



Texas Center for
LEGAL ETHICS
Professionalism in Practice

ETHICAL DECISION MAKING, FAST AND SLOW

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Professor Prentice has published several textbooks and approximately 70 law review articles on securities law and behavioral and business ethics. His work has appeared in leading law journals, such as the *Northwestern University Law Review*, the *Cornell Law Review*, the *Duke Law Journal*, and the *Georgetown Law Journal*. His recent research focuses on the implications of findings in behavioral psychology and behavioral ethics for business regulation, business conduct, and individual moral decision making.

Professor Prentice has given ethics talks to Fortune 500 companies such as Chevron, federal agencies such as the SEC, state agencies such as the Texas Employees Retirement System, international organizations such as the International Ethics Standards Board for Accountants, professional societies such as the American Bar Association, local governments such as the City of San Antonio, and numerous civic organizations.



Kevin Dubose is an appellate lawyer in Houston, and a founding partner of Alexander Dubose & Jefferson LLP. He is a former Chair of the State Bar of Texas Appellate Section, former Chair of the Appellate Section of the Houston Bar Association, and a Past President of the American Academy of Appellate Lawyers.

Kevin first wrote about legal ethics in the early 1990s, and since then has written and spoken about that subject numerous times. He is a lawyer who other lawyers frequently turn to for ethical advice.

When Chair of the State Bar Appellate Section, Kevin appointed, and served on, a committee to draft standards of professionalism designed for appellate law. Those efforts culminated in the creation of the *Standards for Appellate Conduct*, which was adopted by the Supreme Court of Texas and Texas Court of Criminal Appeals in 1999. It became the first, and remains the only, set of ethical standards specifically designed for appellate practice in the United States.

Kevin served on the Board of Directors of the Texas Center for Legal Ethics from 2015-23, and was Chair of that Board in 2020-21. He has participated in over 60 CLE programs on behalf of the Center.

Kevin has received two awards for his contributions to ethics and professionalism in Texas: the Chief Justice Jack Pope Professionalism Award in 2012 (presented by the Texas Center for Legal Ethics), and the Lola

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Kevin also serves on the board of the non-profit Books for Development, which has taken him on five trips to Uganda to establish libraries and train local librarians. He also served lengthy terms on the boards of the Houston Urban Debate League and Main Street Theater.



Beverly Bell Godbey is a Principal in Dallas' Amy Stewart Law, where she advises insurance policyholders in a variety of coverage matters, including policy reviews, comparisons, and dispute resolution. In addition to her insurance work, Beverly has represented corporate clients in complex commercial litigation, personal injury claims, products liability actions, trade secret cases, and professional malpractice claims, among others.

In addition to her law practice, she is a past Chair of the Texas Center for Legal Ethics Board of Trustees and is an instructor for TCLE's *Justice James A. Baker Guide to Ethics and Professionalism* for newly licensed lawyers in Texas. Beverly is committed to serving as a leader in the local and statewide legal community, having served as past president of the Dallas Bar Association and the Dallas Association of

Young Lawyers, former Chair of the Dallas Bar Foundation, and past Chair of the State Bar of Texas Board of Directors.

She is also an avid supporter of pro bono legal services to the poor, receiving various awards for her volunteer work, including the Equal Access to Justice Rainmaker Award, the Pro Bono Appreciation Award, the Jurisprudence Award from the Anti-Defamation League, and the Dallas Bar Foundation's Justinian Award. Based on her work for clients in insurance coverage litigation and commercial litigation, she has been named by her peers to D Magazine's list of the Best Lawyers in Dallas, The Best Lawyers in America, and the annual listing of Texas Super Lawyers, published by Thomson Reuters. Before joining Amy Stewart Law, Beverly was a Partner and Co-Chair of Litigation at Gardere Wynne Sewell LLP in Dallas from 1986 to 2018.



Jonathan Smaby has served as the Executive Director of the Texas Center for Legal Ethics in Austin since 2009. The Center promotes the ethical practice of law by attorneys and educates the public regarding legal ethics and the justice system. The Center also administers the *Justice James A. Baker Guide to Ethics and Professionalism in Texas* CLE course, a four-hour program required of all newly-licensed attorneys by the Supreme Court of Texas.

Prior to being selected as Executive Director, Smaby practiced law in Dallas, where he was the managing shareholder of Roberts & Smaby, PC. He formerly served as Chair of the Consortium on Professionalism Initiatives for the American Bar Association and was a longtime member of the Advertising Review Committee of the State Bar of Texas. More recently, he served on the Succession Planning

Workgroup for the State Bar of Texas that resulted in the creation of a webpage and forms by which attorneys can designate a custodian-attorney in advance in case of their disability or death. He is the editor and primary

author of the popular “Ethics Question of the Month” column in the *Texas Bar Journal*, which is the second most popular feature in the *Journal* per a recent reader survey.

Smaby is a frequent speaker, primarily on the topics of legal ethics, professionalism, behavioral ethics, and implicit bias. He has spoken at events sponsored by the American Bar Association, the State Bar of Texas, the University of Texas Law School, the NAACP, and numerous local bar associations throughout Texas. He is a member of the College of the State Bar of Texas and a Life Fellow of the Texas Bar Foundation.

Smaby is a graduate of the University of Minnesota and the University of Michigan Law School, and he is licensed to practice law in Texas and Minnesota.

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ETHICAL DECISION MAKING, FAST AND SLOW

“[T]he rules and their application are clear in the vast majority of [lawyer ethics] breaches...”¹

“The individual defendants were almost universally described by their attorneys as upstanding citizens, community leaders, church vestrymen, Little League Organizers.”²

I. INTRODUCTION

Why do seemingly upstanding and widely-admired lawyers do bad things? For those of us who teach legal ethics, this fundamental question must be squarely addressed if we wish to make any headway in reducing the number of preventable ethical lapses in the legal profession. The answer, it turns out, is rooted in science. Specifically, extensive research has revealed how our brains actually process information and how strikingly unaware we are of what those brains are sub-consciously up to.

