

BEHAVIORAL LEGAL ETHICS, DECISION MAKING, AND THE NEW ATTORNEY'S UNIQUE PROFESSIONAL PERSPECTIVE

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INTRODUCTION

New attorneys, like their more experienced colleagues, must make any number of professional and ethical decisions as they engage in the day-to-day practice of law. Some of the new attorney's ethical decisions are repetitive and fairly routine: Which activities and how much time should I include on my billable hours report? Should I alert a senior lawyer that my workload is too heavy and might be threatening my budding competence? Am I allowing certain files to languish on my desk? Do I have a good system for making sure I do not miss deadlines? Other ethical decisions are considerably more unusual: What should I do with this damning evidence I just found? Should I read an attorney-client protected memo that the other side disclosed by mistake? Should I do what a senior lawyer asks of me even though I am not sure it is ethically permissible?

If it were possible to observe and keep track of all the large and small ethical decisions the new lawyer makes each day, we could begin to map that individual lawyer's professional development. Our new attorney may be surprised to learn that this objective analysis would likely uncover a "gap" between the attorney's beliefs about his behavior and his actual behavior—between what, if given the opportunity, he would predict he would do under any given circumstance, and what he actually does when confronted with the ethical decision. Occasionally, new attorneys make, quite unintentionally, poor ethical decisions. The emerging field of behavioral ethics seeks, among other things, to understand the disconnect that exists between individuals' perceptions of their ethics or moral code and their actual behavior when faced with ethical dilemmas.¹

This article applies both decision-making constructs and behavioral ethics principles to explore the dynamic that takes place in the "gap" when the new attorney makes ethical decisions that diverge from ethical beliefs. The social science study of decision making is often referred to as "JDM," or judgment and decision making. It is a broad area that seeks to ascertain how people uncover and process facts and information, reach judgments, and make decisions—it provides analytical tools for decision making and focuses on systematic errors commonly made and the heuristics commonly employed by decision makers.² In law, knowing how to make decisions and solve problems is critical. Problem solving has been recognized by the American Bar Association as one of the top ten "fundamental lawyering skills" that every new lawyer should acquire.³ The separate but related study of behavioral ethics has its roots in social

¹ See MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* 1–2 (2011) (investigating "the gap between intended and actual ethical behavior").

² See PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS*, at xxix (2010).

³ Victor J. Rubino & Richard D. Lee, *The Role of CLE in Implementing the Recommendations of the MacCrate Report*, in *THE MACCRATE REPORT: BUILDING THE EDUCATIONAL CONTINUUM* 99, 100 (Joan S. Howland & William H. Lindberg eds., 1994) (placing problem solving as number one on the list of top ten fundamental lawyering skills).

psychology and business—it is associated with behavioral economics and has been applied most frequently to ethical decisions made in a business context.⁴

Recently, scholars have begun to apply behavioral ethics principles to the practice of law by examining behavioral *legal* ethics.⁵ This article seeks to contribute to that growing body of literature. Although the study of behavioral ethics has a foothold among scholars of professional ethics, so far they have tended to treat the field as homogenous. By focusing on the new attorney's ethical decision making, this article shows how the predictions of behavioral ethics may be heterogeneous across attorneys, in particular impacting new lawyers differently than more experienced lawyers. Thus, this article highlights the influence of situational and psychological pressures and the dangers that succumbing unreflectively to intuitive decision making and heuristics can have on the new lawyer's professional development. In doing so, it offers meaningful foundational insights to both supervising lawyers and new lawyers that they likely did not receive in law school. Although all accredited law schools in the United States must teach Professional Responsibility, most students and teachers focus their attention on the prescriptive, or learning the body of laws and rules of professional responsibilities, and not the descriptive or behavioral, to understand the situational pressures, psychological factors, and decision making heuristics that factor importantly into ethical (or unethical) action.⁶ This article focuses on applying a behavioral theory of ethics to new attorney decision making and thus provides a limited, but necessary, first step: a foundation for future efforts to design experiments that test key underpinnings and to build

⁴ See, e.g., Linda K. Treviño et al., *Behavioral Ethics in Organizations: A Review*, 32 J. MGMT. 951, 960 (2006); see also BAZERMAN & TENBRUNSEL, *supra* note 1, at 4 (defining “the emerging field of *behavioral ethics*” as “seek[ing] to understand how people actually behave when confronted with ethical dilemmas”); David De Cremer & Ann E. Tenbrunsel, *On Understanding the Need for a Behavioral Business Ethics Approach*, in BEHAVIORAL BUSINESS ETHICS: SHAPING AN EMERGING FIELD 3, 5–6 (David De Cremer & Ann E. Tenbrunsel eds., 2012) (advocating for a behavioral approach to business ethics “that examines how individuals make actual decisions and engage in real actions when they are faced with ethical dilemmas”); Celia Moore, *Psychological Processes in Organizational Corruption*, in PSYCHOLOGICAL PERSPECTIVES ON ETHICAL BEHAVIOR AND DECISION MAKING 35, 37 (David De Cramer ed., 2009).

⁵ See Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107, 1113 (2013) (providing a “comprehensive survey” of behavioral ethics and psychology principles as applied to legal ethics); see also Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, 90 IND. L.J. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320605.

