors occur outside of conscious awareness, they cannot be eliminated simply through effort and deliberation.<sup>58</sup> After all, no matter how long one observes checks A and B—even after learning the reasons for this mind trick—it is impossible not to see the two checks as different shades.<sup>59</sup>

I complement this lesson in my first blog entry of the semester, which provides additional visual illusions, as well as some short videos that raise important questions about our powers of perception. In one, the now-famous Invisible Gorilla video,<sup>60</sup> observers are instructed to count how many times six people in the video pass a basketball between themselves; all the while, unexpectedly, a person in a gorilla suit walks through the video, turns to the camera, and thumps her chest, then exits the screen. Remarkably, almost 50% of the people studied who watch the video fail to see the gorilla, a phenomenon that researchers call “inattention[al] blindness.”<sup>61</sup> For

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participants, most of whom agreed with the Court’s conclusion that the videotape revealed that the police conduct during and after the chase was justified. *See id.* A substantial number of study participants, however, disagreed with the Court’s conclusion, finding that the tape depicted police conduct that was unjustified. *See id.* The researchers concluded that the contrast in opinions was the result of differing cultural worldviews, with the majority identifying more with hierarchical and individualist perspectives and the minority identifying more with egalitarian and communitarian views. *See id.* at 879. The videotape itself, which is available to be shown in class, can be used to illuminate how, contrary to the Court’s assertion, there are multiple reasonable interpretations of the events depicted, demonstrating the biasing influences of naïve realism. *See id.* at 895. Many other easily accessible materials are also available. For example, for a podcast on naïve realism focusing on the work of Lee Ross, the Stanford psychologist who first documented this phenomenon, see David McRaney, *Naïve Realism*, YOU ARE NOT SO SMART (Nov. 9, 2015), <http://youarenotsosmart.com/2015/11/09/yanss-062-why-you-often-believe-people-who-see-the-world-differently-are-wrong> [<https://perma.cc/9NAJ-XWNM>].

58. *See* KAHNEMAN, *supra* note 27, at 13, 28. This is not to say that conscious deliberation cannot lessen the influence of some unconscious aspects of decision-making. *See, e.g., infra* notes 179-83 and accompanying text.

59. For instructors who want to explore visual illusions in greater detail, including what they reveal about the relationship between automatic and deliberative processes of thinking, see KAHNEMAN, *supra* note 27, at 26-27 (describing the Müller-Lyer illusion); *id.* at 100-01 (describing the 3-D Heuristic).

60. For anyone who has not seen it, I suggest they stop reading now and watch the video. *See* Daniel Simons, *Selective Attention Test*, YOUTUBE (Mar. 10, 2010), <https://www.youtube.com/watch?v=vJG698U2Mvo> [<https://perma.cc/D8ZZ-5X4D>].

61. *See* CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US* 6-7 (1st ed. 2009) [hereinafter *Invisible Gorilla*]. For the original study, see Daniel Simons & Christopher Chabris, *Gorillas in Our*

my purposes, the video reveals two points: First, people generally overlook what they do not expect to see, even when it is prominently displayed right in front of them;<sup>62</sup> and second, most people are unaware of—that is, are blind to—the limits of their own attention.<sup>63</sup> After watching the video, I ask my students to ponder this question: If our minds can be so easily tricked through visual illusions and videos revealing inattention blindness, then in what other ways are we blind to aspects of our own experience?<sup>64</sup>

At this early stage of the course, my hope is that the class discussion and blog have raised student interest in the idea that lawyers can fail to perceive important aspects of their own reality, such as their own (and others') misbehavior. The rest of the semester

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*Midst: Sustained Inattentional Blindness for Dynamic Events*, 28 PERCEPTION 1059, 1066-73 (1999). Instructors might assign students this interesting NPR interview on the study: *Bet You Didn't Notice 'The Invisible Gorilla'*, NAT'L PUB. RADIO (May 19, 2010, 1:00 PM), <http://www.npr.org/templates/story/story.php?storyId=126977945> [<https://perma.cc/D2AR-QYAS>].

62. See CHABRIS & SIMONS, *supra* note 61, at 6-7 (“When people devote their attention to a particular area or aspect of their visual world, they tend not to notice unexpected objects, even when those unexpected objects are salient, potentially important, and appear right where we are looking.”).

63. As Chabris & Simons state, “The gorilla study illustrates, perhaps more dramatically than any other, the powerful and pervasive influence of the *illusion of attention*: We experience far less of our visual world than we think we do.” *Id.* at 7. The authors conducted a survey to document the effect, finding that 75% of people thought they would notice an unexpected event that occurred in front of their eyes, even if they were focusing on something else. *Id.* The study, which reveals that 50% of the participants failed to see the gorilla, demonstrates the power of this illusion. *Id.* at 6.

64. See, e.g., Langevoort, *Getting (Too) Comfortable*, *supra* note 34, at 514-15 (discussing how corporate lawyers can misperceive risk, just as study participants missed seeing the invisible gorilla). To reinforce this point, I post a second blog entry, entitled “A Few Bad Apples or Something Else,” which raises the question of whether most ethical transgressions are the result of intentional misbehavior or more subtle forms of misconduct. In it, I discuss briefly the case of Bernie Madoff, who might be described as the proverbial “bad apple” for his persistent and intentional misconduct, and then ask the students whether this form of misbehavior best describes most misconduct that occurs. Then I link to Professor Leslie Levin’s well-written book review, which surveys psychological research to make the point that, rather than a few bad apples, much of lawyer misbehavior results from subtle and unconscious forms of ethical lapses. See Levin, *supra* note 12, at 1552-53, 1583. This post ends with a video from *Ethics Unwrapped*, entitled “Bounded Ethicality,” which raises some of the same points. See UT McCombs School of Business, *Bound Ethicality*, YOUTUBE (Nov. 11, 2012), <https://www.youtube.com/watch?v=yDXLz2144g> [<https://perma.cc/CTD6-49R4>].

expands on these themes by focusing on specific aspects of behavioral science that relate to the law of lawyering.<sup>65</sup>

## 2. Situationism

In the weeks that follow, our substantive class discussions turn to the bar's licensing procedures,<sup>66</sup> the duty to report misconduct,<sup>67</sup> and managerial and subordinate responsibility for unethical behavior.<sup>68</sup> These are perfect opportunities to introduce and discuss the body of research known as "situationism," which explores the tremendous yet subtle power that situational variables can have on how people think and behave.<sup>69</sup>

The classroom discussion starts with the bar's licensing requirement, which directly poses the question of whether and how the profession should assess the moral character of its applicants—a topic that naturally raises a common fallacy in reasoning known as "the fundamental attribution error" (FAE). In a nutshell, the FAE describes the established tendency to overestimate the predictive value of personality and disposition, while undervaluing the power

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65. As may be evident, my approach does not seek to delve deeply into the underlying psychological explanations for why people make biased judgments based on limited information. An instructor could certainly do so, for example, by exploring how humans rely on scripts, schemas, stereotypes, and other short hands in their perception and construal of experience. I have decided, however, that too much detail on the foundations of social cognition early in the semester might sidetrack our discussions. For those who do want to explore these matters in more depth, excellent resources are available. See, e.g., SUSAN FISKE & SHELLEY TAYLOR, *SOCIAL COGNITION: FROM BRAINS TO CULTURE* 32-58 (2013). For easily accessible summaries of similar material, see, for example, ROBBENOLT & STERNLIGHT, *supra* note 29, at 7-27. See also Donald C. Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1569-97 (2000).

66. Most course books provide a good description of the licensing and admission process, including the one that I use: LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 52-77 (3d ed. 2012).

67. MODEL RULES OF PROF'L CONDUCT R. 8.3 (AM. BAR ASS'N 2002).

68. *Id.* R. 5.1-5.2.

69. See JOHN DORIS, *LACK OF CHARACTER: PERSONALITY & MORAL BEHAVIOR* 1-2, 23-26 (2002); see also ROSS & NISBETT, *supra* note 39, at 3-5. For an ongoing in-depth discussion of situationism and its relationship to various areas of the law, see *The Situationist*, <https://thesituationist.wordpress.com/about/> [<https://perma.cc/EEN2-M4NK>] (last visited Sept. 23, 2016), which is associated with the Project on Law and Mind Sciences at Harvard Law School. See *The Situationist*, <https://thesituationist.wordpress.com/about-plsps-at-harvard-law-school> [<https://perma.cc/2DZY-B7QG>] (last visited Sept. 23, 2016).

of situational forces, in explaining behavior.<sup>70</sup> The bar's focus on moral character is a classic example: By presuming that an applicant's past behavior is predictive of a particular disposition that suggests future conduct, the process fails to account for the situational variables that are highly influential in how decisions are made.<sup>71</sup> As with naïve realism, because I expect my students to possess assumptions about the preeminence of character over situational forces, I do not try to lecture them away from their beliefs. Rather, I simply identify the error in class and mention that there is a rich body of empirical research demonstrating it as a means to raise situationism as a topic.

Now that we have started to think about situationism, we are ready to start a more substantive discussion. There are many ways to address these issues. Two that naturally fit into the curriculum are the influences of conformity and obedience on decision-making.

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70. See DORIS, *supra* note 69, at 92-97; see also ROSS & NISBETT, *supra* note 39, at 125-33. Many legal ethicists have also written about the power of the FAE, including W. Bradley Wendel. See W. Bradley Wendel, *Stephen Glass, Situational Forces, and the Fundamental Attribution Error*, 4 J. L. 99, 99 (2014); see also Perlman, *supra* note 41, at 453; Alice Woolley, *Legal Ethics and Regulatory Legitimacy: Regulating Lawyers for Personal Misconduct*, in ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS 241-69 (Francesca Bartlett ed., 2010); Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 555-59 (1985). Professor David Luban has an interesting perspective on the FAE, wondering whether social psychologists have placed too much emphasis on the power of the situation to overcome individual variations based on character. See David Luban, *Integrity: Its Causes and Cures*, 72 FORDHAM L. REV. 279, 293-98 (2003). *But see* Perlman, *supra* note 41, at 468 n.103 (arguing that Professor Luban overstates the situationist perspective, in that situationism does not posit that individuals have no power to resist contextual influences, but instead "that dispositional traits are far less important than most people realize and that context is a much more significant determinant of human behavior than people typically believe"). See also DORIS, *supra* note 69, at 23-26 (describing the nuanced situationist perspective that takes into account individual variation); Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065, 1071-75 (2010) (discussing the interplay between situational variables and personality traits).

71. Deborah Rhode first made this point thirty years ago, while others have done so more recently. See Rhode, *supra* note 70, at 556-58; Leslie Levin, *The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement*, 2014 BYU L. REV. 775, 777-78 (2014); see also Alice Woolley, *Tending the Bar: The "Good Character" Requirement for Law Society Admission*, 30 DALHOUSIE L.J. 27, 37-41 (2007) (discussing the important role of situational variables in assessing Canada's good moral character assessment).

The role of conformity arises naturally in our discussion of the duty to report misconduct under Model Rule 8.3.<sup>72</sup> As we start to discuss this topic, I ask the students why this rule is so often violated.<sup>73</sup> Typically, students state that reporting a colleague's misbehavior might risk their jobs or endanger their reputations by casting them as disloyal members of the legal community. In other words, they believe that their decision on whether to report another's misbehavior would be triggered by a conscious cost-benefit calculation derived from rational decision-making. Few of my students, however, indicate that their resistance may be due to the subtle pressures to conform to group norms.

At this point, I introduce the famous research by psychologist Solomon Asch, who demonstrated more than fifty years ago the tremendous power of group pressure.<sup>74</sup> In his research, Asch explored the conditions under which an individual would conform to the consensus, even when the group's opinion is obviously wrong. The most well-known variation of his study is beautiful in its simplicity: A number of participants sat in a row, were shown two cards such as in Diagram 2, and then were asked to declare which line on the second card (A, B, or C) was the same height as the line on the first card.<sup>75</sup> The answer, of course, is obvious.

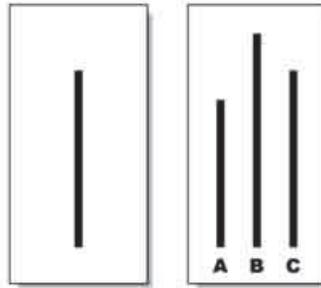
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72. The rule requires “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects” to “inform the appropriate professional authority.” MODEL RULES OF PROF’L CONDUCT R. 8.3(a). Confidential information is excluded from the obligation. *See id.* R. 8.3(c).

73. *See* Perlman, *supra* note 41, at 475 (“Rule 8.3 . . . is rarely enforced. The vast majority of states do not have a single reported case where a lawyer was disciplined under this rule.”).

74. *See* Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31, 32 (1955). For other descriptions of the Asch experiments, see Rapoport, *supra* note 37, at 62-63. *See also* ROBBENOLT & STERNLIGHT, *supra* note 29, at 133-34; O’Grady, *supra* note 40, at 18-19; Perlman, *supra* note 41, at 453-56.

75. *See* Asch, *supra* note 74, at 32.

**Diagram 2**

It turns out, however, that only one of the participants was actually the true subject of the study; the other participants were Asch's confederates who surreptitiously had been instructed to provide the wrong answer at designated times.<sup>76</sup> The study thus created an easy way to measure the degree to which subjects would be willing to succumb to or defy mounting pressure to join the group consensus.<sup>77</sup>

Rather than lecturing on Asch's methodology, I find it more effective to show my students Diagram 2 and ask which two lines are identical. Everyone answers correctly, as expected. Then I ask them to declare whether their answers would change if, prior to answering, they learned that all of their classmates had provided the wrong answer. No one tends to believe that the conduct of others would matter. We then watch a short video of the Asch study, which demonstrates a replication of his experiment in action and discusses many of its findings—including that 36.8% of the subjects in Asch's experiment conformed to the majority's view.<sup>78</sup> Perhaps even more startling, while many of the subjects did resist the majority pressure on one or more of the rounds, ultimately over 75% of them

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76. The subject had been told that the experiment was a vision test, whereas the confederates—who were secretly working with the experimenter—knew that its true purpose was to measure the power of conformity. Procedurally, the experiment involved multiple rounds in which the participants were shown two cards. In each round, a new set of cards with lines of different heights would be used. In the initial rounds, the confederates were instructed to provide correct answers so as to maintain the illusion that they were true participants in the study, but at a designated point in later rounds, as instructed, they provided incorrect answers. *See id.*

77. *See id.* at 32-33.