Our brains are, in many ways, pre-wired to conspire against us when we try to do the right thing. Failure to understand and appreciate just how insidious this phenomenon really is leaves us unequipped to recognize and avoid many of the most common ethical mistakes that lawyers make. Learning the rules and having good intentions may not be enough. Listening carefully to what your brain is really telling you may be equally necessary to steer clear of ethical pitfalls.

II. THE PSYCHOLOGY OF DECISION MAKING

In his recent book *The Undoing Project*,³ Michael Lewis (*Liar’s Poker*, *The Blind Side*, *Money Ball*, *The Big Short*) tells the intriguing story of an incredibly productive thirty-year relationship between Amos Tversky and Daniel Kahneman. Absent Tversky’s premature death, they both undoubtedly would have won the Nobel Prize. As it happened, only Kahneman, a psychologist, received the Prize and he won *in economics*. Their work and that of hundreds of scholars who followed in their footsteps, forever changed the way we think about how people make decisions.

It would take a lengthy paper to summarize the findings that Kahneman and Tversky made and inspired. An interested reader can tackle Kahneman’s book *Thinking, Fast and Slow*,⁴ but be warned that this is not a task for the casual observer – it is a dense, but rewarding tome. At a conference in his honor, Kahneman told one of the attendees that “hundreds” of people had told him they had bought his 499-page book and “several” had told him they had finished it.

In this paper, we will discuss two of the major areas of discovery made or inspired by Kahneman and Tversky, as well as their implications for moral decision making by lawyers and others.

¹ RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 497 (2008).

² JOHN G. FULLER, THE GENTLEMAN CONSPIRATORS: THE STORY OF THE PRICE-FIXERS IN THE ELECTRICAL INDUSTRY 166 (1962) (quoting the *New York Herald Tribune* regarding one of the greatest antitrust scandals of all time).

³ MICHAEL LEWIS, THE UNDOING PROJECT: A FRIENDSHIP THAT CHANGED OUR MINDS (2017).

⁴ DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

III. BEHAVIORAL ETHICS OVERVIEW

From the thirty-thousand-foot view, Kahneman and Tversky's work did great damage to what had been a fundamental assumption underlying standard economic theory—that people are rational decision makers. Kahneman, Tversky, and those who have trod in their footsteps have established: (a) people make most of their decisions rapidly, intuitively, and emotionally, and (b) people's decision-making is heavily influenced by (i) social and organizational pressures, (ii) cognitive heuristics and biases, and (iii) situational factors.

Once widely accepted in the economic and financial domain, the “rational man theory” has been reshaped by new fields of research denominated “behavioral economics”⁵ and “behavioral finance.”⁶ In the field of moral decision making, psychologists, cognitive scientists, evolutionary biologists, and academics from several related fields have performed a large amount of “behavioral ethics”⁷ research over the past fifteen years as they studied how and why people make moral (and immoral) decisions.

Not to spoil the surprise, but the punch line is that people are rational, but only boundedly so...and ethical, but only boundedly so.

IV. SYSTEM 1 AND SYSTEM 2

Kahneman suggests that people use two primary modes of decision-making. Borrowing terms from psychologists Keith Stanovich and Richard West,⁸ he refers to the two decision-making paradigms as “System 1” and “System 2.” “*System 1* operates automatically and quickly, with little or no effort and no sense of voluntary control.”⁹ When we use this mode we decide instinctively, emotionally, and nearly automatically. In contrast, “*System 2* allocates attention to the effortful mental activities that demand it. . . .”¹⁰ This mode is calculating, analytical, methodical, rule-based, and involves slow and deliberative judgment. Because System 2 requires much more effort, and the human brain is inherently lazy, there is a tendency for the brain to revert to System 1 on a sub-conscious level that we do not even notice. Thus, although it is possible for System 2 to affect how System 1 works and occasionally override it, the large majority of our thinking occurs in System 1 mode, not System 2. Even legal reasoning—which seems on its face to be that most cognitive of activities—is affected significantly by System 1.¹¹ “System 2 is more of an apologist for the emotions of System 1 than a critic of those emotions – an endorser rather than an enforcer. Its search for information and arguments is mostly constrained to information that is consistent with existing beliefs, not with an intention to examine them.”¹²

System 1 also dominates our moral judgments and action choices.¹³ We typically judge the morality of someone's actions instinctively and instantaneously. Consider a hypothetical situation where

⁵ See, e.g., COLIN F. CAMERER ET AL., EDS. *ADVANCES IN BEHAVIORAL ECONOMICS* (2004); RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991).

⁶ See, e.g., ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* (2000); RICHARD H. THALER, ED., *ADVANCES IN BEHAVIORAL FINANCE* (1993).

⁷ See, e.g., Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 *ANNUAL REVIEW OF LAW & SOCIAL SCIENCE* 85 (2012); Linda K. Trevino et al., *Behavioral Ethics in Organizations: A Review*, 32 *JOURNAL OF MANAGEMENT* 951, 967 (2006).

⁸ See Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate*, 23 *BEHAVIORAL AND BRAIN SCIENCES* 645 (2000).

⁹ KAHNEMAN, *supra* note 4 at 20.

¹⁰ *Id.* at 21.

¹¹ Stephen M. Maurer, “‘Beauty is Truth and Truth Beauty’: How Intuitive Insights Shape Legal Reasoning and the Rule of Law” (2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3159348.

¹² KAHNEMAN, *supra* note 4, at 103.