⁶ Scholars and legal ethics teachers have noted that “the current state of professional ethics instruction leaves much to be desired” because most law schools entrust ethics instruction to one required class and that class typically “focus[es] primarily (and uncritically) on bar disciplinary rules.” Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?*, 72 FORDHAM L. REV. 333, 340 (2003) [hereinafter Rhode, *If Integrity Is the Answer*]; see also Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J. 1043, 1045 (2007) [hereinafter Rhode, *Teaching Legal Ethics*] (advocating for legal ethics education that includes exposing students to “cognitive bias, organizational culture, situational influence, and additional emotional and psychological factors that can impair judgment”).

specific prescriptions for legal organizations and working groups striving to maintain environments supporting ethical decision making.⁷

Of course, all lawyers, experienced and new, are subject to the impact of psychological dynamics on ethical decision making, but my thesis is that the new lawyer experiences the psychology of ethical decision making differently than her more experienced colleague. New attorneys are uniquely vulnerable to certain situational pressures and may be especially susceptible to some decision making heuristics. On the other hand, this article posits that the newest attorney in a legal working group or firm may actually be the one in the room who is most likely to see ethical implications and frame a situation in ethical terms rather than relying on moral intuition, business schemas, and decision-making shortcuts. Thus, the new attorney is uniquely positioned. The new attorney can expect to confront a number of distinctive situational challenges, yet she is in a posture that makes her best able to avoid the temptations of intuitive, but sometimes inappropriate, ethical decision making. She is perfectly positioned consciously to shape the process that will guide her ethical decision making and contribute importantly to her professional development. To do so, though, she must first be attuned to what takes place in the “gap” between ethical beliefs and ethical decision making.

I. INTRODUCTION TO BEHAVIORAL ETHICS AND DECISION MAKING

A behavioral approach to ethics focuses on two elements: an individual's actual behavior and the psychological processes that underlie that behavior.⁸ In contrast to viewing ethics and morality from a philosophical perspective or as grounded in rules of conduct, behavioral ethics explores empirically how people actually behave when they are faced with an ethical dilemma within the context of larger social prescriptions. As such, it allows a comparison between the actor's ultimate behavior and how the actor thinks she should or would behave. This predictive measure frequently reveals a gap between how people think they would behave and how they actually behave. In addition, a primary assumption underlying behavioral ethics is that ethical failures can occur unintentionally as a result of psychological or situational variables—a possibility rarely considered in any post hoc analysis of unethical conduct. Ethical violations, viewed in hindsight, are typically explained as conscious, intentional acts: an unethical attorney was greedy and wanted more clients, profit, or fame;

⁷ The implications of the behavioral legal ethics foundations explored in this article are potentially quite broad and include relevancies to legal training, mentoring, work team communication, law firm management, and bar disciplinary and educational programs. Such implications warrant consideration in future projects. *See, e.g., infra* notes 103–04 and accompanying text (discussing briefly some implications for new associates). Moreover, this article attempts sensibly to extrapolate experiment results to professional decision making of new attorneys, but future experiments conducted specifically with lawyers and/or law students would usefully enhance the external validity of the findings that underlie the theories proposed in this article.

⁸ De Cremer & Tenbrunsel, *supra* note 4, at 8.

the attorney consciously decided that the end justified the means; or the attorney was behaving as a willful “miscreant.”⁹ Yet a focus on behavioral ethics allows us to contemplate the existence of situational and psychological influences that result in unintentional unethical conduct—that is, conduct that the actor does not consciously recognize as unethical when he is engaging in it but that, when considered in hindsight, he may find surprising and inconsistent with his values.¹⁰ As one scholar aptly summarized, “[t]he general thrust of this new body of behavioral ethics literature is that people fool themselves. They do not wake up one morning and announce, ‘Today is the day I start my life of crime.’”¹¹ Instead, they simply do not recognize how the situations they are working within and the psychology of decision making affect their actions and their ability even to observe an ethical issue sitting right in front of them.¹²

The general study of judgment, problem solving, and decision making—the JDM field—broadly considers all forms of non-ethical and ethical decision making. In general, psychologists recognize two guiding decision-making processes: intuitive decision making, widely known as “System 1” thinking, and deliberative decision making, known as “System 2” thinking.¹³ The System 1 intuitive decision-making process is fast, effortless, automatic, and non-conscious. The System 2 deliberative decision-making process, on the other hand, is slow, difficult, and conscious. It requires time, patience, and conscientious attention. Paul Brest and Linda Hamilton Krieger describe an “ideal” recursive deliberative decision making process as consisting of seven steps: (1) framing the problem to be solved; (2) identifying and prioritizing values, interests, and objectives; (3) identifying and resolving major uncertainties concerning the cause of the problem; (4) generating a range of plausible solutions; (5) predicting the consequences of each course of action generated; (6) making a decision by selecting the course of action that optimizes interests and objectives; and (7) implementing, observing, and learning from the outcome of the

⁹ See *Connick v. Thompson*, 131 S. Ct. 1350, 1368 (2011) (Scalia, J., concurring) (concluding that the misconduct of a new prosecutor who hid blood evidence and failed to reveal his wrongdoing despite the fact that the defendant, Thompson, remained on death row was likely the work of a single “miscreant prosecutor” who was willfully making an effort to “railroad Thompson”).

¹⁰ See BAZERMAN & TENBRUNSEL, *supra* note 1, at 4 (noting that understanding behavioral ethics offers insights on “why we often behave contrary to our best ethical intentions” and why “[o]ur ethical behavior is often inconsistent, [and] at times even hypocritical”); Rhode, *If Integrity Is the Answer*, *supra* note 6, at 343 (2003) (noting some of the situational influences on ethical conduct); see also Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 643 (2004).

¹¹ Robert A. Prentice, *Moral Equilibrium: Stock Brokers and the Limits of Disclosure*, 2011 WIS. L. REV. 1059, 1092.