78. *Id.*

conformed to the majority at least once.<sup>79</sup> I explain that these results have been replicated in a multitude of studies since.<sup>80</sup>

The Asch study raises many points for discussion. For example, one of the most startling is that so many participants conformed, even though there was no penalty for failing to do so.<sup>81</sup> This raises the question of what would happen if, in a different situation, a person had a much greater incentive to conform to the group—for example, the fear of losing one’s job. It also produces a natural opportunity to discuss another finding from the studies: that the power to conform diminishes substantially when variables of the situation change.<sup>82</sup> For example, when unanimity is broken by at least one other participant who also does not conform, the level of conformity by the subject plummets.<sup>83</sup> An instructor can also explore the psychological explanations for conformity, for example, by discussing that some of Asch’s participants, when confronted with a group consensus, questioned the accuracy of their own perceptions, while others knew that they had been accurate and that the group was wrong, yet conformed anyway so as not to “spoil the results” of the experiment.<sup>84</sup>

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79. See *id.* at 35; see also Perlman, *supra* note 41, at 455. I use a short video clip of the Asch experiments introduced by famed social psychologist Philip Zimbardo. See HeroicImaginationTV, *Asch Conformity Experiment*, YOUTUBE (Feb. 19, 2012), <https://www.youtube.com/watch?v=NyDDyT1IDhA> [<https://perma.cc/YJ8J-P79V>]. A longer version of the video is available from NBC Dateline, which ran a segment in 1987 called “Follow the Leader.” See Kobe Bryant, *Follow the Leader*, YOUTUBE (July 23, 2013) <https://www.youtube.com/watch?v=ME4IOsQzcIE> [<https://perma.cc/L7YE-UGH2>]. See generally S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgment*, in *GROUPS, LEADERSHIP, AND MEN* (H. Guetzkow ed., 1951).

80. See generally Rod Bond & Peter Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch’s (1952b, 1956) Line Judgment Task*, 119 *PSYCHOL. BULL.* 111, 111 (1996) (describing the many replications and variations of the Asch experiments in 17 different countries and discussing some of the cultural and other variables that influence the degree of conformity).

81. See DAVID MYERS, *EXPLORING SOCIAL PSYCHOLOGY* 159 (6th ed. 2012).

82. See Perlman, *supra* note 41, at 455.

83. See Asch, *supra* note 74, at 35. As one author has noted, “Asch found that the introduction of certain variables dramatically affected conformity levels. For example . . . conformity fell by more than 50% in most variations of the experiment when one of the confederates dissented from the group opinion.” Perlman, *supra* note 41, at 455.

84. See Asch, *supra* note 74, at 33. These differing explanations are examples of what psychologists call “informational” conformity, which occurs when someone accepts another’s views as more accurate than their own, and “normative” conformity, which occurs when someone conforms out of desire for social approval or acceptance from others. See Michael A. Hogg, *Influence and Leadership*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 1166, 1182 (Susan T. Fiske et al. eds., 5th ed. 2010).

Incorporating research on conformity enriches the discussion of Model Rule 8.3. After discussing the Asch results, many of my students seem more willing to acknowledge the possibility that they, too, might conform to group pressure by not reporting misconduct. We also discuss how group pressure might be countered, for example, by changing the dynamics of the situation such as seeking out colleagues who also are willing to speak up and report misconduct.<sup>85</sup> Finally, I cap off this discussion with two quick examples of conformity in action. The first is the hilarious scene in an elevator from the TV show, *Candid Camera*, which should not be missed.<sup>86</sup> The second is from the movie, *The Matrix*, which provides a nice metaphor for how unseen situational forces can influence behavior.<sup>87</sup>

After discussing conformity pressures, we shift to Model Rule 5.2—the rule that places individual responsibility on subordinate attorneys to make their own ethical judgments even when confronted with pressures to obey superiors.<sup>88</sup> I start this discussion by asking whether students believe it will be easy to escape pressures they may feel from their supervisors to act in a manner that is unethical. This primes the discussion for the one of most well-known experiments in social psychology: Stanley Milgram’s famous studies on obedience.<sup>89</sup>

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85. See *infra* notes 180-82 and accompanying text.

86. This video is available from many sources, including *Peer Pressure on the Elevator – Video*, MANIAC WORLD, <http://www.maniacworld.com/peer-pressure-on-the-elevator.html> [<https://perma.cc/9JZK-T82D>] (last visited Sept. 23, 2016).

87. See THE MATRIX (Warner Bros. 1999). For the uninitiated, *The Matrix* tells of how humankind lives unknowingly tethered to a central computer that generates false impressions of reality. I suggest to my students that they, too, are living in a form of a matrix, but one of social construction. They do not believe me until I issue this simple challenge: Will anyone be willing to stand up in class and disrobe? Of course, I do not want anyone to do so (and none have so far!), but after a brief chuckle the point is made—we all behave in large measure based on unstated social norms that form a type of matrix that tends to cause people, even those who perceive themselves as highly individual, to conform to subtle and often invisible social forces, such as the deep-seated norm against public nudity (I borrowed this simple demonstration from Professor Jonathan Haidt of NYU’s Stern School of Business).

88. The rule states that “[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person,” MODEL RULES OF PROF’L CONDUCT R. 5.2(a), but then adds that “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” *Id.* R. 5.2(b).

89. See STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: THE EXPERIMENT THAT CHALLENGED HUMAN NATURE (1974). These famous experiments have been discussed extensively in legal ethics literature. See, e.g., O’Grady, *supra* note 40, at 14-

Setting up this discussion is rather easy, as many students are already familiar with Milgram's work from their undergraduate days. To start, I explain the methodology of the classic experiment in which subjects (the "teachers") were instructed by the experimenter to provide increasingly severe electric shocks to other participants (the "learners"), who were attached by electrodes to a "shock machine," whenever the learner provided an incorrect answer posed by the teacher.<sup>90</sup> As with the Asch experiment, the real purpose of Milgram's study, in this case to assess the power of obedience to induce unethical behavior, was hidden from the teachers, who did not know that the learners were confederates of the study and were pretending to receive shocks that were not, in fact, administered. We then watch a short video that shows many of the original study participants in action, such as those who giggle nervously as they administer what they believe to be shocks of increasing voltage, or those who turn to the experimenter to ask whether they should continue to administer these shocks even after the learner has apparently lost consciousness.<sup>91</sup>

There are many aspects of the Milgram results worth exploring. The most jarring is the final tally: More than 60% of the participants in Milgram's classic study were willing to administer severe (and potentially lethal) shocks in excess of 450 volts, even when the learner seemed to have lost consciousness, revealing in stark terms the power that obedience seems to possess to produce unethical behavior.<sup>92</sup> I also mention a point that we return to repeatedly in

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16; Perlman, *supra* note 41, at 455-58; Kim, *supra* note 43, at 992-95; David J. Luban, *The Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 94, 96-97 (Deborah L. Rhode ed., 2000).

90. See MILGRAM, *supra* note 89, at 60. The shock machine used in the experiment indicated the danger levels for the amount of voltage administered. For example, in bold red letters, the machine labeled between 300-375 volts as "EXTREME INTENSITY SHOCK"; between 375-435 volts as "DANGER: SEVERE SHOCK," and above 420 volts as "XXX." See *id.* For further descriptions of Milgram's methodology, see O'Grady, *supra* note 40, at 14-16. See also Perlman, *supra* note 41, at 456-59.

91. The video of the Milgram experiments is available for purchase. See *The Stanley Milgram Films on Social Psychology*, ALEXANDER STREET, <http://alexanderstreet.com/products/stanley-milgram-films-social-psychology> [https://perma.cc/C7AQ-QVR8] (last visited Sept. 23, 2016). Shorter clips of the experiments, which can be used for classroom discussions, are widely available. See, e.g., LiveWord?, *Milgram Obedience Study*, YOUTUBE (Dec. 12, 2011), <https://www.youtube.com/watch?v=fCVII-4GZQ> [https://perma.cc/93A9-PLG2].

92. See MILGRAM, *supra* note 89. As Professor Rhode has noted, "Stanley Milgram's classic electric shock experiments offer a chilling reminder of how readily

various points in the semester: the power of incrementalism.<sup>93</sup> One reason why the teachers in the Milgram experiments were willing to administer increasingly severe shocks was that each addition in voltage was only a slight increase from the previous amount administered—making it easier for each succeeding increase in electricity to seem less severe than if there had been a substantial jump in voltage from one shock to the next.<sup>94</sup> The lesson is that small ethical transgressions can transform quickly into bigger ones, often without conscious awareness that it is happening.<sup>95</sup> Bringing these points back to Model Rule 5.2, we discuss how subordinate attorneys may be induced into misbehavior due to subtle and pernicious influences when following the commands of superiors, much like the conduct of the teachers in Milgram's experiments.<sup>96</sup>

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the good go bad if someone in a seemingly legitimate decision making position demands it." Deborah L. Rhode, *Moral Counseling*, 75 *FORDHAM L. REV.* 1317, 1322-23 (2006); see also BLASS, *supra* note 39, at xviii ("Milgram's obedience experiments taught us—dramatically—that, in a concrete situation containing powerful social pressures, our moral sense can readily get trampled underfoot."). However, it should be noted that there remains, more than fifty years after the Milgram experiments, a robust discussion about the extent to which blind obedience can be compelled by an authority figure, with a number of commentators calling for renewed research to answer unresolved questions. See, e.g., Stephen D. Reicher et al., *What Makes a Person a Perpetrator? The Intellectual, Moral, and Methodological Arguments for Revisiting Milgram's Research on the Influence of Authority*, 70 *J. SOC. ISSUES* 393 (2014). Any instructor who plans to teach this material should become familiar with this discussion. See *infra* notes 215-17 and accompanying text.

93. Research demonstrates that it is easier for people to engage in unethical behavior incrementally—that is, by gradually increasing the severity of infractions over time—rather than abruptly and all at once. See, e.g., David T. Welsh et al., *The Slippery Slope: How Small Ethical Transgressions Pave the Way for Larger Future Transgressions*, 100 *J. APPLIED PSYCHOL.* 114 (2015); Francesca Gino et al., *How Unethical Behavior Becomes Habit*, *HARV. BUS. REV.* (Sept. 4, 2014), <http://blogs.hbr.org/2014/09/how-unethical-behavior-becomes-habit> [<https://perma.cc/4KP5-EQ62>]. Similarly, it is easier to accept unethical behavior of others that occurs incrementally rather than abruptly. See Francesca Gino & Max H. Bazerman, *When Misconduct Goes Unnoticed: The Acceptability of Gradual Erosion in Others' Unethical Behavior*, 45 *J. EXPERIMENTAL SOC. PSYCHOL.* 708 (2009).

94. See Jerry M. Burger, *Situational Features in Milgram's Experiment That Kept His Participants Shocking*, 70 *J. SOC. ISSUES* 489, 491-93 (2014); Welsh et al., *supra* note 93, at 116; Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 *AM. PSYCHOLOGIST* 1, 3 (2009); Steven J. Gilbert, *Another Look at the Milgram Obedience Studies: The Role of the Graded Series of Shocks*, 7 *PERSONALITY & SOC. PSYCHOL. BULL.* 690, 691-92 (1981); Luban, *supra* note 70, at 286-87.

95. See *infra* notes 134-41 and accompanying text.

96. A number of other aspects of the Milgram experiments relevant to legal ethics can also be explored. For example, the responsibility of the teachers in the study was diffused by the experimenter, who stated that he would be responsible for

Before leaving our discussion of situationism, I want the students to realize that many other subtle variations in a situation can have profound implications on moral behavior. To make this point, on the class blog I post a summary of some of the research on priming<sup>97</sup> that has been most pertinent to ethical decision-making. I also include links to some of the more interesting research on situationism, including many subtle contextual variables that can influence the likelihood that someone will cheat.<sup>98</sup> My point here is not to tie this research to any particular type of judgment lawyers make, but rather to ask the students to start thinking about how subtle and often overlooked variables in the environment in which they will work may play a significant, if unexpected, role in the types of ethical choices they will confront in practice. It also gets them

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any harm that occurred to the learners—revealing how diffusion of responsibility can facilitate unethical behavior. See Burger, *Replicating Milgram*, *supra* note 94, at 3-4; see also Robbennolt & Sternlight, *supra* note 10, at 1149 (explaining how diffusion of responsibility can loosen restraints against unethical conduct by lawyers). An instructor may also want to emphasize that lawyers in positions of authority should be made aware of the power that they possess to influence the ethical behavior of their subordinates and others. See ROBBENNOLT & STERNLIGHT, *supra* note 29, at 136.

97. “Priming” is a broad category that refers to the influence that unconscious stimuli can have on a person’s perceptions, interpretations, and behavior. See ROBBENNOLT & STERNLIGHT, *supra* note 29, at 11. For example, on the blog I describe and cite to research indicating that the mere exposure to the idea of money is more likely to induce the types of thinking that produce unethical behavior. See Francesca Gino & Cassie Mogilner, *Time, Money, and Morality*, 25 PSYCHOL. SCI. 414, 414-16 (2014); Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 53 (2013). In contrast, priming people to think about time rather than money can produce more charitable and ethical behavior. See Gino & Mogilner, *supra*, at 414-16.