¹³ Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOLOGICAL REVIEW* 814 (2001).

two adult siblings decide to have sex with each other because they believe that it will make their relationship even closer. Even though they take every possible precaution to ensure that conception is impossible and that no one else will ever know about it, most people instantaneously deem the siblings' actions immoral, if not highly immoral! Yet when asked to explain why they reached that judgment, most people have difficulty articulating a logical reason. They may think of reasons why incest is unwise, but they are unable to produce compelling reasons to conclude that it is immoral. Actions are typically immoral because they injure other people, and in this scenario, no other person is harmed. The inability to produce logical reasons for moral judgments is called "moral dumbfounding,"¹⁴ and it is a widespread phenomenon.

We have probably evolved to find the notion of incest disgusting as a way of discouraging us from engaging in it and thereby preserving our genes from the damage caused by inbreeding.¹⁵ Importantly, when we feel that disgust, it causes us to assume that the thing we are disgusted by is also immoral, but that is not necessarily the case.¹⁶ As Daniel Kelly wrote in *Yuck!*, his book about the emotion of disgust, "the fact that something is disgusting is not even remotely a reliable indicator of moral foul play....[T]he moral significance that should be assigned to the fact that people are disgusted by [a particular action] is: none."¹⁷ Furthermore, what disgusts people in the moral realm is largely culturally determined.¹⁸ People raised in one culture are disgusted by the thought of eating beef, while those raised in another culture are disgusted by the thought of eating pork. Neither is disgusting to most people raised in mainstream American culture, but try to talk to people about eating domesticated animals like dogs or cats, and see what reaction you get. Again, reason plays a minor role.¹⁹

Human emotions play a huge role in our moral decision-making, and that means that when we think we are using System 2 to reason through to a moral conclusion, we often are simply searching for rationalizations for decisions we have already made intuitively and instantaneously with System 1.²⁰ That does not mean that we cannot override our System 1 emotional judgment by using our System 2's cognitive tools. We can. And we should.²¹ But this is effortful and not what we typically do. Emotions can play a positive role in our moral lives. Self-conscious emotions such as guilt, shame, and embarrassment motivate most people (the ones who aren't psychopaths) to follow society's moral norms.²² Our fear of being the subject of other-condemning emotions such as anger, contempt and disgust also helps keep us on the moral path.²³

The emotional circuits in our brains play a major role in moral decision making. When they are damaged, it may be difficult or impossible for us to act morally.²⁴

The bottom line is that while we should never ignore that feeling in our gut when we are thinking about doing something we know at some level that we shouldn't, we also should never assume that our

¹⁴ *Id.*

¹⁵ Kelly suggests that there was an evolutionary advantage to being disgusted by the thought of eating feces or rotting corpses, and that the emotion was eventually co-opted from the physical world to deal with more abstract matters and even take on a moral valence. DANIEL KELLY, *YUCK! THE NATURE AND MORAL SIGNIFICANCE OF DISGUST* 1-7 (2011).

¹⁶ Thalia Wheatley & Jonathan Haidt, *Hypnotic Disgust Makes Moral Judgments More Severe*, 16 *PSYCHOLOGICAL SCIENCE* 780 (2005).

¹⁷ KELLY, *supra* note 14 at 148-49.

¹⁸ *Id.* at 6-7.

¹⁹ JESSE PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* 24-25 (2008).

²⁰ FRANS DE WAAL, *THE BONOBO AND THE ATHEIST: IN SEARCH OF HUMANISM AMONG THE PRIMATES* 171 (2013).

²¹ PAUL BLOOM, *AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION* (2016); MARK JOHNSON, *MORAL IMAGINATION: IMPLICATIONS OF COGNITIVE SCIENCE FOR ETHICS* (1993).

²² CRAIG E. JOHNSON, *MEETING THE ETHICAL CHALLENGES OF LEADERSHIP: CASTING LIGHT OR SHADOW* 98 (5th ed. 2015).

²³ *Id.*

²⁴ JESSE J. PRINZ, *BEYOND HUMAN NATURE: HOW CULTURE AND EXPERIENCE SHAPE THE HUMAN MIND* 298 (2012).

moral judgments are correct just because they seem correct to us. It is always a good idea to think deeply and carefully, to get others' points of view, and to be open to the ideas and conclusions of others.

V. BOUNDED ETHICALITY

Kahneman and Tversky demonstrated that humans are rational, but boundedly so.²⁵ We tend to make systematic errors of various kinds and degrees of severity when we make judgments about many things.

Behavioral ethics researchers have extended the Kahneman and Tversky research into the realm of moral decision-making. While most of us want to be good people and generally do the right thing, we are also subject to various pressures, biases and situational factors that explain why most of us depart from our own moral standards on a regular basis (unfortunately), generally in fairly minor ways (fortunately), but sometimes those departures can be significant.²⁶

A. Social and Organizational Pressures.

1. Obedience to Authority. Most of us are wired to be obedient to authority.²⁷ And we are trained as children to please authority figures such as parents, teachers, and police officers. Therefore, even as adults, the pleasure centers of our brains are stimulated when we please our bosses.

Most institutions function best when people follow the rules and orders that authority figures promulgate. However, if you have an unethical boss and your desire to be obedient causes you to *unconsciously* ignore your moral standards while pleasing the boss, or to *consciously* set aside your moral standards so that you can please the boss, then you have a problem. Sometimes people intentionally follow a superior's instructions to act illegally or immorally and that is obviously bad. But it is equally troublesome when people focus so intently upon pleasing the superior that they do not even see the moral challenge they are about to trip over.

*Attorney example: David Helmers, a new attorney, met with class action clients to discuss a settlement proposal and obtain litigation releases. At the direction of a senior attorney in his firm, Helmers misled the clients regarding the settlement. The Kentucky Supreme Court permanently disbarred Helmers, though it noted that he was "inexperienced, impressionable, and may have been influenced, and perhaps even led astray" by his supervising attorney.*²⁸

2. Conformity Bias. Just as people wish to please their bosses, they also want to get along with their peers. It is an evolutionarily sound strategy when joining a group or an organization to "hide and watch," observing what others do to see what works and what doesn't, what facilitates getting along with others and what doesn't.