¹² *Id.*

¹³ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20–21 (2011); see also W. Bradley Wendel, *The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real*, 42 MCGEORGE L. REV. 35, 35 n.2 (2010) (noting that the System 1 and System 2 terminology is “well established in the psychology literature”).

decision.¹⁴ Each step in the process could benefit from conscious use of decision-making strategies and techniques; alternatively, each step in the process could suffer from an inappropriate use of decision-making shortcuts. Obvious pragmatic constraints prevent us from gathering infinite amounts of information and deliberatively weighing every decision we encounter; thus, a good decision maker will understand the decision-making process and the appropriate role of both System 1 and System 2 thinking.¹⁵

With regard specifically to the narrower area of ethical decision making, scholars have described and debated a four-step framework for considering a moral decision: (1) awareness of the ethical issue, (2) reasoning and arriving at a judgment regarding the issue, (3) experiencing a motivating emotion, and (4) behaving in accordance with that intention.¹⁶ A debate exists regarding whether these elements are followed in a linear manner in the actual moral decision-making process. Although the four-step model suggests a strictly linear and deliberative process, decision-making scholars suggest that people actually experience these elements simultaneously under an intuitive mode of moral decision making.¹⁷ Such “intuitionists” have proposed a widely accepted “moral intuition” form of ethical reasoning, arguing that it is a more realistic description of the process underlying actual ethical decisions.¹⁸ Milton Regan, for example, contrasts intuition decision making with deliberative reasoning, noting that “[i]ntuition is the form that occurs effortlessly, ‘such that the outcome but not the process is accessible to consciousness,’ while reasoning ‘occurs more slowly, requires some effort, and involves at least some steps that are accessible to consciousness.’”¹⁹ Regan concludes that intuition “collapses the four stages [of

¹⁴ See BREST & KRIEGER, *supra* note 2, at 11–13.

¹⁵ JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 86–88 (2012) (noting that infinite amounts of information cannot be collected and would not be useful).

¹⁶ See Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 951 (2007); Treviño et al., *supra* note 4, at 952. This is James Rest’s model of ethical decision making that includes four phases: moral awareness, moral judgment, moral intention, and moral action. JAMES REST ET AL., *POSTCONVENTIONAL MORAL THINKING: A NEO-KOHLBERGIAN APPROACH* 100–03 (1999). Of course, legal “ethics” and “morality” are not always the same—what is or is not ethical is not necessarily the same as what is or is not moral; however, ethical and moral decision making are similar in that the decision maker must look beyond the bounds of client, business, and other interests to contemplate a separate ethical or moral “code” and consciously factor those considerations into the problem framework and resulting decision. Thus, this article appropriately applies moral decision-making constructs to ethical decision making and a theory of behavioral legal ethics. See *infra* text accompanying note 28.

¹⁷ See, e.g., BAZERMAN & TENBRUNSEL, *supra* note 1, at 29 (criticizing the four-step model as “incomplete,” unrealistic, and “potentially misleading” in suggesting a linear approach).

¹⁸ Regan, *supra* note 16, at 944; see also Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001); Prentice, *supra* note 11, at 1090.

¹⁹ Regan, *supra* note 16, at 954–55 (quoting Haidt, *supra* note 18, at 818).

moral decision making] into one” stage, during which all aspects of decision making occur simultaneously.²⁰ Under the moral intuition model, ethical decisions are made quickly and intuitively with deliberative (System 2) reasoning employed only later in the process—not to frame or help decide the moral question, but to justify a conclusion already made.²¹

Finally, JDM experiments, research, and literature demonstrate that people frequently rely on “heuristics” or decision-making rules of thumb to shorten and simplify the deliberative decision-making process. A heuristic is a “simple procedure” used to produce decisions that might be “adequate, though often imperfect, answers to difficult questions.”²² Heuristics can helpfully truncate what might otherwise be an impracticably lengthy process for every decision. Commonly employed heuristics include, for example: the “anchoring heuristic,” which describes an unconscious tendency to be influenced by what is frequently an arbitrary external reference point, such as a numerical estimate, coupled with insufficient rational attempts to adjust away from that anchor; the “availability-cascade” heuristic, which describes a tendency to allocate too much importance in the decision-making process to ideas that come to mind fluently and vividly, perhaps due to a current but temporary importance in the media; “confirmation bias,” which describes a tendency to focus on information that supports our conclusions while giving less attention to information that cuts the other way; and the “affect heuristic,” which describes an individual’s tendency to let “likes and dislikes determine . . . beliefs about the world.”²³ For example, an attorney counseling a client might be influenced by recent media reports that discuss low market values on properties with some characteristics similar to the client’s property, becoming both *anchored* by market value numbers associated with those external properties and influenced by the *availability* of the information. In this example, the affect heuristic might operate to narrow information the attorney relies on and the confirmation bias would ensure that the attorney gives too much importance to the evidence that supports his early conclusions on market value. While often useful, reliance on heuristics can lead to decision-making bias and errors because heuristics generally allow a decision maker to substitute and decide a simpler question instead of

²⁰ *Id.* at 955.

²¹ Haidt, *supra* note 18, at 814, 823; Prentice, *supra* note 11, at 1090; Regan, *supra* note 16, at 959–60.

²² KAHNEMAN, *supra* note 13, at 98. The origins of understanding the importance of heuristics and bias in decision making is generally credited to Amos Tversky and Daniel Kahneman and their seminal article *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

²³ KAHNEMAN, *supra* note 13, at 103, 142 (describing “affect heuristic” and “availability cascade”); *see also* BREST & KRIEGER, *supra* note 2, at 267–302 (describing heuristics involved in processing and judgment information, specifically “anchoring” heuristic and “confirmation bias”).

the more complex question at hand, and the substitution is often inappropriate or an imperfect fit.²⁴

II. BEHAVIORAL *LEGAL* ETHICS AND THE *NEW* LAWYER AS ETHICAL DECISION MAKER

A behavioral legal ethics analysis of a new lawyer's unethical conduct asks not what ethical rules the new lawyer violated, but what situational and underlying psychological factors existed to facilitate the new lawyer's actions. Importantly, new attorneys are neither protected nor immune from ethical pitfalls or professional discipline. Like all attorneys, new attorneys can find themselves in serious ethical trouble if they make poor ethical decisions and engage in unethical conduct. Recently, for example, the Kentucky Supreme Court and Kentucky State Bar permanently disbarred a new attorney with just a few years of practice experience for "personally and directly deceiving" his clients," notwithstanding the fact that the new attorney was likely acting at the express direction of his supervising partner, a "well-regarded and reputable attorney."²⁵

Indeed, the legal field provides fertile ground for the consideration of behavioral ethics and ethical decision making. Jennifer K. Robbennolt and Jean R. Sternlight recently noted that "[t]he psychological tendencies that may lead people to behave unethically can be compounded by particular aspects of legal practice" including the demands of the practice, the work group structures, the responsibilities associated with agency and advocacy representation, and the frequently ambiguous guiding rules of professional responsibility.²⁶ Thus, all lawyers, experienced and new, are subject to the influence of psychological dy-

²⁴ See KAHNEMAN, *supra* note 13, at 98–99 (providing several examples of how a "target question" looks as a "heuristic question").