98. For example, I link to an essay in the *New Yorker* magazine that describes many of the subtle situational variables—such as the lighting or messiness of the environment or whether someone is in a position of power or is mentally fatigued—that have been documented to affect the degree to which people cheat. See Maria Konnikova, *Inside the Cheater’s Mind*, NEW YORKER (Oct. 31, 2013), <http://www.newyorker.com/tech/elements/inside-the-cheaters-mind> [<https://perma.cc/H3VE-VSWK>]. I also refer the students to the *Situationist Blog*, *supra* note 69, which contains a treasure trove of material on situationism. Its founder, Jon Hansen, has been one of the leading scholars addressing the power of situational factors on legal doctrine and reasoning. See, e.g., Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003).

thinking about topics that might serve as the basis for their own blog posts later in the semester.

By this point in the semester, my hope is that many of the students have started to question whether merely learning the rules of ethical conduct, even with an optimistic intent to follow them, will be sufficient to ensure ethical behavior. If I have been successful, the students are more cautious in assuming that they will never be subject to the influences and pressures that we have so far discussed. The next step is to turn to some of the subtle psychological factors that make it easy for everyone to engage in biased reasoning in decision-making.

### 3. *Biased Reasoning*

There is so much literature on heuristics and cognitive biases that it would require at least an entire semester dedicated solely to this material to cover it. Of course, we have much less time, so I limit our discussions to only a few of the ways people are unconsciously influenced in making decisions. Two of the most important are confirmation bias and the related concept of motivated reasoning. The power of confirmation bias, a ubiquitous and well-documented phenomenon, causes people unconsciously to seek out, interpret, and remember information in a manner that confirms previously held beliefs.<sup>99</sup> Motivated reasoning, a slightly different concept that is also well-documented, refers to the power of motivation to influence this filtering process; that is, people not only seek to confirm preexisting beliefs, but also seek to reaffirm their preexisting wishes, wants, and desires.<sup>100</sup>

To teach this material, again I find demonstrations helpful. At the beginning of our segment on confidentiality, I ask my students to self-report on a scale of 1-10 the importance they place on confidentiality as a value that lawyers should possess. The reported rate is quite high, usually between 9 and 10.

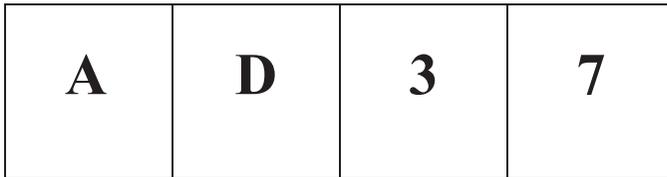
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99. See ROBBENOLT & STERNLIGHT, *supra* note 29, at 11-14; Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

100. For seminal work in motivated reasoning, see Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990). See also Pronin et al., *Objectivity*, *supra* note 51, at 781-99. I have described the power of confirmation bias and motivated reasoning elsewhere. See Eldred, *Motivation Matters*, *supra* note 35, at 492-98; Eldred, *Ethical Blindness*, *supra* note 35, at 362-65.

Next, I administer a variation of the famous Wason Selection Test, one of the foundational studies documenting the power of confirmatory reasoning.<sup>101</sup> The test is quite simple. I show the students four cards of the type used by Wason (see Diagram 3) and pose this hypothetical: *If there is an “A” on one side of the card, then there is a “3” on the other side of the card.* Then, I assign this task: Which two cards would you turn over to test the accuracy of this hypothesis?

**Diagram 3**



After a short time for consideration, I ask for results. Most students report that they would turn over the “A” and the “3,” a common but erroneous response.<sup>102</sup> We then discuss why. As Wason demonstrated, when confronted with a hypothesis, most people seek to confirm it by looking for examples where it is true. The problem with this form of reasoning is that no matter how many positive examples are found, there is always the possibility that in one instance it may be false. As a result, when considering any hypothesis, the only way to determine its accuracy is to investigate whether there are any instances in which it is false, rather than seeking out examples where it is true. The correct answer, therefore, is to turn over the cards with the facing “A” and “7.”<sup>103</sup>

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101. Peter Wason, *Reasoning About a Rule*, 20 Q.J. EXPERIMENTAL PSYCHOL. 273 (1968); see also JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 42-43 (2012) (discussing the Wason selection task).

102. Erica Dawson et al., *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1379, 1380 (2002) (reporting the success rate on the task at approximately 20%).

103. Once instructed, and after a short reflection, most students realize that if there is a number other than a “3” on the opposite side of the card with the facing “A,” then the hypothesis is false; likewise, if there is an “A” on the opposite side of the card with the facing “7,” then again the hypothesis has been proved false. In contrast, turning over the card with the facing “3” is inconsequential: If there is an “A” on the other side, it only reveals an example where the hypothesis is true, but does not *prove* that the hypothesis is true; and if there is a letter other than an “A” on the other side of the card with the facing “3,” then no useful information is

So what does this have to do with confidentiality? I suggest to my students quite a lot. For example, when we discuss permissive disclosure of otherwise confidential information under Model Rule 1.6(b),<sup>104</sup> I ask whether they think they will be swayed in favor of protecting confidentiality by interpreting the rules narrowly due to the high value they have previously placed on protecting client confidences.<sup>105</sup> After experiencing the Wason test, my hope is that they will start to appreciate how their preexisting views might shape their future judgments.<sup>106</sup> I must admit, however, that most students seem skeptical that they will be influenced by their unconscious bias in favor of confirmatory information; instead, they seem inclined to believe that they will be able to consider each situation objectively—perhaps not a surprise given the strength of naïve realism.<sup>107</sup>

This perspective, however, seems to change once I introduce the science of motivated reasoning. To do so, again I use a

obtained—after all, the hypothesis is that “If there is an A on one side, there is a 3 on the other,” not “If there is a 3 on one side, there is an A on the other.” Finally, turning over the card with the facing “D” provides no useful information. For a deeper discussion of the Wason selection task, including explorations of the factors that reduce the power of confirmatory reasoning, see Thomas D. Gilovich & Dale W. Griffin, *Judgment and Decision Making*, in HANDBOOK OF SOCIAL PSYCHOLOGY, *supra* note 84, at 547-48.

104. The rule sets forth a series of limited circumstances in which a lawyer is allowed, but not required, to disclose what otherwise would be deemed confidential information. See MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (AM. BAR ASS'N 1983). These include the conclusion that disclosure is reasonably necessary “to prevent reasonably certain death or substantial bodily harm,” and “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services.” *Id.* R. 1.6(b)(1)-(2).

105. See *supra* p. 26 (noting that students rate the duty of confidentiality as quite important, in the range of 9 out of 10).

106. There are many other experiential ways to teach the power of confirmatory reasoning, including another famous test developed by Peter Wason, entitled the “2-4-6 induction task,” which asks subjects to discover a rule involving three numbers by inviting and then receiving feedback on subsequent sequences of three numbers. See Peter Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q.J. EXPERIMENTAL PSYCHOL. 129, 130 (1960). Instructors can easily adapt the test, which demonstrates how easy it is for participants to seek out information that confirms preexisting hypotheses, to the classroom environment. See *Podcast: Professor Eldred and Behavioral Legal Ethics*, NEW ENG. L. REV. (Apr. 23, 2015), <https://newenglrev.com/2015/04/23/podcast-professor-eldred-and-behavioral-legal-ethics> [<https://perma.cc/7WJK-TBBK>]. For a video demonstration of this exercise, see Veritasium, *Can You Solve This?*, YOUTUBE (Feb. 24, 2014), <https://www.youtube.com/watch?v=vKA4w2O61Xo> [<https://perma.cc/H2L2-8MFJ>].

107. See *supra* notes 51-54 and accompanying text.

demonstration, this time from materials created by Dan Kahan, a leading scholar on the ways in which motivated reasoning influences decision-making. Based on his study entitled *They Saw A Protest*,<sup>108</sup> which is a modern-day update of one of the classic studies in social psychology,<sup>109</sup> I show the students a video of a street protest of the military's now defunct "don't ask, don't tell" policy in front of a military recruitment office and then ask them to decide, silently and to themselves, whether the protest should be protected free speech under the First Amendment.<sup>110</sup> Then I tell them that I am going to show them another video of a protest, but this time one outside an abortion clinic<sup>111</sup> and, once again, they are to decide for themselves whether they believe the protest is protected free speech. We then watch the exact same video as before.<sup>112</sup> In our discussion, I ask if anyone experienced any shift in personal opinion about whether the protest should be protected based on the type of protest they had seen. Many students report that they experienced some shift; in other words, their own response differed based on knowing what type of activity was being protested, even though the activity observed was exactly the same. We conclude by briefly discussing the results of Professor Kahan's study, which documented how perception of legally relevant facts—here, for example, the conduct of the

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108. Dan M. Kahan et al., "*They Saw a Protest*": *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012).

109. See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954). In this study, the researchers measured the extent to which observers of a football game between Dartmouth and Princeton ascribed aggressive and improper play to the two teams. See *id.* at 130. The study concluded that the affiliation of the observer—that is, whether he was a student at the school of either team—played a substantial role in the observer's construal of the events of the game. See *id.* at 133; see also BREST & KRIEGER, *supra* note 50, at 245-46 (describing the study). For a fuller description of the study and its application to partisanship in a legal context, see Robertson, *Judgment, Identity, and Independence*, *supra* note 44, at 7-12.

110. See Kahan et al., *supra* note 108, at 870 & n.87. The video is still available. Videoreview12, *Recruit\_Center\_11192010*, YOUTUBE (Jan. 6, 2011), <https://www.youtube.com/watch?v=X3PJACpL53k> [<https://perma.cc/87ZL-6FB6>].

111. See Kahan et al., *supra* note 108, at 870 & n.87. The video is still available. Videoreview12, *Abortion Clinic 11 22 2010*, YOUTUBE (Jan. 6, 2011), [https://www.youtube.com/watch?v=k8ru-FE2v\\_8](https://www.youtube.com/watch?v=k8ru-FE2v_8) [<https://perma.cc/7HLU-9CQQ>].

112. The videos depict conduct that is sufficiently ambiguous so that different reasonable interpretations are possible about whether the conduct is protected speech.

protestors—is influenced by the perceiver’s preexisting cultural values.<sup>113</sup>

After this demonstration, I take a step back and explain that there are “literally file cabinets” of data documenting the power of motivated reasoning.<sup>114</sup> In each of these studies, the point is essentially the same: People tend to seek out and interpret information based on their preconceived desires.<sup>115</sup> For example, people tend to scrutinize more carefully information that is inconsistent with their preferences than they do information that is compatible with their wants. As one expert has noted, when evaluating whether to believe favorable information, people tend to ask themselves an easy question, “Can I believe this?”—whereas when considering the reliability of unfavorable information, they ask a much more demanding question, “Must I believe this?”<sup>116</sup> And, as with all cognitive biases, these processes occur outside of conscious awareness, meaning people do not perceive the asymmetric ways in which their desires influence how they consume information.<sup>117</sup>

We then circle back to confidentiality. For example, we discuss how in many instances the confidentiality rules provide lawyers with a competitive advantage over other professions that do not similarly

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113. See Kahan et al., *supra* note 108, at 883-94. In a recent and quite important study, Dan Kahan and his colleagues have found evidence that judges and lawyers (but not law students) are immune to the type of cultural cognition documented in his earlier work. See Dan Kahan et al., “Ideology” or “Situation Sense”? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349 (2016). For a discussion of this study and its application to behavioral legal ethics, see *infra* notes 222-26 and accompanying text.

114. HAIDT, *supra* note 101, at 98. There are many interesting ways to highlight motivated reasoning, such as, the biased ways that people seek out and consume the news. See John McCormick, *Liberals and Conservatives Consume News Differently, Study Finds*, BLOOMBERG NEWS (Oct. 21, 2014, 7:46 AM), <http://www.bloomberg.com/politics/articles/2014-10-21/liberals-and-conservatives-consume-news-differently-study-finds> [<https://perma.cc/5YW2-TB4B>].

115. As I have noted elsewhere, “[C]onsiderable evidence indicates that people frame questions in ways that favor their beliefs; search their memory and other sources for favorable information and then truncate their search once it is found; tend to perceive ambiguous information in a manner that is consistent with preferences; and evaluate favorable information less rigorously than unfavorable information.” Eldred, *Motivation Matters*, *supra* note 35, at 495.

116. Dawson et al., *supra* note 102, 1379-80; THOMAS GILOVICH, HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 31-37 (1991).

117. See GILOVICH, *supra* note 116.

promise such protections<sup>118</sup> and how, therefore, self-interest in protecting confidential information might cause lawyers to narrowly interpret the rules regarding permissive disclosure.<sup>119</sup> Armed with our recent discussion of motivated reasoning, my hope is that at least some of my students will start to realize that their perceptions of their own objectivity might be belied by their all-too-human tendencies to seek out and interpret information in a self-serving manner.<sup>120</sup>

We end our discussion of confirmation bias and motivated reasoning in class by recognizing that its applicability is far from limited to confidentiality. Rather, I ask the students to consider how many of the ethics rules can be interpreted in a self-serving manner, raising the possibility that as lawyers they will need to consider how their ethical choices can be captured by the fallibility of reasoning that we all possess.

#### 4. *Bounded Ethicality*

By the middle of the semester, my hope is that the students have developed a basic understanding of what psychologists have started to call “bounded ethicality.” The general idea is that we are

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118. See Fred C. Zacharias, *Steroids and Legal Ethics Codes: Are Lawyers Rational Actors?*, 85 NOTRE DAME L. REV. 671, 693 n.95 (2010) (“By allowing lawyers to promise secrecy, confidentiality rules provide lawyers with a competitive advantage over accountants and other service providers who cannot do the same”); Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 599 (1989) (describing why the confidentiality rules are in the legal profession’s self-interest).

119. See DEBORAH RHODE & GEOFFREY HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 94 (2d ed. 2007) (“Social psychology research confirms what common sense and common experience suggest. People have a natural inclination to conflate what is personally advantageous with what is socially just and ethically justifiable.”). For description of the research documenting how self-interest produces automatic motivated reasoning, see Eldred, *Ethical Blindness*, *supra* note 35, at 361-68.