However, problems arise when people strive so hard to get along with others that they fail to use their own moral compass when facing an ethical challenge. They may be so focused on getting along with others that they do not even see the moral challenge that they face. Or, they may see it, but be so used to focusing on getting along with their fellow employees that they simply adopt others' views without activating their own moral compass. Or, they may see the ethical challenge, but consciously choose not to

²⁵ See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (Sept. 27, 1974); CHOICES, VALUES, AND FRAMES (Daniel Kahneman & Amos Tversky eds. 2000).

²⁶ MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 5 (2011); David De Cremer, *Psychology and Ethics: What It Takes to Feel Ethical When Being Unethical*, in PSYCHOLOGICAL PERSPECTIVES ON ETHICAL BEHAVIOR AND DECISION MAKING 5 (David De Cremer ed., 2009).

²⁷ "One of the most consistent findings in human psychology is that people tend to do what they are told to do." Lynn A Stout, *Killing Conscience: The Unintended Behavioral Consequences of 'Pay for Performance'*, 39 J. CORP. L. 525 (2014).

²⁸ Kentucky Bar Ass'n v. Helmers, 353 S.W.3d 599, 602-03 (Ky. 2011).

follow their own moral compass in favor of reaping the rewards of “going along to get along.” In any of these three situations, the conformity bias can lead good people to do bad things.

Psychologist David Luban has noted: “The desire to fit in with those around us helps explain how lower-level employees, such as lawyers and accountants, become fatally implicated in corporate wrongdoing. In large organizations, decisions get parceled out among many people, and every piece of work is the product of many hands.”²⁹

Attorney Example: Around the turn of the century, abusive tax shelters somehow became all the rage among many law and accounting firms. The abuses were clear to objective third parties, but somehow attorneys who saw other attorneys engaged in the activity came to the conclusion that it would be alright for them to do so as well. As one attorney said when he entered his guilty plea: “I think my desire to be a big shot, [to] feel that I was part of the in-crowd in the tax community, overrode my conscience.”³⁰ Another attorney reasoned that “Deutsche Bank, a global financial institution, and its lawyers, the renowned corporate firm Shearman & Sterling, would not risk their reputations on an abusive tax shelter,”³¹ so he thought it must be okay for him to engage in the activity.

B. Cognitive Heuristics and Biases.

1. Overconfidence Bias. After surveying the academic literature, columnist David Brooks concluded: “The human mind is an overconfidence machine.” Studies show that mathematically impossible proportions of us believe that we are better than average drivers, auditors, teachers, etc. Unfortunately, this unrealistic overconfidence extends to the moral realm where impossibly high percentages of people believe that they are more moral than others, and 92% of Americans say that they are satisfied with their moral character.

When people are satisfied with their moral character and believe that they are morally superior to those around them, they have a tendency to believe that if they encounter a moral challenge, they will handle it properly. This complacency often leads people to make moral choices without sufficient reflection, which often does not end well. As with other areas of human endeavor, unrealistic overconfidence in our moral character is a key ingredient in a recipe for disaster.

Attorney Example: To adequately and ethically represent their clients, attorneys must be able to give reasonably accurate, good-faith assessments of decisions to sue or settle, go to trial or settle, to appeal or settle, etc. Unfortunately, studies show that attorneys, especially male attorneys, tend to be overconfident in their assessment of the outcomes of civil and criminal proceedings.³²

2. Framing. How people decide an issue often depends significantly upon how the question is framed.³³ In the business world, people will make different decisions if they view a choice only in terms of the likely dollar outcome than if they have moral standards in their frame of reference. Sometimes, people focus so much on pleasing their bosses, on getting along with their peers, or on meeting some bonus target that ethical considerations fall out of the frame altogether. In this kind of setting truly unfortunate decisions are often made. A classic example is the Enron debacle. That company had so many important metrics tied to its stock price (bonus payments, debt covenants, etc.) that top executives had no choice but to get up every day thinking about how to maximize the firm’s stock price. With that focus, individuals will make different, and less ethical, decisions than if they have acting honorably prominently placed in their frame of reference.

²⁹ David Luban, *Making Sense of Moral Meltdowns*, in MORAL LEADERSHIP 57, 70 (Deborah L. Rhode ed., 2006).

³⁰ TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 292 (2014).

³¹ *Id.* at 116.

³² Elizabeth Loftus et al., *Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes*, 16 PSYCHOLOGY, PUBLIC POLICY & LAW 133 (2010).

³³ RONALD A. HOWARD & CLINTON D. KORVER, ETHICS FOR THE REAL WORLD: CREATING A PERSONAL CODE TO GUIDE DECISIONS IN WORK AND LIFE 95 (2008) (“...our biggest mistakes in ethical decision making are mistakes in framing”).

*Attorney Example: Attorney John Gellene, who sought court approval to have his law firm appointed to represent the Bucyrus Co. bankruptcy estate, failed to disclose conflicts of interest his firm had. Milton Regan, who wrote about the case, believed part of the reason for the failure to disclose might be that although Gellene owed a duty to look out for the interests of all creditors, including JNL, because proceedings with JNL quickly became contentious, Gellene might have framed JNL as a foe rather than a beneficiary of his fiduciary duty. With that frame of reference, withholding information favorable to JNL's position seemed reasonable to Gellene.*³⁴

3. Incrementalism. Incrementalism is the slippery slope, also known as “boiling frog syndrome.” Psychologists Gino and Bazerman believe that “much unethical behavior occurs when people unconsciously lower the bar over time through small changes in ethicality.” Cutting small corners gradually becomes cutting big corners, especially because the human mind is not particularly good at noticing small changes in the environment. As Georgetown Law School professor Donald Langevoort noted:

Interviews with white collar criminals do often describe a slippery slope but identify the first step as a moment of weakness—being pressured by a friend or colleague into a small (and thus easily rationalized) act of wrongdoing, unaware of how that one step makes it so much harder to say no when asked again. In broker-dealer regulation, for example, one common problem is forged client signatures on transactional or account paperwork. Note how easy this is to start—you’re actually saving the client the time and hassle of signing the papers—and how readily a year or two later this can turn into forged signatures that misappropriate funds from the client’s account and not the broker’s hands.³⁵

Patrick Schiltz has warned young lawyers about how incrementalism in the billing context may lead them to disaster if they are not careful. Here’s how it will happen:

And then you will pad more and more—every two minute telephone conversation will go down on the sheet as ten minutes, every three hour research project will go down with an extra quarter hour or so. You will continue to rationalize your dishonesty to yourself in various ways until one day you stop doing even that. And, before long—it won’t take you much more than three or four years—you will be stealing from your clients almost every day, and you won’t even notice.³⁶

*Attorney Example: Marc Drier who stole millions of dollars from investors while trying to keep his high-flying law firm afloat commented: “It’s a slippery slope once you surrender to ambition,” Drier commented. ‘I did not set out to steal hundreds of millions of dollars, but ended up doing so incrementally after crossing a line I could not retreat from...Once I started, there seemed to be no way out other than to continue.’*³⁷

4. Loss Aversion. Studies show that people hate losses about twice as much as they like gains. That means that people will take chances (including risking being caught acting unethically) to avoid a loss more readily than they will take chances to achieve a gain. The way this plays out in practice is that people make a careless mistake or an innocent error in judgment. Having done so, they become worried about losing their reputation for competence or even their job. Being unduly worried about sustaining that loss, they are unable to own up to their mistake. An innocent error devolves into an intentional fraud. People

³⁴ MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 174 (2004) [HEREINAFTER (REGAN, *EAT WHAT YOU KILL*)].

³⁵ Donald Langevoort, *Behavioral Ethics, Behavioral Compliance*, in *RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING* __ (Jennifer Arlen, ed. 2018) (forthcoming).

³⁶ Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 *VANDERBILT LAW REVIEW* 871, 917-19 (1999).

³⁷ EUGENE SOLTES, *WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL* 259 (2016).

will cover up or tell lies to avoid losing their job that they never would have told to get the job in the first place.

Attorney Example: As noted earlier, John Gellene failed to disclose a conflict of interest his law firm had when it was appointed attorney for bankrupt firm Bucyrus. The failure may have initially been viewed as accidental and certainly was remediable by a quick admission of error. However, Regan notes that Gellene's vigorous defense of his firm's position would have meant that to have changed course in order to reveal the conflict "would involve an enormous psychological reversal. Having decided to conceal the information, in other words, it became harder to reverse course the more time passed."³⁸ Reagan ultimately concluded: "[I]f Gellene had a character flaw, it was that he tended to lie when he wanted to avoid the consequences of his own negligence. That surely is not admirable, but it is understandable."³⁹ As Gellene himself admitted: "When I am confronted with a mistake, it is very difficult for me to stand up and say I did a stupid thing."⁴⁰

5. The Tangible and the Abstract. People are more influenced by factors that are close in time and space than those farther removed, spatially or chronologically. It takes moral imagination to adequately consider the impact that one's actions might have on people who are living in another state or who won't be affected until a few years in the future, even though those effects may be very likely. Therefore, a business person might cut a corner to save some money that will show up on a financial statement at the end of the quarter, even though the impact might be to reduce product quality and increase the chances of personal injury in the future. Victims are simply statistical beings with neither a name nor a face, and, therefore, any potential injury to them is easily ignored. It may drop entirely out of the decision-maker's frame of reference.

Attorney Example: A story told by one law firm associate: "Sometimes I'd be reviewing a pre-bill and I'd look under 'costs' and I'd see '150 copies.' I didn't make 150 copies.... I'd go back to the partner and say, 'Look, somebody's been using the wrong code.' And he would say, 'Well, there's nothing we can do about that.' I'd say, 'Are we going to charge it to that client?' He goes, 'Well, ...it's the insurance company that pays the bill, so whether it is on that file or another ... What difference does it make?' It's a big faceless, giant insurance company. What's 150 copies at twenty cents a page? Well, it's exactly that amount."⁴¹

6. Moral Equilibrium. Most people, other than psychopaths, want to, and do, think of themselves as good people. Furthermore, people tend to keep a running score in their heads where they compare their conduct with their self-image as good people. When people find themselves doing something they are not morally proud of, their scoreboard goes into deficit. They will look for opportunities to do something good in order to put their scoreboard back in balance. This is called moral compensation. Unfortunately, sometimes when people do something good, they feel like their scoreboard is sporting a surplus and they may give themselves permission not to live up to their own moral standards "just this once." This is called moral licensing. Moral compensation + moral licensing = moral equilibrium.

The scary part of the equation here is moral licensing. This means that just when we have acted morally, or perhaps been praised for or received a reward for acting ethically, we may be particularly vulnerable to transgressions. We are more likely than at other times to give ourselves permission to depart from our own moral standards. Could this be why family values politicians and leaders of megachurches sometimes find themselves in the headlines for consorting with prostitutes or having affairs?

Attorney Example: Even as he aggressively enforced New York's anti-prostitution laws, state Attorney General Eliot Spitzer was himself patronizing prostitutes. Psychologists de Steno and

³⁸ REGAN, *supra* note 34, at 174.

³⁹ *Id.* at 301-02.

⁴⁰ *Id.* at 51.

⁴¹ Lisa G. Lerman, *Scenes from a Law Firm*, 50 RUTGERS LAW REVIEW 2153, 2162-63 (1998).