²⁵ See *Kentucky Bar Ass'n v. Helmers*, 353 S.W.3d 599, 602–03 (Ky. 2011). The new attorney, David Helmers, had met with his severely injured class action clients to discuss a settlement proposal and obtain litigation releases, and during that meeting he failed to explain relevant settlement information including how the individual monetary awards were calculated, the aggregate sum of the settlement, and the decertification of the class action. *Id.* at 600. Moreover, although the award amount and individual allocations had already been determined, Helmers followed his supervisor's instructions to mislead their clients by simulating an actual settlement negotiation with the defendants by offering each client an amount substantially below the predetermined allocation and then presenting a larger offer only if the client refused the first offer. *Id.* The Kentucky Supreme Court noted that Helmers was "inexperienced, impressionable, and may have been influenced, and perhaps even led astray" by more experienced supervising lawyers, but the Court nonetheless found that permanent disbarment was reasonable in light of the "serious deficiency in character revealed by the facts." *Id.* at 603. The Supreme Court's opinion in *Connick v. Thompson* provides another startling example of a new attorney engaging in unethical behavior: Gerry Deegan had been out of law school for less than a year when he hid exculpatory blood evidence that resulted in an innocent man, John Thompson, remaining on death row for eighteen years. See *Connick v. Thompson*, 131 S. Ct. 1350, 1355–56 (2011); *id.* at 1372 n.3 (Ginsburg, J., dissenting).

²⁶ Robbennolt & Sternlight, *supra* note 5, at 1124.

namics on ethical decision making.²⁷ The *new* lawyer, however, experiences the psychology of ethical decision making differently than her more experienced colleague. Under some circumstances, the new lawyer will be more vulnerable to heuristics and situational pressures. Perhaps surprisingly, though, the new lawyer, who is in an entirely different posture than her senior colleague, may be better situated to resist relying on heuristics and inappropriate System 1 fast thinking.

Understanding the influences of behavioral legal ethics and decision making for the new lawyer takes on critical importance for two reasons. First, a behavioral theory of legal ethics posits that a conscientious attorney can unintentionally make a poor ethical decision. This is a scary thought for the new attorney—it is the recognition that he can try very hard to be professional and ethical, study the ethical rules applicable in his state, understand the rules to the best of his ability, and fully accept the importance to his moral compass as well as his future credibility of maintaining the highest level of professionalism, and *still* find himself in ethical trouble, behaving in ways he never would have predicted or imagined. Second, the early stages of a new lawyer's professional development make up the critical foundation for professional growth. Professional identity is shaped in a step-by-step fashion by the ethical decisions a new attorney makes and the ultimate action he takes. Efforts to reduce cognitive dissonance—the uncomfortable feeling experienced when actions are inconsistent with beliefs—can result in a new lawyer incrementally changing his ethical standards to match actual ethical decisions and behavior.²⁸ Moreover, after a series of small ethical lapses, “ethical numbness” can set in, desensitizing the new lawyer to unethical behavior and making each new lapse less ethically painful.²⁹ Ultimately, a new lawyer's individual ethicality changes with each small decision, which impacts his professional development and shapes his professional identity. Thus, understanding the effect of the behavioral legal ethics and legal decision-making principles that are most pertinent to the dynamics that occur when the new lawyer makes an ethical decision can profoundly influence a new attorney's professional development.

²⁷ Jennifer Robbennolt and Jean Sternlight recently provided an excellent and comprehensive survey of the key psychological principals that apply to all lawyers as ethical actors. *See id.* at 1113.

²⁸ *Id.* at 1153 (discussing role of cognitive dissonance in behavioral legal ethics); *see also* BAZERMAN & TENBRUNSEL, *supra* note 1, at 72.

²⁹ *See* BAZERMAN & TENBRUNSEL, *supra* note 1, at 75–76 (discussing a hypothetical new lawyer who insists at the start of her career that she would never bill hours she had not worked, but who, as time went on and she fell occasionally short of the standard, would slowly and incrementally pad her hours, developing “new normal” with each ethical infraction); *see also* DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* 137 (2012).

A. *New Attorneys and Diminished Ethical Perspective: Decision-Making Dynamics that Provide Greater Pressure on the New Lawyer*

New attorneys face unique challenges with regard to ethical decision making. They are familiar with the body of rules and laws that govern professional responsibility for lawyers, but they are generally not familiar with the operation of the standards in a real-world context. In addition, new attorneys confront a number of situational and psychological decision-making hurdles that apply with a distinctively powerful force due to their inexperience and vulnerability. This section applies a behavioral ethics perspective to analyze some important challenges for the new attorney as an ethical decision maker.

1. *Social Dynamics—Behavioral Legal Ethics and Law’s Work Groups*

An attorney’s work environment impacts decision making and behavioral legal ethics considerations in important ways, and the new attorney is particularly vulnerable to many of the social dynamics of today’s legal workplaces. The practice of law is frequently collaborative within hierarchically structured organizations and work teams. Many new attorneys work in law firms, governmental agencies, or other legal organizations; thus, a new attorney’s work is often undertaken on teams with other lawyers and legal staff.³⁰ Although law firms are now thought to be more loosely organized than they were twenty-five years ago, success in a law firm is still typically achieved by advancing up the hierarchy to partnership in an “up or out” tournament.³¹ New attorneys in a legal organization generally receive work assignments from senior lawyers rather than directly from clients, and the new attorney is typically reviewed and evaluated at least annually by a senior lawyer, who may collect input from other firm lawyers. For the new attorney, the competitive nature of the practice of law and the social dynamics of the legal workplace present a number of psy-