120. As one author has observed, “One of the core teachings of behavioral ethics research is that it is not just difficult, but impossible, to be truly objective about a decision when you have a significant interest in the outcome.” Scott Killingsworth, “C” is for *Crucible: Behavioral Ethics, Culture, and the Board’s Role in C-Suite Compliance*, in CULTURE, COMPLIANCE, AND THE C-SUITE: HOW EXECUTIVES, BOARDS, AND POLICYMAKERS BETTER SAFEGUARD AGAINST MISCONDUCT AT THE TOP 53 (Michael D. Greenberg ed., 2013), [http://www.rand.org/content/dam/rand/pubs/conf\\_proceedings/CF300/CF316/RAND\\_CF316.pdf](http://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF316/RAND_CF316.pdf) [<https://perma.cc/STH8-SRAW>]; see also O’Grady, *supra* note 14, at 685 (“Nothing obscures objective decision making more directly than having a vested personal interest or stake in an outcome.”).

often unaware of the reasons that we violate our own preferred ethical principles—or to put it another way, why it is so easy to deceive ourselves into thinking we are more ethical than we are in reality.<sup>121</sup> To emphasize this point further, and to delve deeper into the psychology involved, I next focus on two particular aspects of the bounded nature of ethical decision-making.

a. Overconfidence Bias and Conflicts of Interest

The first is generally known as overconfidence bias, a well-documented phenomenon that describes the ways in which everyone, lawyers included, tend to overestimate their own abilities regarding a variety of positive traits, including whether they are competent, ethical, and deserving.<sup>122</sup> The net result is that we all suffer from an “illusion of objectivity”<sup>123</sup> in which we overestimate our ability to act ethically in the face of conflicting duties, while at the same time underestimating the many ways in which our desires and self-interests can bias the decisions we reach.<sup>124</sup>

Applying this research to the types of ethical decisions that lawyers make, scholars have noted how easy it is to fail to make accurate assessments when confronting conflicts of interest.<sup>125</sup> The

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121. See Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 CURRENT OPINION PSYCHOL. 77, 77 (2015); Bazerman & Gino, *supra* note 23, at 95; Mary C. Kern & Dolly Chugh, *Bounded Ethicality: The Perils of Loss Framing*, 20 PSYCHOL. SCI. 378, 378 (2009); Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74, 82 (Don A. Moore et al. eds., 2005) [hereinafter *Bounded Ethicality*].

122. See Chugh, *Bounded Ethicality*, *supra* note 121, at 81-86; see also Robbennolt & Sternlight, *supra* note 10, at 1116. As two authors recently noted, “Overall, psychologists view above-average effects and comparative optimism as ‘perhaps the two most robust and widely replicated phenomena from the literature on social comparative judgments.’” Ulrike Malmendier & Timothy Taylor, *On the Verge of Overconfidence*, 29 J. ECON. PERSP. 3, 4 (2015) (internal citations omitted).

123. See Thomas Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, in 20 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 297, 302 (Leonard Berkowitz ed., 1987).

124. See Chugh, *Bounded Ethicality*, *supra* note 121, at 83. For an excellent discussion of how the motive to view oneself in a positive light can influence judgments of lawyers, see Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 855 (1995).

125. See, e.g., Robbennolt & Sternlight, *supra* note 10, at 1117. This point, which I have discussed more fully elsewhere, see Eldred, *Psychology of Conflicts*,

point is not that lawyers tend to be venal by intentionally engaging in behavior that is unethical, although of course that occurs on occasion. Rather, the research on bounded ethicality demonstrates that people often fail to perceive how their over-inflated self-perception undermines their objectivity in making ethical decisions.<sup>126</sup> And because this process occurs without conscious awareness, it happens without leaving a trace, permitting the lawyer to maintain a self-image as honest and ethical.<sup>127</sup>

There are many ways for students to experience the power of bounded ethicality. For example, early in the semester, as part of a blog post, I direct them to a wonderful online resource where they can take any number of tests that help to illuminate their ethical blind spots.<sup>128</sup> Then, when we start to discuss conflicts of interest, I reinforce the general notion through an easy demonstration. I start by asking students to rate themselves regarding a set of desirable attributes, such how well they drive a car, how interesting they are,

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*supra* note 35, has also been discussed in other contexts. See, e.g., Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1462 (2016); Milan Markovic, *The Sophisticates: Conflicted Representation and the Lehman Bankruptcy*, 2012 UTAH L. REV. 903, 915 (2012). Judicial recognition that lawyers are susceptible to the unconscious influences of self-interest when confronted with conflicts of interest has started to take hold. See, e.g., *West v. People*, 341 P.3d 520, 532 (Colo. 2015) (applying the research on bounded ethicality in determining the meaning of an "adverse effect" when a defendant seeks a new trial claiming that a conflict of interest resulted in ineffective assistance of counsel); *United States v. Ky. Bar Ass'n*, 439 S.W.3d 136, 154 (Ky. 2014) (citing the research on bounded ethicality to hold that defense lawyers cannot ethically advise a client to waive a claim of ineffective assistance of counsel).

126. See Robbennolt & Sternlight, *supra* note 10, at 1117; Chugh et al., *Bounded Ethicality*, *supra* note 121, at 85; Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1090 (2011).

127. See Prentice, *supra* note 126, at 1086 ("The most discomforting thing about bounded ethicality is that well-intentioned people can make serious ethical errors without ever consciously deciding to stray from the straight and narrow."); Shahar Ayal & Francesca Gino, *Honest Rationales for Dishonest Behavior*, in *THE SOCIAL PSYCHOLOGY OF MORALITY* 152 (Mario Mikulincer & Phillip R. Shaver eds., 2012) (noting that bounded ethicality causes people to "make unconscious decision errors that serve their self-interest but are inconsistent with their consciously espoused beliefs and preferences . . . [that] they would condemn upon further reflection or greater awareness").

128. See YOURMORALS.ORG, <https://www.yourmorals.org> [<https://perma.cc/76K2-R3S8>] (last visited Sept. 23, 2016) (free registration required). The test I encourage my students to take is entitled "Bias Evaluation," which is listed under the Cognition and Beliefs tab on the YourMorals.org website. YOURMORALS.ORG, [http://www.yourmorals.org/all\\_morality\\_values\\_quizzes.php#COGNITIONS](http://www.yourmorals.org/all_morality_values_quizzes.php#COGNITIONS) [<https://perma.cc/J9AY-RL9C>] (last visited Sept. 23, 2016).

how honest they are, and finally, how modest they are.<sup>129</sup> Then, by a show of hands I ask who in the class believes they are “above average” in each of these desirable attributes. My experience has been that, consistent with a large body of research on this subject,<sup>130</sup> most students report that they are better than average on these traits. We then take a moment to expose the obvious problem with these results: By definition, no more than 50% of the population can be above average for any given attribute and therefore, unless the class is made up of students who happen to rate especially high on positive attributes, the fact that most of the students believe themselves to be above average reveals how many of them have made overconfident self-assessments. Once I point out this obvious fact, there tends to be a moment of laughter, as it sinks in that many in the class have, through this simple exercise, revealed the overconfidence bias.

After the demonstration, we discuss how the research on bounded ethicality exposes the difficulty in making accurate self-assessments about conflicts of interest. As a doctrinal matter, the rules on conflicts place the responsibility on lawyers to determine whether a conflict exists and, if so, whether it is consentable. These calculations require careful self-assessment. For example, under Model Rule 1.7, a lawyer must decide whether there is a significant risk that other duties or interests will materially limit obligations owed to a current client and, if so, whether despite the conflict the lawyer can nonetheless “provide competent and diligent representation.”<sup>131</sup> To be sure, in some cases the lawyer’s self-assessment will be subject to later review, perhaps by a disciplinary

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129. I borrowed these questions from an excellent TED talk on point. See Tali Sharot, *The Optimism Bias*, TED.COM, [https://www.ted.com/talks/tali\\_sharot\\_the\\_optimism\\_bias?language=en](https://www.ted.com/talks/tali_sharot_the_optimism_bias?language=en) [<https://perma.cc/E7FR-CRPE>] (last visited Sept. 23, 2016).

130. Numerous studies demonstrate that people persistently maintain an above average view of themselves, for example, by believing that they possess desirable skills, such as driving a car, managerial prowess, productivity, and other traits. See Chugh et al., *Bounded Ethicality*, *supra* note 121, at 84; Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110-11 (1997). Similarly, people regularly overstate their contribution to a joint task, estimating their own contributions to be more than 50%. *Id.* at 111.

131. See MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2), (b)(1). The rules on successive, or former, client conflicts also require lawyers to make risk assessments, for example, in determining whether there “is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.” *Id.* R. 1.9, cmt. 3. For a discussion of how lawyers’ conflicts of interest are essentially about risk analysis, see Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823, 874 (1991-1992).

body, during a disqualification motion, or in a malpractice action.<sup>132</sup> But in the vast majority of cases, there will be no after-the-fact review, meaning that the lawyer's own assessment will be the only word on the matter. Accuracy in self-evaluation, therefore, could not be more important.

In the end, my point is not to persuade my students that they will inevitably succumb to conflicts of interest whenever they are presented with an opportunity to do so. That is too strong a claim, one that is not supported by the research.<sup>133</sup> Rather, as with many other psychological phenomena that we discuss, my goals are both to provide a different perspective on the rules than students might elsewhere receive and to start to raise their awareness of the many ways that, in the real world, even good people can make unethical choices.

#### b. Incrementalism

The metaphor of the boiling frog is well known: A frog that is placed in a boiling pot of water will attempt to jump out, but when placed in water that is slowly heated, the frog does not realize that the temperature is rising until it is too late.<sup>134</sup> The point is that slow, incremental changes often go unnoticed. In the realm of ethics, it is the same. Often called the slippery slope, small transgressions that may seem inconsequential can multiply and become more pronounced, slipping into more significant ethical lapses.<sup>135</sup> One psychological explanation for this phenomenon is rooted in the value people place on maintaining a positive self-image. When a small transgression occurs, there is a tendency to rationalize away the misbehavior so that there is no tension between one's actions and one's favorable self-image.<sup>136</sup> The result is that, instead of having to

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132. See *Model Rules of Professional Conduct: Preamble & Scope*, AM. B. ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) [<https://perma.cc/P2US-3ESZ>] (last visited Sept. 23, 2016). In criminal cases, there is also the possibility of post-conviction review through a claim for ineffective assistance of counsel. For a discussion of the doctrine in this area, as well as the psychology involved, see Eldred, *Psychology of Conflicts*, *supra* note 35, at 75.

133. Indeed, recent research suggests that in some cases the power of bounded ethicality can be diminished, at least when the incentives that produce the conflict are deemed "subtle." See *infra* notes 218-21 and accompanying text.

134. See Gino & Bazerman, *supra* note 93, at 717.

135. See *supra* notes 93-95 and accompanying text.

136. For a recent study documenting this effect, see Welsh et al., *supra* note 93. Other studies have documented the role that maintaining self-image plays in

confront the ethical lapse, the behavior becomes acceptable and even routine, making it easier to engage in increasingly unethical behavior without disapprobation.<sup>137</sup> Just like the frog that does not realize the effects of small increases in temperature, so too small transgressions can pave the way for more serious misconduct without the lawyer's conscious awareness.<sup>138</sup>

I find that teaching about the slippery slope is one of the most important lessons during the semester. For example, in the course book that I use there is a set of problems addressing instances in which lawyers lie to their own clients.<sup>139</sup> Before I started teaching about behavioral legal ethics, I found that students tended to gloss over these indiscretions, perhaps because they believed that they were somewhat trivial in isolation. But once students learn about the psychology of the slippery slope, it becomes much easier to explore why seemingly small transgressions can have such a profound adverse result.

My students also seem to appreciate hearing from people who have actually experienced the power of the slippery slope. The Milgram experiment, which we have already discussed in class by this point, is one example. As another example, in class I play a short video about a white-collar defendant whose road to a felony conviction for stealing over \$500,000 from her employer started with one instance of failing to reimburse her company for travel expenses.<sup>140</sup> The point made in the video is how the employee had rationalized her early and seemingly small misconduct, which led to

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mediating unethical behavior. See, e.g., Nina Mazar et al., *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, 45 J. MARKETING RES. 633 (2008); see also Killingsworth, *supra* note 120, at 5-6 (discussing maintenance of self-image as the motivator for rationalizing away incremental misconduct).

137. See Welsh et al., *supra* note 93; Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 228-29 (2004). Similarly, small incremental steps can make it harder to see the unethical behavior in others. See Gino & Bazerman, *supra* note 93.

138. See Robbenolt & Sternlight, *supra* note 10, at 1119-20.

139. See LERMAN & SCHRAG, *supra* note 66, at 320-22 ("Problem 5-2, Lying to Clients"). The problem involves a number of scenarios where a lawyer misleads a potential or actual client—for example, by exaggerating expertise to gain a potential client's trust or not telling a client that the lawyer received an extension to file a motion after missing the filing deadline. See *id.*

140. In this video, an employee discusses her descent down the slippery slope that led her to steal \$500,000 from her employer. See *The Slippery Slope to Major Fraud*, ASS'N CERTIFIED FRAUD EXAMINERS (Jan./Feb. 2012), <http://www.acfe.com/vid.aspx?id=4294974547> [<https://perma.cc/8THZ-N2UT>].

more serious misbehavior and consequences.<sup>141</sup> I also read aloud a few short paragraphs from an article by Judge Patrick Schiltz who describes vividly how slight fabrications in a lawyer's time sheets can easily lead to the slippery slope of much more serious misbehavior.<sup>142</sup> My hope is that through these three-dimensional demonstrations, students learn why it is so important for lawyers to act ethically, even in the smallest of matters.