*Valdesolo speculate that moral equilibrium may “have been partially at play in Spitzer’s decision to indulge himself. After all, didn’t all his victories against the scourge of corruption give him license on some level to enjoy himself in an unsavory act now and again?”*⁴²

7. Self-Serving Bias. The self-serving bias is the tendency people have to gather information, process information, and even remember information in ways that advance their own self-interest or that support positions that they already have taken. Because of the overconfidence bias, people often believe that they are in the right and that the things they believe are correct. Therefore, they may be easily led to look only at information that supports their point of view, to process information in a one-sided fashion, and to ultimately make decisions that seem fair to them, but cause others to shake their heads and ask: “What were you thinking?” As Professor Tigran Eldred has noted: “[E]veryone – lawyers and other professionals included – tend to be unaware of the ways in which self-interest exerts influence over the decision-making process.”⁴³

*Attorney Example: Charles Cooper strongly opposed gay marriage and argued before the Supreme Court in favor of upholding California’s ban on gay marriage. He later learned that one of his daughters was gay and helped her plan her wedding to another woman, admitting that his views on gay marriage were “evolving” consistent with his evolving self-interest.*⁴⁴

8. Role Morality. Shakespeare wrote: “All the world’s a stage and all the men and women merely players....”⁴⁵ We often feel as if we are playing roles and this can lead us to apply our personal moral values when in our homes and our places of worship, but to abandon those standards when we are out in the world playing the role of “loyal employee,” “hard-charging sales rep,” or “zealous advocate.” Sociologist Robert Jackall, after inserting himself into a corporate bureaucracy for an extended time, heard an officer say: “What is right in the corporation is not what is right in a man’s home or in his church. What is right in the corporation is what the guy above you wants from you. That’s what morality is in the corporation.”

Regan has described how role morality can be a particular problem for attorneys:

[I]t’s probably fairly common for lawyers to construct a moral universe that’s particular to the matter on which they’re working. Both professional training and psychological tendencies incline many lawyers to identify strongly with their clients. This process helps provide the lawyer with a moral orientation in her work. ... In some cases, it authorizes the lawyer to engage in behavior that otherwise would be subject to moral criticism.

*Attorney Example: Applbaum defines role morality as “claim[ing] a moral permission to harm others in ways that if not for the role, would be wrong.”*⁴⁶ *And Radtke suggests that a lawyer defending a guilty client is an example of role morality that is sanctioned and even mandated by our adversarial system of justice.*⁴⁷

C. Situational Factors.

1. Time Pressure. We often do not realize how factors in our environment impact how we make decisions and how we act, even when morality is implicated. Time pressure is an environmental factor that

⁴² DAVID DESTENO & PIERCARLO VALDESOLO, OUT OF CHARACTER: SURPRISING TRUTHS ABOUT THE LIAR, CHEAT, SINNER (AND SAINT) LURKING IN ALL OF US 57 (2011).

⁴³ Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS LAW REVIEW 333 (2015).

⁴⁴ Julie Pace, *Prop 8 Lawyer Plans Daughter’s Gay Wedding*, AUSTIN AMERICAN STATESMAN, April 18, 2014.

⁴⁵ William Shakespeare, *As You Like It*, Act II, Scene VII.

⁴⁶ ARTHUR I. APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE 3 (2000).

⁴⁷ Robin R. Radtke, *Role Morality in the Accounting Profession—How Do We Compare to Physicians and Attorneys?*, 79 JOURNAL OF BUSINESS ETHICS 279 (2008).

may cause us to abandon our own moral standards without even noticing it. In one famous study, seminarians were asked to walk across campus to entertain a group of visitors who had shown up unexpectedly until the school's president could arrive. The experimenters recommended that they tell the story of the Good Samaritan to entertain the guests. As the study subjects walked across campus they encountered a fellow lying by the sidewalk in obvious need of a Good Samaritan. If they were not in a hurry, virtually all of the seminarians stopped to help. However, if they had been told that they should hurry because the visitors were becoming impatient, only 63% stopped to help. And, if they put under even more pressure to get across campus to entertain the group, only 10% stopped to help. These subjects certainly did not realize how time pressure affected their moral decision making, but it certainly did.⁴⁸

Attorney Example: In a Texas case involving one of the authors, the plaintiffs' attorney was representing about 25 clients. The defendants made a settlement offer with a very short deadline for acceptance. Rather than asking for an extension or recruiting other lawyers in his firm to help, plaintiffs' counsel accepted the offer within the time period but without contacting all his clients to see if they would agree to the settlement offer. It turned out, many did not.

Attorney Example: John Gellene, whom we have seen in earlier examples, billed almost 3,000 hours in the year he made the fateful nondisclosure in the Bucyrus bankruptcy. He worked "fiendishly hard" on the case and, according to Regan, "would do all this while working on other matters as well, flying from city to city and country to country, on the phone from airports and hotel rooms, juggling the relentless demands of high-profile corporate bankruptcies. He would function, in other words, in an environment of constant urgency."⁴⁹

2. Transparency. Integrity has been defined as doing the right thing when no one is looking.⁵⁰ Unfortunately, all the experimental evidence indicates that most people are substantially less likely to do the right thing if they feel they are not being watched than if they feel they are being observed.⁵¹ For example, people cheat less in a well-lit room where they feel more likely to be seen, but are much more likely to act improperly in a dimly-lit room.⁵² When prompted to think about God (and therefore about the possibility of being monitored by the supernatural), people tend to behave better as well.⁵³

Attorney Example: Prominent law professor Walter Effross suggested that to encourage junior attorneys at a law firm not to overbill or engage in other wrongful activity, firms should put life-sized cardboard models of managing partners in their offices so that the junior attorneys would always feel as though they were being observed.⁵⁴

3. Self-control. It takes self-control to resist the temptation to lie or cheat in order to gain personal advantage. Unfortunately, most of us have a finite amount of self-control and if we use it up—perhaps training for a triathlon or trying to stick to a punishing diet—then we have less self-control in reserve to resist opportunities to benefit from dishonesty. People who have exhausted their self-control have been found to cheat more thereafter.⁵⁵

⁴⁸ See John M. Darley & C.D. Batson, "From Jerusalem to Jericho": A Study of Situational And Dispositional Variables in Helping Behavior, 27 JOURNAL OF PERSONALITY & SOCIAL PSYCHOLOGY 100 (1973).