³⁰ See, e.g., Mark V. Tushnet, Commentary, *Evaluating Students as Preparation for the Practice of Law*, 8 GEO. J. LEGAL ETHICS 313, 313 (1995) (“For most lawyers, the practice of law is a collaborative enterprise.”). Of course, not all new attorneys begin their careers in law firms or within established work groups. In Arizona, perhaps in response to a tightly competitive job market, new attorneys appear to be starting solo practices in increasing numbers, which may give rise to unique ethical issues associated with a lack of professional mentoring and consultation opportunities. I am currently collecting data on new attorney ethical violations in Arizona for a work in progress that will contrast the ethical challenges confronted by new attorneys in solo practices with the ethical challenges confronted by new attorneys in law firms and work groups. See Catherine Gage O’Grady, *Data on Probable Cause Complaints Filed Against Arizona Lawyers with Less Than Five-Years of Practice Experience* (unpublished manuscript) (on file with author).

³¹ See MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 21 (2004). See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991) (applying the “tournament” theory to law firm operation and organization). *But see* Susan Saab Fortney, *Leaks, Lies, and the Moonlight: Fiduciary Duties of Associates to Their Law Firms*, 41 ST. MARY’S L.J. 595, 599 (2010) (noting that economic and organizational changes have resulted in law firms employing lawyers in “an array of categories” including non-equity partners and permanent associates).

chological influences on their ethical decision making including, as discussed below, work team psychologies, wrongful obedience concerns, and conflicts of interest.

a. Working Environment and Work Teams

All attorneys are influenced by their work environments and the “subtle but powerful forces that shape behavior” in the law firm.³² A new attorney will naturally be most inclined to look to the behavior of other attorneys to learn what is expected or appropriate in the work environment. For example, if cheating on small or large ethical decisions is seen as acceptable in the work environment, the new attorney’s individual ethic will be shaped by that culture, and cheating will increase.³³ The influences are greatest when they come from members of an attorney’s own group, rather than outsiders.³⁴ Junior lawyers will be more influenced by the culture of their work group or small practice areas than they will be by the firm as a whole.³⁵ One study demonstrated that senior lawyers’ understandings of the integrity of the whole firm’s ethical community were not well understood by the firm’s junior lawyers and diverged significantly from the junior lawyers’ understandings of the firm’s ethical culture.³⁶

Within the work team dynamic, a number of other psychological dynamics occur that can unconsciously influence a new attorney’s ethical decision making. A cohesive and efficient work team can take a perspective on a problem that can often be unique from the individual ethicality of any of the team members. “Cognitive framing” in organizations and “ethical fading,” for example,

³² REGAN, *supra* note 31, at 10.

³³ See ARIELY, *supra* note 29, at 195–207 (describing a series of experiments with college students demonstrating that cheating on a matrix task increased in direct response to social cues when students were provided with a live example of another student from their social group cheating); see also Michael Vitiello, Commentary, *Personal Reflections on Connick v. Thompson*, 11 OHIO ST. J. CRIM. L. 217, 226 (2013) (identifying a “waterfall” effect which suggests that “[w]hen others are cheating and getting away with it, the norm of fairness says it must be all right”).

³⁴ ARIELY, *supra* note 29, at 197–207 (describing cheating studies demonstrating that cheating decreased when a student saw cheating was from an outside group); see also Robbenolt & Sternlight, *supra* note 5, at 1147.

³⁵ See Linda Klebe Treviño et al., *It’s Lovely at the Top: Hierarchical Levels, Identities, and Perceptions of Organizational Ethics*, 18 BUS. ETHICS Q. 233, 237 (2008); see also REGAN, *supra* note 31, at 42 (noting that as large law firms become more decentralized, lawyers will find themselves responding to the culture of their practice group rather than to the broader firm’s general culture).

³⁶ Christine Parker & Lyn Aitken, *The Queensland “Workplace Culture Check”: Learning from Reflection on Ethics Inside Law Firms*, 24 GEO. J. LEGAL ETHICS 399, 427–28 (2011) (noting that “junior lawyers [are] most aware of and sensitive to the ethical subculture of their own work team and supervising partner, rather than the firm as a whole” and quoting one junior lawyer as responding on a survey questionnaire as “I have no idea what the other partners of the firm, other than the one I work for, believes or encourages in relation to ethics”).

are concepts used to describe team dynamics that limit the way a problem is initially framed. Cognitive framing in organizational ethics describes how a work team's shared understanding of the work serves to cognitively "frame" an individual's understanding and vision of the work.³⁷ Ethical fading describes how ethical dimensions are eliminated or faded from a problem to be solved because other aspects of the decision, such as business, strategic, or client's best interest considerations dominate the framing process.³⁸ While working as a unified team is efficient and highly functional, these dynamics can "blind" individuals to ethical issues and even eliminate the consideration of different perspectives in the decision-making process.³⁹ Moreover, if senior lawyers on a work team are viewed as providing a "buffer" for newer attorneys, the new attorney may rely on that "diffusion of responsibility" when making ethical decisions, which sometimes leads to the end result that no one takes responsibility for an ethical decision.⁴⁰ In addition, a new lawyer is likely to be particularly susceptible to "motivated blindness"—a tendency to ignore the unethical behavior of others, particularly those we work closely with or admire, or to disregard bad data "that we would prefer not to see."⁴¹ Finally, "pluralistic ignorance" ensures that when a new attorney looks to others on a work team for cultural clues and finds that no one else seems troubled by a particular decision, the new attorney may understandably, but improperly, conclude that all is well.⁴² In short, the social dynamics that unconsciously shape ethical decision making in the work place and on work teams apply with great force to a new attorney, who will be trying to learn about her new environment by constantly assessing others and relying on those assessments to guide her ethical decision making.

b. Wrongful Obedience

Obedience to a person in authority is a well-studied area in social psychology. The seminal shock machine obedience experiments conducted by Stanley

³⁷ See *id.* at 403.