### 5. *The Power of Emotion*

There is a large and still growing body of literature that considers the broad range of ways in which emotion influences various aspects of law, including moral and ethical decision-making.<sup>143</sup> For example, many legal scholars have devoted time to focusing on the seminal work of psychologist Jonathan Haidt, who has been at the forefront in demonstrating the power of emotion and intuition in moral decision-making.<sup>144</sup> His social-intuitionist model makes the central point that moral reasoning does not produce most moral judgments; rather, as a large body of experimental data demonstrates, they are the product of the emotional and intuitive responses that precede conscious awareness.<sup>145</sup> Placing this idea into a larger social fabric, he argues that people are poorly equipped individually to change their opinions about deeply held beliefs, but

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141. For more details, see *Confessions of a Con Artist*, CNN MONEY (Nov. 30, 2011, 1:16 PM), [http://money.cnn.com/2011/11/30/smallbusiness/con\\_artist](http://money.cnn.com/2011/11/30/smallbusiness/con_artist) [https://perma.cc/5FEK-GAYJ].

142. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 916-18 (1999).

143. See Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 800-01 (2015); ROBBENNOLT & STERNLIGHT, *supra* note 29, at 45-66; Susan A. Bandes & Jeremy A. Blumenthal, *Emotion and the Law*, 8 ANN. REV. L. & SOC. SCI. 161 (2012).

144. See, e.g., Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 954-63 (2007); Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633, 1685 (2007). For my earlier description of Professor Haidt's work, see Eldred, *Psychology of Conflicts*, *supra* note 35, at 69-70.

145. Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) [hereinafter *The Emotional Dog*]. For other descriptions of the social-intuitionist model, including responses to critics, see Jonathan Haidt, *The Emotional Dog Gets Mistaken for a Possum*, 8 REV. GEN. PSYCHOL. 283, 283 (2004); Jonathan Haidt & Craig Joseph, *Intuitive Ethics: How Inately Prepared Intuitions Generate Culturally Variable Virtues*, 133 DAEDALUS 55, 56 (2004).

instead are much more likely to be influenced by the dominant social group to which they belong.<sup>146</sup>

In teaching these concepts, simulation exercises that invoke emotional reactions tend to work best. Fortunately, the course book for my class provides a number of excellent opportunities to employ this approach. For example, early in the semester when we are discussing client confidentiality, we engage in a role-play involving a grieving father who, during a meeting with two defense lawyers, presses for information about the whereabouts of the father's missing (and presumably dead) child.<sup>147</sup> I play the role of the father, while students take the role of the lawyers. In pushing the students to reveal the whereabouts of the missing child during the simulation, I try to elevate the desperate nature of the father's plight, imploring the students to disregard their confidentiality duties to help locate the missing child. It becomes an emotionally charged conversation, to say the least. And while none of the students have yet violated their duty of client confidentiality during this simulation, I find that in the debrief afterward many students seem attentive to the possibility that ethical deliberation can be influenced and altered by emotionally

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146. See Haidt, *The Emotional Dog*, *supra* note 145, at 819; HAIDT, *supra* note 101, at 46-48. The metaphor he has developed in recent writing makes this point poignantly: Human rationality is akin to a Rider who is atop of an Elephant, which represents our emotions. See HAIDT, *supra* note 101, at 52-71; HAIDT, *supra* note 53. The Rider may want to change the course or direction of the Elephant, but inevitably will fail when all six tons of the Elephant want to go elsewhere. As a result, the best approach to changing one's reasoning process is not by forcing oneself through sheer will to alter one's views on an emotionally charged issue, but rather to attempt to alter the path of the Elephant in the first place. *Id.* As one example, Professor Haidt describes a project he co-directs that is dedicated to political civility, [www.CivilPolitics.org](http://www.CivilPolitics.org). Jonathan Haidt, *Reasons Matter (When Intuitions Don't Object)*, N.Y. TIMES (Oct. 7, 2012, 5:00 PM), <http://opinionator.blogs.nytimes.com/2012/10/07/reasons-matter-when-intuitions-dont-object/> [<https://perma.cc/F85Y-SVXH>]. In explaining the goals of the project, he notes:

We believe this ability [civility] is best fostered by indirect methods (changing contexts, payoffs and institutions) rather than by direct methods (such as pleading with people to be more civil, or asking people to sign civility pledges). In other words, we hope to open up space for civil disagreement by creating contexts in which *elephants* (automatic processes and intuitions) are calmer, rather than by asking *riders* (controlled processes, including reasoning) to try harder.

*Id.* (emphasis added) (internal quotations omitted).

147. This role-play is based on the famous "dead bodies case," which is addressed extensively in the course book for my course. See Mark Hansen, *The Toughest Call*, 93 A.B.A. J. 28, 28-29 (2007); LERMAN & SCHRAG, *supra* note 66, at 173-85.

charged events. During the discussion, I also take a few minutes to highlight Professor Haidt's research on the role of emotion in decision-making, asking the students to consider the possibility that they are in less control of their decision-making processes than they might realize. Later in the semester, I reinforce this point in a blog entry about moral psychology, which contains an extended video of Professor Haidt's work.<sup>148</sup>

### 6. *The Role of Narrative*

The value of teaching legal ethics through narrative and case studies is well known.<sup>149</sup> Stories have the power, for example, to help students develop empathy,<sup>150</sup> connect more broadly and directly to the emotional life of those accused of wrongdoing,<sup>151</sup> and deepen their appreciation of the rich context in which a lawyer's ethical decisions are made.<sup>152</sup> Stories are also deeply engaging, making the material more accessible and enjoyable to learn.<sup>153</sup>

There is another aspect of storytelling that matters in the context of behavioral legal ethics. A significant strand of psychological research focuses on the need of people to make sense of the world.<sup>154</sup> The central idea here is that when confronted with multiple and confusing stimuli, we use a variety of techniques to filter and organize and make sense of our experiences.<sup>155</sup> One

148. A number of excellent videos are available, including the one I use. See, e.g., Hear the Reasons, *Jonathan Haidt – The Rationalist Delusion in Moral Psychology*, YOUTUBE (Dec. 5, 2013), <https://www.youtube.com/watch?v=kl1wQswRVaU> [<https://perma.cc/A4UF-AUNQ>].

149. See, e.g., Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 *FORDHAM L. REV.* 787 (2000); Thomas L. Shaffer, *On Teaching Legal Ethics with Stories About Clients*, 39 *WM. & MARY L. REV.* 421 (1998); Stephen Gillers, *Getting Personal*, 58 *LAW & CONTEMP. PROBS.* 61 (1995).

150. See Menkel-Meadow, *supra* note 149, at 791.

151. See *id.* at 792.

152. See *id.* at 793-95.

153. See Nancy Levit, *Legal Storytelling: The Theory and the Practice—Reflective Writing Across the Curriculum*, 15 *J. LEGAL WRITING INST.* 259, 263 (2009).

154. See BREST & KRIEGER, *supra* note 50, at 219-20. As one author has noted, "We all are confronted with multiple stimuli in our environment, and we must impose some structure upon it for it to 'make sense.' We use various cues, patterns, routines, and scripts, typically created jointly with others, to help us accomplish this task." Regan, *supra* note 144, at 951; see generally KARL E. WEICK, *SENSEMAKING IN ORGANIZATIONS* (1995).

155. See KAHNEMAN, *supra* note 27, at 50-58 (discussing automatic associative coherence).

significant aspect of sense-making, which some argue is foundational, is the stories we tell to ourselves and others.<sup>156</sup> As Donald Langevoort has noted, “[S]tories have a greater capacity to influence than more rational forms of discourse.”<sup>157</sup> I agree, having found that one of the most effective ways to help students appreciate the subtle and unconscious aspects of decision-making is by sharing stories about how lawyers actually behave.<sup>158</sup>

There is no shortage of such tales to be told from a behavioral perspective.<sup>159</sup> One that I find quite useful, and which I raise during discussion of Model Rule 1.13,<sup>160</sup> is the Tyco debacle of more than a decade ago. During our class discussions of the “reporting up” and “reporting out” requirements of the rule,<sup>161</sup> I play a short video about

156. Langevoort, *supra* note 65, at 1594. One of the pioneers of cognitive psychology, Jerome Bruner, believes that construction of narrative is the central aspect of experience. See generally Jerome Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 1-21 (1991). For his excellent discussion with his co-author of the role of narrative in legal discourse, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 120-21 (2000).

157. See Langevoort, *supra* note 65, at 1594.

158. Others have come to a similar conclusion. See, e.g., Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 749 (2003).

159. For example, more than one author has explored the behavioral aspects of the story of John Gallene, the disgraced bankruptcy partner at the Wall Street law firm of Milbank, Tweed, Hadley & McCloy. See Robbennolt & Sternlight, *supra* note 10, at 1114-16; Nancy B. Rapoport, *The Curious Incident of the Law Firm That Did Nothing in the Night-Time*, 10 LEGAL ETHICS 98, 98-114 (2007) (reviewing Milton Regan’s EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER (2004)). Many other notable stories of misconduct are told from a behavioral perspective, including the collapse of Enron, see Nancy B. Rapoport, *Enron, Titanic, and The Perfect Storm*, 71 FORDHAM L. REV. 1373 (2003); Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417 (2003); the demise of the major Wall Street Law firm, Dewey & LeBoeuf, see Nancy B. Rapoport, “Nudging” Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 42, 46 n.11, 59-61 (2014); a major scandal in Australia involving the Australian Wheat Board also involved behavioral perspectives, see Kath Hall & Vivien Holmes, *The Power of Rationalization to Influence Lawyers’ Decisions to Act Unethically*, 11 LEGAL ETHICS 137 (2009); and the case of a lawyer at the U.S. Department of Justice who claims that she lost her job after providing her client advice it did not favor. See McGowan, *Office Politics*, *supra* note 13. Indeed, even works of fiction have given rise to a behavioral analysis. See Painter, *supra* note 12 (discussing the psychological lessons that emerge from Arthur Solmssen’s novel, THE COMFORT LETTER (1975)).

160. See MODEL RULES OF PROF’L CONDUCT R. 1.13 (AM. BAR ASS’N 2014).

161. Model Rule 1.13(b) places responsibility on a lawyer for an organization to report possible wrongdoing to a higher authority within the organization under certain circumstances (the “reporting up” rule), whereas Model

the various misdeeds of Dennis Kozlowski, the former CEO of Tyco who was convicted of extensive fraud and larceny from the company,<sup>162</sup> which opens up a good discussion about the obligations that the company's in-house lawyer might have had regarding Kozlowski's criminal behavior.<sup>163</sup> Most students recognize that a lawyer for the company who had contemporaneous knowledge of Kozlowski's misconduct would have owed obligations under the rule.<sup>164</sup> At the same time, they seem to appreciate—at a cursory level—some of the behavioral reasons why it might have been difficult for anyone inside the company to report Kozlowski's profligate spending and other misbehavior.

After this short discussion, we continue this theme on the class blog, where I post a summary of a wonderful article by Sung Hui Kim, who has meticulously described the story of Mark Belnick, Tyco's former General Counsel.<sup>165</sup> Belnick, who was charged but eventually acquitted of criminal activity in the case, received a remarkable compensation package at Tyco, which included, in addition to his salary, a \$17 million bonus for helping Tyco successfully handle an SEC inquiry, and \$14 million in interest-free loans to renovate a \$2.8 million Manhattan apartment and purchase a \$10 million home in Park City, Utah.<sup>166</sup> The Manhattan District Attorney's Office, which brought the criminal charges against

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Rule 1.13(c) permits, but does not require, a lawyer to disclose otherwise confidential information about wrongdoing to those outside the organization under certain circumstances (the "reporting out" rule). *See id.* R. 1.13(b)-(c).

162. The video segment is a profile of Dennis Kozlowski conducted by *60 Minutes*. *See* [gzfraud, Tyco CEO Dennis Kozlowski CBS 60 Minutes Prison Interview](https://www.youtube.com/watch?v=MymLaVYsyHw), YOUTUBE (Sept. 5, 2011), <https://www.youtube.com/watch?v=MymLaVYsyHw> [<https://perma.cc/DD7F-FGP6>].

163. For more on Kozlowski and the Tyco scandal, see David Kaplan, *Tyco's 'Piggy,' Out of Prison and Living Small*, N.Y. TIMES (Mar. 1, 2015), [http://www.nytimes.com/2015/03/02/business/dealbook/dennis-kozlowkis-path-from-infamy-to-obscurity.html?\\_r=0](http://www.nytimes.com/2015/03/02/business/dealbook/dennis-kozlowkis-path-from-infamy-to-obscurity.html?_r=0) [<https://perma.cc/A2SR-CAUX>]; Mark Maremont & Laurie P. Cohen, *Tyco Spent Millions for Benefit of Kozlowski, Its Former CEO*, WALL ST. J. (Aug. 7, 2002, 9:52 AM), <http://www.wsj.com/articles/SB1028674808717845320> [<https://perma.cc/F3Z2-VQFF>].

164. It should be noted that the "reporting out" provision of Model Rule 1.13(c) did not exist at time of the Tyco scandal and, indeed, was enacted in response to corporate fiascos such as Tyco, Enron, and WorldCom. *See* Ronald D. Rotunda & John S. Dzienkowski, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE, § 1.13-2(d), 615-18 (West 2012-2013). As a result, for the purposes of our class discussion, I ask the students to assume that Model Rule 1.13(c) had been in force at the time of Dennis Kozlowski's misconduct.

165. *See* Kim, *supra* note 43.

166. *See id.* at 1005-06.

Belnick, claimed that this financial compensation package was essentially “hush money” paid when Belnick was hired to ensure that he would not disclose Kozlowski’s rampant financial misdeeds.<sup>167</sup>

As part of this blog post, I discuss the various psychological factors Professor Kim has identified that help to explain Belnick’s failure to uncover and report Kozlowski’s wrongdoing. These include many of the factors we have already discussed in class, such as the power of obedience as demonstrated by the Milgram experiments;<sup>168</sup> the power of self-interest that, because of self-serving biases and motivated reasoning, can cause people to interpret information in a self-serving manner;<sup>169</sup> and the power of conformity pressure.<sup>170</sup> Then I ask the students whether, from their perspective, Belnick should be seen as a villain in this tale, as someone who should have known better but who fell prey to many of the psychological pressures to which we are all susceptible, or as an innocent victim with no blame at all.<sup>171</sup> I end the discussion by wondering in how many other cases lawyers for organizations (even without the lavish compensation package received by Belnick) might be tempted to succumb to the psychological pressures described by Professor Kim and how these pressures might influence decisions regarding the obligations to report up and out under MR 1.13.