⁴⁹ REGAN, *supra* note 34, at 193, 99, 163.

⁵⁰ This quotation is widely ascribed to C.S. Lewis, although it appears that he did not, in fact, originate the saying. See <http://whosaidthisquote.blogspot.com/2016/12/integrity.html>.

⁵¹ John Hermann, *Algorithmic Surveillance Has Put Humanity in Touch with a New Wort of Omniscience—the Kind We Can Fool*, NEW YORK TIMES MAGAZINE, Jan. 14, 2018, p. 14.

⁵² Jonathan Haidt, *Can You Teach Businessmen to Be Ethical?*, WASHINGTON POST, Jan. 13, 2014.

⁵³ Herman, *supra* note 51, at 14.

⁵⁴ Nancy Rapoport, "Nudging" Better Lawyer Behavior: Using Default Rules and Incentives to Change Behavior in Law Firms, 4 St. Mary's Journal on Legal Malpractice and Ethics 42, 75 n. 113 (2014).

⁵⁵ ADAM GALINSKY & MAURICE SCHWEITZER, FRIEND & FOE: WHEN TO COOPERATE, WHEN TO COMPETE, AND HOW TO SUCCEED AT BOTH 171 (2015); CHRISTIAN B. MILLER, CHARACTER & MORAL PSYCHOLOGY 74-75 (2014).

As one author noted: “The general tip is to *never rely on self-control*....The best way to assert self-control is to never put yourself in situations where you have to exert it , and instead to focus on structuring your environment such that succumbing to temptation is impossible.”⁵⁶

*Attorney Example: Gentilin has observed that “[f]ield studies have also shown that there can be moral consequences associated with making decisions when our cognitive resources are depleted. In an ingenious study conducted by Shai Danziger and his colleagues, the rulings on parole requests made by eight Jewish-Israeli judges over a ten-month period were analysed. It was found that the probability of judges providing prisoners with favourable rulings was markedly higher at the beginning of the day and just after their two scheduled food breaks. As judges sequentially presided over a series of requests, the likelihood of a favourable ruling steadily declined.”*⁵⁷

4. Money. Money has a surprisingly corrosive effect on people’s moral behavior.⁵⁸ There is substantial evidence that just being primed to think about money causes people to be less sociable, less caring, and to act less morally. One set of experimenters concluded that priming subjects to think of money caused them to evaluate their decision in a business frame, which freed them to ignore the consequences of their decisions for others.⁵⁹

As John Hendry has pointed out:

In the limited, abstract world of finance, however, money *is* the measure of everything. One danger of working in such an abstract world is that when moral issues do arise, they aren’t recognized, partly because people aren’t looking for them and partly because the language—in this case the language of monetary calculations—has no way of expressing them. Just as money can’t buy love, or goodness, or right or wrong, it also can’t easily measure or represent them in a net present value calculation.⁶⁰

*Attorney Example: In writing about law firm compensation, attorney James Goodnow observed: “When firms focus exclusively on the bottom line, they run the risk that lawyers will sacrifice relationships and community at the altar of money. I’ll be the first to admit I’ve been guilty of falling into the all-about-the-Benjamins trap many times myself. It’s a place that’s easy to find yourself given the availability of market financial data and dearth of data about how firms stack when it comes to the intangibles.... But if cash is the only lens you use to view the world, you push further down a path toward the Gordon Gekko model of law, where greed is good, and anything else is just a distraction. But here’s the dirty little secret of Gordon Gekko: Greed isn’t good. Greed isn’t even all that smart. Greed is an abdication of responsibility, a philosophy of deliberate tunnel vision.”*⁶¹

⁵⁶ DANIEL M. WEGNER & KURT GRAY, THE MIND CLUB: WHO THINKS, WHAT FEELS, AND WHY IT MATTERS 310 (2016).

⁵⁷ DENNIS GENTILIN, THE ORIGINS OF ETHICAL FAILURES: LESSONS FOR LEADERS 148 (2016).

⁵⁸ Alain Cohn, Ernst Fehr & Michel Andre Marechal, *Business Culture and Dishonesty in the Banking Industry*, 516 NATURE 86-89 (Dec. 4, 2014); A.C. Kay et al., *Material Priming: The Influence of Mundane Physical Objects on Situational Construal and Competitive Behavioral Choice*, 95 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION SCIENCES 83 (2004); Nattavudh Powdthavee & Andrew J. Oswald, “Does Money Make People Right-Wing and Inegalitarian? A Longitudinal Study of Lottery Winners?”, available at ssrn.com/abstract=2396429 (2014).; Kathleen Vohs, *Money Priming Can Change People’s Thoughts, Feelings, Motivations, and Behaviors: An Update on 10 Years of Experiments*, 144 JOURNAL OF EXPERIMENTAL PSYCHOLOGY: GENERAL e86 (2015); Kathleen Vohs et al., *Merely Activating the Concept of Money Changes Personal and Interpersonal Behavior*, 17 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 208 (2006); Kathleen Vohs et al., *The Psychological Consequences of Money*, 314 SCIENCE 1154 (2006)

⁵⁹ Maryam Kouchaki et al., *Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes*, 121 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 53 (2013).

⁶⁰ JOHN HENDRY, ETHICS AND FINANCE: AN INTRODUCTION 41 (2013).

⁶¹ James Goodnow, *Blinded by the Benjamins?* Biglaw Blog, May 23, 2018, available at <https://abovethelaw.com/2018/03/blinded-by-the-benjamins/>.