³⁸ See BAZERMAN & TENBRUNSEL, *supra* note 1, at 16. For an example of ethical fading, see *infra* text accompanying notes 95–97 (describing the tragic decision to launch the Challenger space shuttle despite low temperatures).

³⁹ See Parker & Aitken, *supra* note 36, at 403–04.

⁴⁰ See Robbenolt & Sternlight, *supra* note 5, at 1149 (providing an example of a law firm associate who "assumes that someone else will make a decision about how to bill her hours" so it does not matter if she pads her time reports); see also Celia Moore & Francesca Gino, *Ethically Adrift: How Others Pull Our Moral Compass from True North, and How We Can Fix It*, 33 RES. ORGANIZATIONAL BEHAV. 53, 65 (2013) (describing diffusion of responsibility experiments).

⁴¹ BAZERMAN & TENBRUNSEL, *supra* note 1, at 81. For an example of motivated blindness, see *infra* text accompanying note 105 (describing the Bernie Madoff Ponzi scheme).

⁴² Robbenolt & Sternlight, *supra* note 5, at 1148 & n.221 (discussing an experiment demonstrating that when smoke slowly filled a room, reporting by the participants was much less frequent when others were in the room than when the participant was alone).

Milgram at Yale are among the most well-known experiments in psychology.⁴³ Milgram designed a basic scenario experiment with several variations on the basic scenario that were designed to test obedience to authority. In Milgram's experiment, an experimenter ordered naïve subjects (dubbed the "teacher") to give electrical shocks from a shock generator to another person, a confederate in the experiment (dubbed the "learner"), in increasing severity each time the learner made a mistake on a word-pair memory test.⁴⁴ Of course, no shocks were actually given and no pain was actually received, but it is clear from Milgram's video recordings of the experiments that the naïve teachers believed the learner was in pain.⁴⁵ Milgram's experiments, along with replications and partial replications of it, have demonstrated that nearly two-thirds of us would obey fully the instructions of a person in authority, even if we believed we were harming someone in the process.⁴⁶ Obedience is a particularly interesting area within which to consider behavioral ethics principles because follow-up studies have demonstrated that people unfamiliar with Milgram's experiments predict that only one person in a thousand would obey orders to shock someone all the way to the end of a shock generator and no one thought *they* would obey such orders.⁴⁷ Thus, people consistently and uniformly underestimate their own rate of obedience and the obedience rates of others suggesting a gap between belief and conduct.⁴⁸

Legal environments are particularly fertile ground for obedience, and a new attorney is particularly susceptible to the problem of wrongful obedience or complicity with improper practices.⁴⁹ Legal workplace dynamics coupled with a tight job market for new attorneys can reinforce a new attorney's view of herself as an "employee" in a firm with little autonomy, which is conducive to increased wrongful obedience.⁵⁰ Within this context, new attorneys can find

⁴³ See STANLEY MILGRAM, *OBEEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 2–3 (1974).

⁴⁴ *Id.* at 3. For an excellent general description of Milgram's experiment, see 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).

⁴⁵ MILGRAM, *supra* note 43, at 3; Luban, *supra* note 44.

⁴⁶ See Luban, *supra* note 44, at 97. For a recent partial replication of Milgram's experiments with results sufficiently similar to lead to the conclusion that "average Americans react to this laboratory situation today much the way they did [forty-five] years ago," see Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 *AM. PSYCHOLOGIST* 1, 9 (2009).

⁴⁷ See Luban, *supra* note 44, at 94, 97.

⁴⁸ The problem of wrongful obedience in the workplace is further compounded by experiments on cheating in the workplace that suggest people working in a collaborative work environment are more likely to cheat if they think the dishonesty will benefit others as well as themselves. See ARIELY, *supra* note 29, at 222, 226 (discussing "altruistic cheating").

⁴⁹ See Luban, *supra* note 44, at 95; Catherine Gage O'Grady, *Wrongful Obedience and the Professional Practice of Law*, 19 *J.L. BUS. & ETHICS* 9, 11–13 (2013) [hereinafter O'Grady, *Wrongful Obedience*]; Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 *HOFSTRA L. REV.* 451, 451–52 (2007).

⁵⁰ See Catherine Gage O'Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 *CLINICAL L.*

themselves between a rock and a hard place: like all attorneys, the new attorney is bound to uphold the rules of professional responsibility, yet senior attorneys may direct them to engage in unprofessional conduct. More subtly, a new attorney might interpret perceived signals from a supervisor or make assessments of the work environment that result in the new attorney engaging in wrongfully obedient behavior.⁵¹ In general, a new attorney will not be able to avoid allegiance to the rules of professional responsibility with an “I was just following orders” defense. Model Rule of Professional Conduct 5.2(b) purports to protect junior lawyers who follow a senior lawyer’s “reasonable resolution” of an “arguable [ethical] question”; however, as a practical matter, Rule 5.2(b) offers a new lawyer no additional safeguards because a reasonable resolution of an arguable question is virtually always professionally appropriate without need to consider Rule 5.2(b).⁵² Thus, wrongful obedience problems arise in the practice of law quite independently from the rules, and new attorneys have indeed found themselves sanctioned severely by disciplinary bodies even if their conduct was a result of following express orders from a supervising attorney.⁵³

REV. 485, 503, 506–07 (1998) [hereinafter O’Grady, *Preparing Students*] (suggesting that new lawyers may be more willing to adopt an “employee” role in a depressed job market and that a law firm’s hierarchical structure could reinforce new lawyers’ tendencies to see themselves as employees); O’Grady, *Wrongful Obedience*, *supra* note 49, at 25 (describing the conflict of bureaucratic norms and professional norms on new lawyers and concluding that “any workplace dynamic that reinforces the ‘employee’ role for new lawyers is conducive to increased wrongful obedience and decreased autonomous judgment”).