From my perspective, using a narrative approach such as the Tyco story, rich as it is in detail and intrigue, contextualizes the behavioral concepts discussed during the semester and helps to make behavioral legal ethics come alive in a way that deepens an understanding of the material.

### 7. Prevention

One confounding aspect of the lessons from behavioral science is that because the factors that influence judgment and behavior largely occur outside of conscious awareness, they are difficult to

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167. *See id.* at 989.

168. *See id.* at 992-96, 1001-04.

169. *See id.* at 1005-08, 1029-34.

170. *See id.* at 1019-24. Other psychological factors are also at play, Professor Kim argues, including the pressures to align one’s views with those of the client and the influence of role ideology. *See id.* at 1008-11, 1012-18.

171. Belnick continues to proclaim his own innocence, stating in 2006, “[T]here is nothing I would have done differently, absolutely nothing. I was never asked to do anything wrong.” *Mark Belnick Tells His Story*, INSIDE COUNS. (May 30, 2006), <http://www.insidecounsel.com/2006/05/30/mark-belnick-tells-his-story?page=1&slreturn=1448899387> [<https://perma.cc/55UA-DXEM>].

counteract.<sup>172</sup> That said, there are a number of interventions that have been identified as helpful in reducing the biases produced by unconscious influences. Throughout the semester, I explore these interventions, and the science behind them, in a variety of ways.

To begin with, merely becoming aware of the power of subtle situational and cognitive forces, while no panacea, can help lawyers develop appropriate strategies to counteract biased decision-making.<sup>173</sup> For example, knowing about the power of the slippery slope can attune lawyers to the importance of being vigilant in respecting all of their ethical duties, even those that might seem trivial in some matters.<sup>174</sup> I try to impart this lesson many times, discussing why it is so important to always respect the ethical boundaries of the rules. When discussing whether it is ever permissible to lie to clients, for instance, I explain that some lawyers may feel comfortable instructing an assistant to fend off communications by an overly intrusive client by fibbing about whether the lawyer is in the office. This type of “white lie,” on its own, may produce little harm. But when viewed through the science of the slippery slope, the danger of such small transgressions becomes more apparent. My goal is to encourage students to realize that persistent ethical conduct is not only right, but also is a buffer against the dangers of incrementalism. In a broader sense, my hope is that by discussing the various components of behavioral legal ethics, the students will develop creative ways to combat the pull towards unethical behavior.

There are, in addition, specific strategies that can be employed to help reduce the power of unconscious influences. For example, one way to increase the possibility of ethical behavior is for lawyers to make salient the ethical dimensions of decisions at the time they are made.<sup>175</sup> We discuss this strategy both in class and on the blog,

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172. See Timothy D. Wilson et al., *Mental Contamination and the Debiasing Problem*, in *HEURISTICS AND BIASES*, *supra* note 26, at 185, 189-92.

173. See Robbennolt & Sternlight, *supra* note 10, at 1157-58. As Professor Rhode has noted:

[Legal ethics education] can also make individuals aware of how economic incentives, peer influence, and diffused responsibility can skew judgment, and how to design appropriate responses. Although the classroom experience cannot fully simulate the pressures of practice, it can provide a setting to explore their causes and correctives before individuals have a stake in coming out one way rather than another.

Rhode, *supra* note 1, at 49.

174. See Robbennolt & Sternlight, *supra* note 10, at 1157.

175. See Robbennolt & Sternlight, *supra* note 10, at 1158-61.

noting that ethical fading occurs when people fail to perceive the ethical aspects of their decisions.<sup>176</sup> To reinforce this point, at the end of the semester I provide each student with a picture that includes a quote by Martin Luther King, Jr. that I believe captures the importance of persistent ethics: “The time is always right to do [what is] right.”<sup>177</sup> My hope, which I express when the students receive these pictures, is that they will place this quote in their workspace. Perhaps, as the research suggests, such a reminder front and center will make ethics salient at the time that these future lawyers are called upon to make decisions with ethical consequences.

Another strategy that has also been documented to help loosen the binds of unconscious influences is known as “perspective taking.”<sup>178</sup> The basic notion is that biases can be lessened if the decision-maker consciously seeks to engage in thinking that is inconsistent with the positions that are likely to produce biased reasoning. So, for example, one might seek to better understand the viewpoint that is opposite of one’s preferred position.<sup>179</sup>

Gaining an outsider’s perspective, by trying to consider how a disinterested person would view the situation, or by obtaining counsel from someone who can view the situation more objectively, can also help.<sup>180</sup> These are ideas that can be explored in various ways. Early in the semester, for instance, we discuss a case, *Kelly v.*

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176. See *supra* note 49 and accompanying text. For the seminal work on ethical fading, see Tenbrunsel & Messick, *supra* note 137, at 228.

177. Martin Luther King, Jr., Address at Southern Methodist University (Mar. 17, 1966). Others have made similar suggestions. See, e.g., Robbennolt & Sternlight, *supra* note 10, at 1159 (“A paperweight, wall hanging, or other memento can be a visual reminder of the standards one wants to uphold.”).

178. ROBBENNOLT & STERNLIGHT, *supra* note 29, at 25-26.

179. See Robbennolt & Sternlight, *supra* note 10, at 1159. Considering counterarguments that can weaken one’s position, for example, has been demonstrated to reduce self-serving biases. See Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997) (discussing research results). However, there is also evidence that encouraging lawyers to consider viewpoints opposite of their own is not an effective debiasing technique. See Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL’Y & L. 133 (2010) (finding that considering the opposite did not reduce overconfidence of lawyers in predicting case outcomes).

180. See Robbennolt & Sternlight, *supra* note 10, at 1160. Instructors must be careful, however, in teaching about perspective taking, as in some instances it has been found that attempting to take a perspective of another can amplify, rather than reduce, biased decision-making. See ROBBENNOLT & STERNLIGHT, *supra* note 29, at 25.

*Hunton & Williams*,<sup>181</sup> which involved the courageous decision by a group of young associates at a prestigious law firm to report the overbilling practices of one of the firm's rainmakers. In rendering its decision, the court noted that the associates raised the rainmaker's misdeeds with management of the firm after receiving counsel from a trusted outside advisor, a federal judge for whom one of the associates had clerked.<sup>182</sup> When discussing this case, I make note of this aspect of the decision, highlighting how obtaining advice of an outsider can make it easier to overcome the barriers to ethical behavior.

I also raise another important point during the discussion of the *Kelly* case, which I reinforce over the semester: The decision to report the billing abuse was not the result of one courageous lawyer acting alone; rather, a group of three associates worked together to gather evidence of the overbilling and report it to the firm's managers.<sup>183</sup> This is an example of another approach to reducing the power of unconscious bias. Recall that Solomon Asch's experiments revealed that it is easier to resist the power to conform when others do so as well.<sup>184</sup> This is an important lesson from the *Kelly* case: The three associates acting together were able to do what one of them alone may not have—overcome the pressure to stay silent in the face of obvious misbehavior by a senior member of the firm.

There are many other techniques that that can be employed to help reduce unethical behavior and that might be useful to emphasize for anyone who plans to teach this material. An instructor, for example, might focus on approaches offered by experts on how to plan responses to future ethical problems before they occur.<sup>185</sup> There are also many institutional responses that are available to enhance the ethical culture of workplaces, which can make it less likely that individuals will be subject to the incentives and pressures that can produce unethical behavior.<sup>186</sup> While I have not yet focused on these approaches in any detail, I hope do so in developing and expanding my approach in future years.

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181. *Kelly v. Hunton & Williams*, No. 97-CV-5631 (JG), 1999 WL 408416 (E.D.N.Y. June 17, 1999).

182. *See id.* at \*3.

183. *Id.*

184. *See supra* notes 79-81 and accompanying text.

185. *See, e.g., infra* notes 231-35 and accompanying text.

186. *See Robbennolt & Sternlight, supra* note 10, at 1169-81 (discussing ways organizations can improve ethical culture to mitigate the unconscious aspects of unethical decision-making).

### 8. Summary

The subjects and techniques described so far provide a flavor of the many ways in which I have integrated behavioral legal ethics into the pedagogy of my professional responsibility class. While I have attempted to make these and other behavioral concepts a core feature of the course, there is also a large body of empirical research that I have not yet attempted to address. In this respect, teaching behavioral ethics is both exciting and challenging, as there is such a wide amount of material from which to draw when planning the curriculum. My approach is a work-in-progress. And while it is premature to draw any final conclusions about the endeavor, teaching behavioral science to law students has already produced an opportunity to make some observations about the experience.

## III. REFLECTIONS

Reflecting on teaching behavioral legal ethics over the last two years, three observations stand out. The first concerns the overall effectiveness of this approach. On this score, my preliminary assessment is that teaching behavioral science as part of a survey course in professional responsibility can enhance the core ethics curriculum, although additional forms of assessment will be useful in deciding how to improve this approach as it continues. Second, anyone who plans to teach behavioral legal ethics should seek to stay abreast of current developments in the subject, both to incorporate new findings into the curriculum and also to be able to address any methodological questions that arise about the science that undergirds the field. Third, because the approach described in Part II is but one way that behavioral legal ethics can be integrated into the professional responsibility curriculum, some other possible approaches, as well as future directions in this area, are explored.

### A. Assessing the Experience

One measure of this endeavor is how students have responded to learning about behavioral legal ethics. If the first two years using this approach are a valid indication, the majority of my students have reported that they find that it has been beneficial. In the most recent class (spring 2015), for example, the students completed a short, anonymous survey, which asked on a scale of 1 to 5 how they rated learning about the psychological dimensions of ethical decision-

making.<sup>187</sup> The 39 students who took the survey rated the experience positively, with the class average of 4.5 out of 5.<sup>188</sup>

The student comments flush out these reactions. For example, one student said, “[K]nowing the rules will only be helpful if you are aware of how you will act when faced with ethical dilemmas.”<sup>189</sup> Another made a similar point: “I found the psychology of legal ethics extremely helpful. It really allowed me to focus in on the issues I know I will be challenged with when I enter the legal profession.”<sup>190</sup> Other comments were similar.<sup>191</sup>

My sense is that there are at least three reasons why students have been receptive to this approach. The first concerns the role of context. Students seem to appreciate the human agency involved in ethical decision-making, recognizing that there is no way to fully appreciate how, as future lawyers, they will respond to ethically fraught situations until they are placed in real world contexts, with all of the associated pressures. This is one reason that, as others have noted, teaching ethics contextually provides a more complete and developed sense of the types of experiences that students will face in practice.<sup>192</sup> Teaching behavioral science in the ethics curriculum

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187. I administered the survey on the last class of the semester (April 22, 2015), with 39 of the 42 registered students in attendance. The methodology was as follows: toward the end of the class, I handed the students index cards and asked them anonymously to “Rate 1 to 5 (5 being the highest)” their answers to this question: “To what extent did you find it useful to learn about the psychology of legal ethics?” I also asked the students to “[a]dd any comments you think appropriate.” All 39 students in attendance provided comments, although one student did not provide a rating. I do not profess that this survey meets the rigor of scientific validity, although it is one measure of the student reaction to the experience of learning behavioral legal ethics.

In addition, I administered a survey in the first year of teaching behavioral ethics in the course (spring 2014), using an online survey instrument that asked students to rate the class blog based on whether it was “educational” and “enjoyable to read.” While this online survey also produced favorable ratings, it is less reliable than the in-class survey administered in spring 2015 due to the response rate: only 21 of the 39 class completed the spring 2014 online survey, producing a response bias.

188. Of the 38 students who provided ratings, 24 students rated the experience at 5.0; 2 rated it at 4.5; 10 rated it at 4.0; 1 rated it at 3.5; 1 rated it at 3.0; and 1 rated it at 2.0 (on file with author).

189. Student comment to anonymous survey, April 22, 2015 (on file with author).

190. *Id.*

191. For example, one student added, “I think a conversation about ethics that doesn’t include a psychological component is not a full or helpful discussion,” while another stated that it is “kind of hard to imagine studying ethics without any mention of the psychological issues at this point.” *Id.*

192. See *supra* notes 3, 8 and accompanying text.

amplifies this theme, by helping students understand the subtle ways that various situations can influence ethical behavior. And while no course can fully replicate the real world situations awaiting future lawyers, by experiencing and then discussing many of the influences and pressures that may await them, students seem to gain a better appreciation for why context matters.

Again, the student comments reflect this conclusion. For example, one student said that learning about psychology “helps give a glimpse into the real world” factors that “influence our decisions on ethical standards.”<sup>193</sup> Another student made a similar point: “I found it helpful to learn about psychology and very interesting as well. It gives you a view of how these rules act in the real world and how it’s not that easy all the time to follow these rules exactly.”<sup>194</sup> Such comments suggest that the students recognize that learning the foundations of behavioral science can help them to understand the dynamics of how ethical decisions occur, including the many subtle psychological factors that can influence their future conduct in the practice of law.

A second explanation for the positive reception concerns the level of student engagement. Anyone who teaches legal ethics knows that, unfortunately, sustaining student attention and active engagement often can be difficult.<sup>195</sup> One reason may be that students often feel that learning the rules of professional responsibility, without more, is not sufficiently stimulating to pique and sustain their interest.<sup>196</sup> While there are many ways to improve engagement,<sup>197</sup> I have found that using the techniques described in

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193. See Student Comment to Anonymous Survey, April 22, 2015 (on file with author).

194. See *id.*

195. See Rhode, *Teaching Legal Ethics*, *supra* note 12, at 1048 (explaining many reasons students are disinclined to relish courses in legal ethics); Green, *supra* note 4, at 358-59 (discussing student dissatisfaction with the legal ethics curriculum). Alas, this observation is nothing new. See Steven Lubet, *I Teach Legal Ethics*, 13 J. LEGAL PROF. 133, 133 (1988) (describing “widespread student apathy and dissatisfaction” with a required class in professional ethics).