VI. RATIONALIZATIONS

Harvard psychologist Joshua Greene has rightly suggested that “[r]ationalization is the great enemy of moral progress...”⁶² Rationalizations are the excuses that people give themselves for not living up to their own moral standards. Perhaps the most impactful thing people can do to try to keep themselves on the straight and narrow is to monitor their own rationalizations. Anand and colleagues have studied and categorized rationalizations.⁶³ Here are the most frequent:

A. Denial of Responsibility.

One of the ways that people can think of themselves as good people while doing bad things is by using the denial of responsibility rationalization. A lawyer might say to herself: “I know that this is wrong, but it is what my client wants me to do.”

B. Denial of Harm.

Another classic rationalization is denial of harm, where the wrongdoers can do something wrong that they cannot plausibly blame on others, but still think of themselves as good people because they conclude that their wrong caused no harm. A lawyer might say to herself: “I know that I shouldn’t do this, but no one will really be hurt.” Or, to put it more succinctly, “No harm, no foul.”

C. Denial of Victim.

One step further down the rationalization line is doing something wrong where harm is definitely caused, but still thinking of one’s self as a good person because the person who was harmed deserved to be harmed and therefore was not truly a victim. A lawyer may say to himself: “I know I shouldn’t do this, but my client is such a rich jerk that he deserves to get ripped off.”

D. Social Weighting.

There are two aspects to social weighting, both practices that allow the wrongdoers to minimize the salience of their bad acts.

1. Condemning the Condemnor.

Criminals will often admit their crimes, but mitigate them in their own minds by accusing the prosecutors and/or the police of being unfair or unduly punitive. An attorney might say to herself: “I know the judge would be furious if he knew that I was doing this, but he’s the biggest hypocrite I’ve ever seen on the bench.”

2. Selective Social Comparison.

Selective social comparison occurs when people minimize their wrongdoing by concluding that others are doing even worse things. As an example, an e-mail from one party to the Libor manipulation scandal to another went: “Don’t worry mate—there’s bigger crooks in the market than us guys!”⁶⁴ A

⁶² JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* 301 (2013).

⁶³ Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 19 *ACADEMY OF MANAGEMENT EXECUTIVE* 9, 11 (2005).

⁶⁴ Floyd Norris, *After Fraud, The Fog Around Libor Hasn’t Lifted*, *NEW YORK TIMES*, Nov. 1, 2013, p. B1.

lawyer might say to himself: “I know I shouldn’t pad my bills like this, but the lawyers in the firm I used to work for do much worse.”

E. Appeal to Higher Loyalties

This rationalization involves wrongdoers telling themselves that they owe loyalty to other people, other entities, or other causes that justify their acts. For example, a lawyer might say to herself: “I know this is wrong, but my law firm really needs me to come through for it during these tough financial times.” Or, “I know this is wrong, but I need this job. I’ve got a family to feed!”

F. Metaphor of the Ledger.

With this rationalization, people excuse their own wrongdoing by noting credits they have built up through hard work or past production.” They may say: “I work so much overtime, it’s alright if I take office supplies home for personal use.” A lawyer might say to himself: “I am the lowest paid partner at my firm; I deserve to pad my expense account just a bit.”

Unfortunately, lawyers are often quite adept at rationalizing.⁶⁵ Richard Abel, who has studied lawyer wrongdoing extensively, writes:

Whereas ordinary criminals are aware, and sometimes proud, of their outlaw status, white-collar criminals and disciplined lawyers vehemently deny their culpability. They point to their high social status and sterling character not just in mitigation of doing wrong but also as proof that they could never have done wrong. They emphasize the rules they did *not* break. Some advance noble motives: embezzling to save the business (and their employee’s jobs) or displaying excessive zeal on behalf of a deserving client. Deviants endlessly invent rationalizations: blaming victims (who sometimes cooperate by blaming themselves), insisting that no one was harmed or that the ‘victims’ could afford it, denying personal cupidity or gain and offering restitution.⁶⁶

G. Euphemisms.

Relatedly, attorneys, like everyone else, often use euphemisms to rationalize wrongdoing by making it sound harmless. In war, dead civilians become “collateral damage.” In medicine, death becomes a “negative patient outcome.” In law, attorneys do not steal from escrow accounts, they “borrow.” They do not withhold documents in discovery, they “overlook” them.⁶⁷

VII. CONCLUSION

As Abel notes, “[a]lthough some lawyers, like grifters and professional embezzlers, rationally choose to violate ethical rules in the pursuit of profit, coldly calculating the unlikelihood of punishment, *most [lawyers] drift into such conduct unselfconsciously.* That is one reason why they are genuinely surprised (and outraged) when they are caught.”⁶⁸

Most lawyers, like most nonlawyers, are overly confident regarding their morals and undereducated regarding the social and organizational pressures, cognitive heuristics and biases, and situational factors that can make it difficult for them to always live up to their own moral standards. Educating attorneys regarding the teachings of behavioral ethics research can improve their chances of leading the kind of lives

⁶⁵ See REGAN, *supra* note 34, at 350-51.

⁶⁶ ABEL, *supra* note 1, at 53.

⁶⁷ Elizabeth Chambliss, *Whose Ethics? The Benchmark Problem in Legal Ethics Research*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING* 50 (Leslie C. Levin & Lynn Mather eds., 2012)

⁶⁸ ABEL, *supra* note 1, at 53 (emphasis added).

they can be proud of. And if law firms will take advantage of this new research, they can structure incentives, improve monitoring, and take other steps to make it easier, rather than harder, for their attorneys to do the right thing.⁶⁹

⁶⁹ See Nicholas Epley & David Tannenbaum, *Treating Ethics as a Design Problem*, 3 JOURNAL OF BEHAVIORAL SCIENCE AND POLICY 73 (2018); Yuval Feldman, *Using Behavioral Ethics to Curb Corruption*, 3 JOURNAL OF BEHAVIORAL SCIENCE AND POLICY 87 (2018).