⁵¹ See *supra* note 25 and accompanying text (describing facts in *Kentucky Bar Ass’n v. Helmers*, 353 S.W.3d 599 (Ky. 2011) which led to a new attorney’s permanent disbarment). One study of New York law firms from the 1960s found that unpleasant tasks that require arguably questionable behavior for successful completion are delegated to the subordinate associates on a hierarchically structured attorney work team. See JEROME E. CARLIN, *LAWYERS’ ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 96–117 (1966). The infamous *Berkey v. Kodak* circumstances provide an example of a new attorney interpreting signals from a supervisor: when an associate heard his supervising partner perjure himself before a federal judge by claiming that documents sought in discovery were destroyed, the associate twice tried to inform the partner that the documents were intact and back at the office, but the partner ignored him—the associate then returned to the office, found the documents, and hid them in a locked closet. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (1979); see Luban, *supra* note 44, at 95 (discussing the *Berkey v. Kodak* circumstances); O’Grady, *Wrongful Obedience*, *supra* note 49, at 10–11 (same).

⁵² See O’Grady, *Wrongful Obedience*, *supra* note 49, at 28 (arguing that while Rule 5.2 sends the wrong message and is meaningless, its existence or non-existence is not likely to impact a junior attorney’s response to a supervising lawyer’s request within the realities of the legal workplace); Andrew M. Perlman, *The Silliest Rule of Professional Conduct: Model Rule 5.2(b)*, PROF. LAW., vol. 19 issue 3, at 14, 14 (2009).

⁵³ See, e.g., *Helmers*, 353 S.W.3d at 602–03 (disbarring new attorney for “personally and directly deceiving” his clients notwithstanding that he was probably acting at the direction of his supervising attorney who was a “well-regarded and reputable attorney”).

c. *Conflicts of Interest and Self-Puffery*

Nothing obscures objective decision making more directly than having a vested personal interest or stake in an outcome—a conflict of interest. Even when professionals honestly believe that they are acting ethically by, for example, putting their clients' interests first, robust research shows that “when people have a vested interest in seeing a problem in a certain manner, they are no longer capable of objectivity” and this conflict unconsciously affects their behavior.⁵⁴ A conflict of interest or self-interested motivation need not be tied directly to any financial gain.⁵⁵ For new attorneys, especially those working in competitive or hierarchical work groups, a conflict of interest arises from the new attorney's self-interested motivation to succeed. The desire to “look good” may lead to behaviors, sometimes described as “self-puffery,” that can be inconsistent with the new attorney's ethical beliefs. Cheating associated with “self-puffery,” for example, can be as blatant as padding the time recorded on client work or as subtle as trying to claim individual credit for team work.⁵⁶ In short, the self-interested motivation to succeed and advance in the profession may trigger a temptation to cheat.

Once self-puffery begins, the conduct may lead to “rationalization” and a “cognitive flexibility” that can change an individual's ethicality and perhaps significantly affect professional development. Rationalization is a response to the uncomfortable feeling of cognitive dissonance, providing individuals with a narrative to explain behavior that is inconsistent with their individual sense of professionalism.⁵⁷ To make matters worse, people not only rationalize their behavior, but they ultimately tend to believe their own self-puffery. One interesting experiment, for example, demonstrated that when people cheat to get a higher score than they deserve on a test and are subsequently asked to predict

⁵⁴ See BAZERMAN & TENBRUNSEL, *supra* note 1, at 19–21 (noting conflicts of interest in the medical profession). In *Blind Spots*, Bazerman and Tenbrunsel refer generally to the behavioral ethics dynamics that are often mired in conflict of interest as “bounded ethicality.” *Id.* at 8.

⁵⁵ See *id.* (identifying the “systematic constraints on our morality that favor our own self-interest at the expense of the interest of others”); see also ARIELY, *supra* note 29, at 75–76 (discussing experiment where sponsoring art gallery paid for the participants' stipend, considered not a direct financial gain but the equivalent of giving a favor, which “had a deep effect on how people responded” to that gallery's art, and noting further that “when participants were asked if they thought that the sponsor's logo had any effect on their art preferences, the universal answer was ‘No way, absolutely not.’”).

⁵⁶ See, e.g., Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC, Aug. 5, 2013, at 24, 26–28 (noting that Mayer Brown's compensation scheme ultimately promoted brutal internal competition for business, hoarding, and territoriality, and that senior lawyers modeled protectionism by “seiz[ing] credit for business that younger colleagues brought in”).

⁵⁷ See ARIELY, *supra* note 29, at 27 (noting that “behavior is driven by two opposing motivations. On one hand, we want to view ourselves as honest, honorable people. We want to be able to look at ourselves in the mirror and feel good about ourselves On the other hand, we want to benefit from cheating and get as much money as possible” This is accomplished through “cognitive flexibility” or rationalization).

how they will do on the next test, their predictions are based on their exaggerated (and inaccurate) performance score, which they come to see as a true reflection of their skill.⁵⁸ Thus, the new attorney's self-interested conflict based on a desire to succeed can trigger cheating, which the new attorney will ultimately adopt as the "new normal" as she moves forward in her professional development.

2. *Cognitive Overload—Depletion and the Tired Brain*

All new attorneys, whether working in groups or in a solo practice, have a great deal to learn in an environment that is both foreign to them and frequently stressful. It is widely understood that cognitive overload and burdensome work demands are a major cause of physical and mental health difficulties; it is less well known that such demands can also contribute to poor ethical decision making that results in unethical behavior.⁵⁹ Cognitive load experiments demonstrate that when people have a lot on their minds and are overloaded with work and new stresses, they have less cognitive room for resisting temptation and are more likely to succumb to it.⁶⁰ When the brain is occupied and deliberative reasoning is fully employed in other areas, "the impulsive system gains more control over our behavior."⁶¹ Moreover, in addition to succumbing to ethical lapses, a depleted person may be more likely actually to choose ethically risky opportunities in the first place.⁶² Thus, depletion has a "double whammy" impact—the tired decision maker will look for the ethically suspect opportunity and then once in it, they will be more prone to cheat.⁶³ Thus, as Max Bazerman and Ann Tenbrunsel noted: "[D]ecision making tends to be most ethically compromised when our minds are overloaded. The busier you are at work, for example, the less likely you will be to notice when a colleague cuts ethical corners or when you yourself go over the line."⁶⁴

In general, most lawyers face a variety of court and client deadlines in their work. The pace of the work can be overwhelmingly fast and the work itself can be frustratingly mundane. Although all lawyers are subject to the psychological impact of the tired brain, new attorneys face unfamiliar situations daily in their

⁵⁸ *See id.* at 148.