196. The many challenges of teaching a standard survey course in legal ethics are well known, including the general apathy for the course inside of law school, the unease many students (and faculty) feel at discussing morally ambiguous situations, and the lack of experience by most students with the types of situations that provide context for rich discussions of ethical behavior. See Rhode, *Teaching Legal Ethics*, *supra* note 12, at 1048.

197. For example, one way is by teaching legal ethics in conjunction with actual practice settings, such as placements and externships. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J.

Part II—especially teaching through simulations,<sup>198</sup> extensive use of multimedia,<sup>199</sup> and the use of interactive technology, such as the extra credit blog<sup>200</sup>—has helped students stay engaged and interested throughout the semester.<sup>201</sup> Such techniques can be particularly useful in teaching the “millennial generation” who seem to desire these and other similar forms of pedagogy.<sup>202</sup>

A final aspect, related to student engagement, concerns the quality of the discussion in the classroom, especially about morally

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LEGAL ETHICS 31, 64-65 (1995); Rhode, *supra* note 1, at 52-53. Many of the ideas presented in this Article could be used in combination with such an approach.

198. Others have extolled the benefits of using simulations and other forms of experiential learning to teach legal ethics. See, e.g., Lisa G. Lerman, *Teaching Ethics in and Outside of Law Schools: What Works and What Doesn't*, PROF. LAW. SYMP. 57, 59-60 (2006); James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 75 (1996); Gillers, *supra* note 149, at 62-63.

199. The value of using film, video, and other forms of multimedia to teach legal ethics has been widely discussed. See, e.g., Rhode, *Teaching Legal Ethics*, *supra* note 12, at 1053; John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 J. LEGAL EDUC. 19 (1990).

200. For a description of the trend toward increased use of interactive technology as an important component of legal education, see Michele Pistone, *Law Schools and Technology: Where We Are and Where We Are Heading*, 64 J. LEGAL EDUC. 586 (2014); DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE 5-8 (2009). For other examples of how blogs have been integrated successfully into the law school curriculum, see Patrick E. Longan, *Teaching Professionalism*, 60 MERCER L. REV. 659, 693 (2008). See also Stephen M. Johnson, *Teaching for Tomorrow: Utilizing Technology to Implement the Reforms of MacCrate, Carnegie, and Best Practices*, 92 NEB. L. REV. 46, 66 (2013). One fascinating example is Lewis & Clark Law School's Transformative Immigration Law Seminar. As part of the course, students research and create blog posts utilizing social science research as an advocacy tool, creating authority (the blog posts themselves) to be used by advocates in the field of immigration law. See Juliet Stumpf, *At the Border of the Classroom*, U. OXFORD (Sept. 21, 2015), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/09/border-classroom> [<https://perma.cc/9LFR-U8LH>].

201. A number of student comments in the course noted that integration of the psychological aspects of ethical decision-making made the course “interesting,” “helpful,” “enjoyable,” “refreshing,” and “fun.” Student Comments to Anonymous Survey, April 22, 2015 (on file with author).

202. See Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227, 229-30 (2015) (“Millennial students ask for ‘self-directed learning, interactive environments, multiple forms of feedback, and assignment choices that use different resources to create personally meaningful learning experiences.’” (quoting Emily A. Benfer & Colleen D. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. 1, 10 (2013))); THOMSON, *supra* note 200 (discussing technological competencies and expectations of the Millennial generation).

ambiguous and difficult situations. Before I started to integrate a behavioral component into my class, I noticed that students often seemed reticent to declare publically their views about difficult ethical dilemmas. Indeed, more than once I recall when, in response to questions, students were unwilling to disclose their own feelings, perhaps because of a fear that their responses would be judged either by their classmates or by me.<sup>203</sup> Teaching behavioral ethics has altered this dynamic to some extent; that is, after we discuss the psychological dimensions of ethical behavior, especially the reasons why even good people can engage in misconduct, I have found that many students seem freer to express their own private views about difficult ethical decisions. While I do not know whether there is any causal connection for this greater openness and willingness to engage, my suspicion is that the students feel more at ease discussing their own views, knowing that their responses will not be considered an automatic reflection of their own moral character.

As these student responses suggest, teaching behavioral legal ethics as part of the ethics curriculum has, to date, been a positive experience. But it is important not to overemphasize the students' comments, which alone do not determine the extent to which they have actually learned and internalized the behavioral concepts they were taught. To answer this harder question, an additional level of assessment is needed. One option would be to add a component of summative assessment at the end of the semester, such as a final exam that includes questions that focus on the behavioral science taught in the course.<sup>204</sup> I have resisted assessing in this manner for three reasons. First, much of the material is taught for extra credit and the students that avail themselves of that option do so with an expectation that their performance will not otherwise be graded. Second, while there is certainly value in summative assessment tools such as a final exam, there are also dangers—for example, turning the experience of learning into a competitive enterprise in which the students study the material primarily for an end-of-semester grade rather than for the intrinsic value of learning the material itself.<sup>205</sup> Third, given that much of what the students learn occurs experientially, I have doubts that testing the students through a final

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203. Others have noted similar reticence by students. See Rhode, *Teaching Legal Ethics*, *supra* note 12, at 1048-49.

204. For a description of summative assessment and its comparison to formative assessment, see Bloom, *supra* note 202, at 232-35.

205. For a discussion of some of these dangers in the context of teaching professional responsibility, see SULLIVAN ET AL., *supra* note 3, at 149-50.

exam about their knowledge of the material is the proper assessment technique for my course.

Fortunately, there are other ways to assess student learning. To begin with, the science on assessment, which has become an important topic surrounding the entire law school curriculum,<sup>206</sup> indicates that formative assessment, where students are provided ongoing feedback, can be an effective measure. To some extent, this form of assessment is built into the methods I have employed. For example, I provide written feedback to the students who comment on the extra credit blog.<sup>207</sup> In this way, I am able both to evaluate the quality of the comments made by the students and provide feedback almost immediately. Additional opportunities for formative assessment and feedback occur for those students who decide to write their own blog entries on a particular aspect of behavioral legal ethics.

Another form of assessment, which I have not yet employed but plan to use in the future, involves student self-evaluations in which students assess their own learning of the subject matter. By using appropriate benchmarks, these comparisons provide an opportunity to gauge the degree of learning that takes place during the semester.<sup>208</sup>

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206. The American Bar Association recently adopted new accreditation standards relating to obligations of member law schools to develop and implement proper outcome measures. See David Thomson, *When the ABA Comes Calling, Let's Speak the Same Language of Assessment*, 23 PERSPECTIVES 68 (2014). These developments have transpired against the backdrop of a number of influential reports calling for better assessment of the law school curriculum. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 108-09 (Clinical Legal Educ. Ass'n ed., 2007); SULLIVAN ET AL., *supra* note 3, at 7-9.

207. For example, during the spring 2015 semester, I provided written comments to twenty-six of the forty-one student comments to the blog.

208. In one format, this approach can assess student understanding of the subject at the beginning of the course (the "pre" measure) and then again at the end of the course (the "post" measure). By comparing the two sets of responses, an evaluation can be made of the degree of learning that apparently occurs. See Drumwright et al., *supra* note 12, at 450. The challenge of this approach, as others have noted, is that the student perceptions of what is being studied can change during the semester, invalidating the comparison of the responses. See *id.*; Tony Lam & Priscilla Bengo, *A Comparison of Three Retrospective Self-Reporting Methods of Measuring Change in Instructional Practice*, 24 AM. J. EVALUATION 65, 67-68 (2003). One way to address this confounding element, known as "response shift," is to use a "pre-then-post" approach, in which the students at the beginning of the semester assess their knowledge of the subject matter, then at the end of the semester answer two sets of questions: the first asks them to evaluate retrospectively their knowledge of the subject at the beginning of the semester (the "then" measure);

Finally, there is a need to determine whether teaching law students about the psychology of decision-making improves their ethical behavioral after entering practice. Having taught from a behavioral perspective for only two years, it would be premature to attempt any such assessment based on my experience so far. But as the field of behavioral legal ethics matures, and more students are exposed to the lessons behavioral science has to offer, it will be important to seek proper measures. And while developing techniques to assess the effectiveness of this (or any) form of ethics instruction will be a challenge,<sup>209</sup> it is a project well worth pursuing.

Overall, the initial feedback from my students indicates that teaching behavioral legal ethics enhances the legal ethics curriculum. Recognizing that my approach is a work in progress, my goal is to continue to find ways to enhance and measure student understanding, appreciation, and, ultimately, real world application of this important material.

## B. Developments in Behavioral Science

As an empirical discipline, behavioral legal ethics is only as viable as the science upon which it rests. As a result, any instructor who plans to incorporate behavioral insights into the ethics curriculum will need to maintain familiarity with methodological questions that have been raised and the applicable science in the area.

Initially, anyone teaching this material should be aware of the general skepticism that some have posed as to whether the core findings of behavioral science have relevance to law in general. These doubts emerged shortly after the inception of interdisciplinary work into behavioral law and economics more than a decade ago.<sup>210</sup> Since then, proponents of a behavioral approach have responded

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and the second asks them to assess their degree of knowledge at the end of the semester (the “post” measure). See Drumwright et al., *supra* note 12, at 450. Comparing the differences between the “then” and “post” responses has been demonstrated to provide a more accurate assessment than the traditional “pre” and “post” method. *Id.*

209. See, e.g., Drumwright et al., *supra* note 12, at 447.

210. See, e.g., Gregory Mitchell, *Why Law and Economics’ Perfect Rationality Should Not Be Traded for Behavioral Law and Economics’ Equal Incompetence*, 91 GEO. L.J. 67, 72-73 (2002) (arguing against a behavioral approach to law); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998) (questioning the role of behavioral law and economics).

forcefully and largely successfully.<sup>211</sup> One leading authority has even declared “victory” in this debate, noting the overwhelming acceptance among legal scholars of the role that behavioral science should play in assessing law’s prescriptions.<sup>212</sup> Nor is this acceptance in the legal realm unique; rather, the last number of years has seen expanding use of behavioral science to address a wide array of public policy issues<sup>213</sup>—further evidence of the ascendancy of the field. Anyone who plans to teach behavioral science would be well served to stay abreast of these and related discussions,<sup>214</sup> both to respond to

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211. See, e.g., Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663 (2003); Jeffrey J. Rachlinski, *The “New” Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739, 743 (2000).

212. See Korobkin, *supra* note 26, at 1653-55 (noting that two prominent law review articles favoring the incorporation of a behavioral approach to law and economics have been the most cited law works of scholarship from 1995 through 2011).

213. For example, in 2010 the British government created the Behavioural Insights Team that has found various ways to incorporate behavioral science into a wide array of policy prescriptions. See BEHAV. INSIGHTS TEAM, <http://www.behaviouralinsights.co.uk> [<https://perma.cc/L5NW-YTY4>] (last visited Sept. 23, 2016); see also Evan Nesterak, *Behavioral Insights Team 5 Years On: A Conversation with Owain Service*, PSYCH REP. (Nov. 3, 2015), <http://thepsychreport.com/politics/the-behavioral-insights-team-5-years-on-a-conversation-with-owain-service> [<https://perma.cc/NQU9-7RPN>] (describing various ways that behavioral science is improving public policy, such as increasing participation rates in job training and placement programs, enhancing small business participation in programs designed to reduce costs, encouraging the use of alternatives to cigarettes to reduce the harms caused by tobacco consumption, and increasing organ donations). In the United States, a recently announced executive order instructs all federal agencies to find ways to apply the lessons of behavioral science in fulfilling their objectives. See Exec. Order No. 13707, 80 Fed. Reg. 56,365 (Sept. 15, 2015). This step has been lauded as a major achievement for a behavioral approach to public policy, revealing the value of behavioral science in addressing important matters of social concern. See Francesca Gino, *Why the U.S. Government Is Embracing Behavioral Science*, HARV. BUS. REV. (Sept. 18, 2015), <https://hbr.org/2015/09/why-the-u-s-government-is-embracing-behavioral-science> [<https://perma.cc/6FSM-27ZH>] (last visited Sept. 23, 2016).

214. More recently, there has been a robust debate within the field of psychology more generally about whether the results of many studies are as valid as claimed. Much of this concern centers around what some are calling a “replicability crisis” in which a number of well-known studies have failed to replicate in subsequent experiments, leading some to argue that these studies are either unreliable or do not generalize across times and situations. See generally Harold Pashler & Eric-Jan Wagenmakers, *Editors’ Introduction to the Special Section on Replicability in Psychological Science: A Crisis of Confidence?*, 7 PERSP. ON PSYCHOL. SCI. 528 (2012). The result has been a call for more transparency and availability of data, and for greater efforts to replicate research results. See John Bohannon, *Psychologists Launch a Bare-All Research Initiative*, SCIENCE (Mar. 5,

any skepticism that may be encountered and to ensure that the best available research is being taught in the classroom.

Another area where an instructor should maintain familiarity focuses more directly on the empirical claims of behavioral legal ethics itself. For example, within the last few years there has been a renewed debate over Stanley Milgram's seminal shock experiments, with at least one well-known critic challenging the methodological basis of his experiments.<sup>215</sup> Others defend Milgram's studies, concluding that, even if there are legitimate questions about any of his methods, his results are sound<sup>216</sup>—a conclusion supported by the repeated replications of his findings.<sup>217</sup> Anyone interested in teaching about Milgram's work should become familiar enough with this debate to be versatile about the continued viability of the obedience studies.

Similarly, other areas of recent research have shed important light on the scientific claims made by behavioral legal ethics. For example, in a recent study researchers sought to determine the extent to which certain types of conflicts of interest can be reduced through

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2013), <http://news.sciencemag.org/2013/03/psychologists-launch-bare-all-research-initiative> [<https://perma.cc/Z2CY-672Q>]. Some do not see a crisis, see, for example, Lisa Feldman Barrett, *Psychology Is Not in Crisis*, N.Y. TIMES (Sept. 1, 2015), [http://www.nytimes.com/2015/09/01/opinion/psychology-is-not-in-crisis.html?\\_r=2](http://www.nytimes.com/2015/09/01/opinion/psychology-is-not-in-crisis.html?_r=2) [<https://perma.cc/XK4F-YFSQ>], while others believe that these events will lead to better research methods and sounder results. See Gary Marcus, *The Crisis in Social Psychology That Isn't*, NEW YORKER (May 1, 2013), <http://www.newyorker.com/tech/elements/the-crisis-in-social-psychology-that-isnt> [<https://perma.cc/5V26-UMQH>]. At this point, it is too early to know how this debate will be resolved. At the very minimum, instructors in behavioral legal ethics should not rely on any claims that have limited empirical support and should keep an eye toward any consensus that emerges as the replicability discussion continues to unfold.

215. See GINA PERRY, *BEHIND THE SHOCK MACHINE: THE UNTOLD STORY OF THE NOTORIOUS MILGRAM PSYCHOLOGY EXPERIMENTS* (2013). See generally Cari Romm, *Rethinking One of Psychology's Most Infamous Experiments*, ATLANTIC (Jan. 28, 2015), <http://www.theatlantic.com/health/archive/2015/01/rethinking-one-of-psychologys-most-infamous-experiments/384913/> [<https://perma.cc/MH4J-9DBY>].

216. See, e.g., Carol Tavris, *Book Review: 'Behind the Shock Machine' by Gina Perry*, WALL ST. J., Sept. 7, 2013, at C5; Nestar Russell, *Book Review: Gina Perry. Behind the Shock Machine: The Untold Story of the Notorious Milgram Psychology Experiments*, 49 J. HIST. BEHAV. SCI. 221 (2013).

217. See Perlman, *supra* note 41, at 458 ("Milgram's findings have been replicated throughout the world, with similar results in both genders, different socioeconomic groups, and different countries."). One famous recent partial replication is by Dr. Jerry Burger, who was able—within current ethical constraints—to establish that levels of obedience have changed little since Milgram's original work. See Burger, *Replicating Milgram*, *supra* note 94; see also O'Grady, *supra* note 40, at 16-18 (discussing Dr. Burger's replication study).

the use of deliberative forms of reasoning—such as making people explicitly consider the costs of succumbing to the conflict or appealing to their sense of morality about the conflict.<sup>218</sup> According to the results, subtle conflicts of interest produced by slight financial incentives can be reduced through use of the explicit interventions proposed.<sup>219</sup> This, of course, is only one study and its external validity needs to be carefully assessed.<sup>220</sup> However, if its findings can be replicated, especially in the types of situations where lawyers face real world conflicts, it suggests that the errors produced by bounded ethicality may be diminished—at least in some instances—by explicit forms of reasoning, a finding that provides some optimism that ethical blind spots can be overcome.<sup>221</sup>

Another study of importance was recently conducted by Dan Kahan and his colleagues, which suggests that motivated reasoning may not be as powerful in causing biased judgments by legal practitioners as previously supposed.<sup>222</sup> In the study, state court judges and lawyers<sup>223</sup> were asked to make judgments about the meaning of key words in a statute based on vignettes that were meant to invoke what is described as “identity-protective cognition,” which refers to a species of motivated reasoning that produces political polarization in certain types of decisions.<sup>224</sup> The study’s results

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218. See Yuval Feldman & Eliran Halali, *Can We Regulate ‘Good’ People in Subtle Conflicts of Interest Situations*, SOC. SCI. RES. NETWORK (July 10, 2015), <http://ssrn.com/abstract=2536575> [<https://perma.cc/WU7M-YYR>]. In the study, the researchers provided subjects who had filled out a questionnaire with the possibility of a small financial incentive of \$1.00 to slant their answers in a particular direction. This produced what the researchers term a “subtle conflict of interest” between the subjects’ own financial self-interest and their non-biased responses to the questionnaire. *Id.* at 21.

219. *Id.*

220. For example, the financial incentive in the study—the possibility of an additional payment of \$1.00—is insignificant compared to the substantial financial incentives that can exist for a lawyer who must forgo a fee from a potential client because of a conflict of interest. *See id.* at 25.

221. *But see* Max Bazerman & Mahzarin R. Banaji, *The Social Psychology of Ordinary Ethical Failures*, 17 SOC. JUST. RES. 111, 111 (2004) (“[S]uch measures simply bypass the vast majority of unethical behaviors that occur without the conscious awareness of the actors who engage in them.”).

222. Kahan et al., *supra* note 113.

223. The study also evaluated the responses of law students and members of the general public. *Id.* at 375-76.

224. *See id.* at 354-55 (defining “identity-protective cognition” as “the species of motivated reasoning known to generate political polarization over risks and myriad policy and legally consequential facts”). Also known as “cultural cognition,” the central idea is that people reason based on “the influence of group

demonstrated that judges and lawyers are not susceptible to motivated cognition based on their cultural values, at least with regard to the types of legal judgments they make when engaging in legal analysis such as statutory interpretation.<sup>225</sup>

These findings must be taken seriously in any discussions of behavioral legal ethics. On the one hand, the study suggests that legal training may immunize lawyers from the types of motivated judgments previously described.<sup>226</sup> If so, instructors who teach behavioral legal ethics must incorporate this study and its findings into any lesson about the role of motivated cognition and legal ethics. On the other hand, the scope of the study suggests that more research is needed before any definitive conclusions can be made about the relationship between motivated cognition and legal ethics. For example, the study addressed only one type of motivated reasoning, which focuses on identity-protective characteristics. Whether the same results can be expected in other situations, such as where lawyers are confronted with choices that pit their professional obligations against self-interest, remains to be seen.<sup>227</sup> In addition, the study did not concern lawyers acting as advocates in pursuit of client objectives; rather, the lawyers in the study were asked to interpret a statute's meaning from a neutral position, as if they were adjudicating a dispute.<sup>228</sup> Whether lawyers would respond the same way as partisans as they would as arbiters remains to be seen.<sup>229</sup> For

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values—ones relating to equality and authority, individualism and community—on risk perceptions and related beliefs.” Dan Kahan, *Fixing the Communications Failure*, 463 NATURE 296, 296 (2010). As but one example,

Citizens who subscribe to an egalitarian ethic that identifies free markets as founts of unjust disparity readily credit evidence that commerce and industry are destroying the environment; citizens who adhere to an individualistic ethic that prizes private orderings dismiss such evidence and insist instead that needless government regulation threatens to wreck economic prosperity.

Kahan et al., *supra* note 108, at 859.

225. See Kahan et al., *supra* note 113, at 412-13.

226. See *supra* notes 108-17 and accompanying text.

227. See *supra* notes 118-19 and accompanying text (describing research demonstrating that lawyers and other professionals are susceptible to motivated reasoning based on self-interest); see also Yuval Feldman & Alon Harel, *Social Norms, Self-Interest and Ambiguity of Legal Norms: An Experimental Analysis of the Rule vs. Standard Dilemma*, 4 REV. L. & ECON. 81, 89 (2008) (“Motivated reasoning manifests itself as a tendency to evaluate information in a way beneficial to the agent’s narrow self-interest.”).

228. See *supra* note 113 (describing the study’s methodology).

229. For a description of how lawyers are susceptible to partisan bias that favors their clients, see Perlman, *supra* note 12, at 1654-57.

present purposes, the point is not to determine the full value of the study, which no doubt provides important insights into legal decision-making and judgment. Rather, it is to note that anybody who teaches behavioral legal ethics must stay atop the research to make sure that students are exposed to the most recent and relevant scientific findings in the field.

### C. Alternative Approaches and Future Directions

The description in Part II provides a blueprint of one approach for how to teach behavioral ethics as part of a professional responsibility survey course. For those who are looking for other ideas, approaches are starting to emerge.<sup>230</sup> For example, Vivien Holmes from Australian National University (ANU) School of Law recently described a model that she and her colleagues have developed to teach behavioral science to approximately 600 students per semester as part of a required course that includes ethics education.<sup>231</sup> Based on an innovative pedagogy developed for business education known as Giving Voice to Values (GVV),<sup>232</sup> the ANU curriculum employs online video scenarios raising ethical challenges for the student viewer.<sup>233</sup> In web conferences with colleagues and mentors, students are required to practice responding

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230. In addition, there are at least two course books that incorporate some aspects of behavioral science into discussions of legal ethics. *See supra* note 13.

231. *See* Holmes, *supra* note 15.

232. The central idea of GVV is that students need to learn more than how to resolve difficult ethical dilemmas; rather, they must also develop the skills to act upon their values in situations where there are deep pressures to act unethically. *See* MARY C. GENTILE, *GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT'S RIGHT* (2010); *The Giving Voice to Values Curriculum*, BABSON C., <http://www.babson.edu/Academics/teaching-research/gvv/Pages/home.aspx> [<https://perma.cc/3L4R-JRS8>] (last visited Sept. 23, 2016). Through a structured curriculum that draws extensively on research findings from behavioral ethics and that employs case studies and simulations, students are taught how to develop what has been described as a “moral muscle”—where, through practice and preparation, they pre-script and rehearse approaches to acting ethically in difficult situations. *See* GENTILE, *supra*, at ix-xvii. In this way, students learn techniques to prepare for and resist the temptations and pressures that can cause unethical behavior. *See id.* at xii.

233. Called the *Professional Practice Core* course, the class incorporates a number of doctrinal areas, including ethics, into an online curriculum in which students participate in “virtual” law firms to provide advice to clients. *See* Holmes, *supra* note 15, at 128-29. During the semester, the students are confronted with a number of ethical dilemmas, such as how to respond to a senior partner who wants to assert a frivolous claim of privilege or a request that a lawyer falsely affirm witnessing a signature. *See id.* at 130.

to these challenges as if they were junior lawyers attempting to act ethically. In this way, students learn how to identify and overcome barriers to ethical behavior, including strategizing how to counteract demands from superiors that can produce misconduct.<sup>234</sup> Early evaluations of the program have been quite promising.<sup>235</sup>

Other approaches, although not focused on legal ethics per se, are also available. For example, two leading scholars on behavioral legal ethics, Professors Robbennolt and Sternlight, each teach a course on psychology and lawyering that uses role-plays, simulations, and other experiential methods to teach students about the psychology of decision-making.<sup>236</sup> In her course, for instance, Professor Robbennolt administers an in-class survey in the first class that helps students experience many of the heuristics and cognitive biases that they will study throughout the semester.<sup>237</sup> And in her course, Professor Sternlight stages an encounter with a colleague early in the semester to help the students understand the fallibility and malleability of memory.<sup>238</sup> These and other techniques help students in both classes gain an appreciation for the many ways that subtle psychological factors will influence their decisions as lawyers.

Finally, anyone interested in teaching behavioral legal ethics would be well served to review the videos and associated materials created by *Ethics Unwrapped*.<sup>239</sup> In use by hundreds of educational institutions,<sup>240</sup> these videos intersperse interviews of students discussing ethical questions with engaging whiteboard animation on a wide range of topics and are accompanied by teaching notes and references for further reading. I have found many of the videos, especially those that discuss core aspects of behavioral ethics, to be very helpful in teaching my students. Other instructors could do

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234. See *id.* at 134.

235. See *id.* at 133-34 (noting that students after the course report much less willingness to follow suggestions from superiors to act unethically than they did prior to taking the course).

236. See Sternlight & Robbennolt, *supra* note 12, at 378-79.

237. *Id.* at 378-79. This exercise highlights a number of cognitive biases and heuristics, including “the effects of availability, anchoring, representativeness, self-serving bias, the options under consideration, cognitive reflection, and hindsight bias.” *Id.*

238. *Id.* at 379.

239. Minette Drumwright et al., *About Ethics Unwrapped*, ETHICS UNWRAPPED, <http://ethicsunwrapped.utexas.edu/about> [<https://perma.cc/W2J5-MXDZ>] (last visited Sept. 23, 2016).

240. As of recently, the *Ethics Unwrapped* materials have been in use in over 500 colleges and universities; the project has received numerous awards; and their videos have had over 360,000 YouTube views. See Email from Cara Biasucci, Program Director, Ethics Unwrapped (Dec. 15, 2015, 00:00 EST) (on file with author).

much more—for example, although the videos have been developed for business students, it would be easy to adapt them as the basis for an entire curriculum to teach behavioral legal ethics. Perhaps an intrepid educator might even be inspired to produce a similar set of videos focusing on the particular types of ethical problems that lawyers face. The success of *Ethics Unwrapped* suggests that such a project geared toward legal ethics, if done well, could be quite effective.<sup>241</sup>

As these examples demonstrate, we are in the early stages of developing ways to teach behavioral legal ethics. Those of us with an interest in exploring how to teach the psychology of ethical decision-making—both in law schools and more broadly across professional disciplines as a whole—have much to learn from each other.<sup>242</sup> As we do, and the field continues to mature, new methodologies will develop, generating new and exciting ways to teach behavioral science in the ethics curriculum.

#### IV. CONCLUSION

Behavioral legal ethics, now firmly rooted in legal scholarship, is starting to find its way into the law school curriculum. This Article describes my approach to teaching legal ethics from a behavioral perspective. Using a model that integrates the use of technology and multimedia, role-plays and simulations, and other forms of experiential learning into the survey course on legal ethics, this Article's central thesis is that law students should have grounding in the psychological influences and social pressures that are likely to await them in practice. Preliminary results have been encouraging, suggesting that teaching from this perspective can provide an engaging way to incorporate the insights from behavioral science into the professional responsibility curriculum.

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241. *Awards We've Won!*, ETHICS UNWRAPPED, <http://ethicsunwrapped.utexas.edu/about> [<https://perma.cc/6PHZ-33RZ>] (last visited Sept. 23, 2016).

242. See Eldred, *supra* note 45, at 2.