⁵⁹ *See* Rhode, *Teaching Legal Ethics*, *supra* note 6, at 1046 (noting physical and mental health problems, and the need for "better work/life balance" in the profession).

⁶⁰ *See* ARIELY, *supra* note 29, at 99–100, 106 (describing experiments where participants succumbed to a less-reasoned choice or behaved unethically when they were struggling cognitively, for example, trying to remember a seven digit number, or when they were cognitively depleted).

⁶¹ *Id.* at 100.

⁶² *Id.* at 111–12 (describing the "Stroop task" experiment in which participants were given either depleting or non-depleting versions of a test and the depleted group was found to be more likely than the non-depleted group to voluntarily put themselves in a position that would tempt them to cheat).

⁶³ *Id.* at 112.

⁶⁴ BAZERMAN & TENBRUNSEL, *supra* note 1, at 34.

work and encounter a sense of overwhelm that is qualitatively different than more experienced lawyers.⁶⁵ The pace of the work can be overwhelmingly fast, which is difficult enough, but managing it is complicated by the fact that the work pace is frequently unpredictable for the new attorney who has less control over work generation: sometimes the work load is too light for a brief time and then suddenly it becomes overwhelming. Apart from the pace of the work, the work itself can be frustratingly mundane or unsatisfying. New attorneys may find themselves working long hours, sometimes on monotonous or “alienating” work projects, often without a full understanding of why the work is useful to the client and without the rewarding sense of accomplishment that can follow a hard day’s work.⁶⁶ The new attorney’s lack of control over work generation and inexperience with work assignments, coupled with the demands of collaborating with senior lawyers, can result in the new attorney suffering from pronounced stress in the legal work place.⁶⁷ In short, new attorneys as a group are frequently busy, stressed, confused, and overloaded, which may lead them to miss moral aspects of a situation, select an ethically risky environment, and take the easiest path in ethical decision making.

3. Economic Pressures

Economic pressures have been shown to hinder ethical decision making and tempt individuals to choose less ethical behaviors.⁶⁸ A recent study tested the question of whether real-time financial and budgetary preoccupations could impede cognitive function.⁶⁹ The study found that financial worries and the cognitive load they impose substantially impede cognitive capacity for all decision making, not just financial decision making.⁷⁰ The experiment results suggested that financial concerns are distracting, draining, and counterproductive to cognitive ability—they capture our attention, create intrusive thoughts, and

⁶⁵ See, e.g., Robbennolt & Sternlight, *supra* note 5, at 1141–42 (discussing lack of sleep, time pressures, and cognitive depletion as impacting a lawyer’s ability to recognize the moral aspects of a situation, step away from temptation, and resist temptation).

⁶⁶ See WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* 14–15 (1995) (contrasting the satisfaction of working long hours in a greenhouse to lawyering); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 180 (1988) (noting that litigation associates are frequently confined to more mundane or “alienating,” work while senior lawyers enjoy the opportunity to perform the “visible advocacy functions” that accompany a litigation practice).

⁶⁷ Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 *MINN. L. REV.* 697, 733 (1988) (noting that associates in a law firm experience more stress “because of their inexperience and newness” to both the profession and law’s collaborative work teams).

⁶⁸ Robbennolt & Sternlight, *supra* note 5, at 1142. *But cf.* Deborah L. Rhode & Amanda K. Packel, *Ethics and Nonprofits*, *STAN. SOC. INNOVATION REV.*, Summer 2009, at 29, 29 (noting that due to increased ethically ambiguous decision making “[t]hose who work on issues of ethics are among the few professionals not suffering from the current economic downturn”).

⁶⁹ Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 *SCIENCE* 976, 976 (2013).

⁷⁰ *Id.* at 980.

reduce overall available cognitive resources.⁷¹ Comparing their findings to sleep research examining sleep loss on cognition, the authors concluded that “[p]ut simply, evoking financial concerns has a cognitive impact comparable with losing a full night of sleep.”⁷²

Extrapolating these findings to new lawyers, the evidence suggests that new lawyers would indeed experience the influence of poverty pressures on cognition. In the current economic and workplace environment, a new lawyer may be anxiously living “hand to mouth” for the first several years of his career. In a recent analysis of “Big Law” (and the Mayer Brown law firm in particular), Noam Scheiber noted, “It is almost impossible to overstate the trauma of [the recession] on the associates who lived through it.”⁷³ The job market downturn and high law school student loan debt have put unique stresses on recent law graduates who must find jobs and preserve them to pay back student loans.⁷⁴ Currently, about 90 percent of law students finance their legal education, and the average law school debt is over \$75,000 for public school graduates and over \$125,000 for private law school graduates.⁷⁵ To make matters even more economically stressful, law graduates have experienced difficulty finding full-time, long-term legal jobs after graduation. According to the American Bar Association, only 57 percent of the law students who graduated in 2013 found long-term, full-time legal jobs (jobs where bar passage is required).⁷⁶ Moreover, in 2013, the median starting salary for recent law graduates who found employment was only \$62,467, an amount inadequate to cover debt levels.⁷⁷ Finally, new associates lucky enough to have secured positions in

⁷¹ *Id.* (concluding that “the very context of poverty imposes load and impedes cognitive capacity”).

⁷² *Id.*; see also WORLD BANK GRP., WORLD DEVELOPMENT REPORT 2015: MIND, SOCIETY, AND BEHAVIOR 13, 80–92 (2015) (recognizing poverty as a “context in which decisions are made” and analyzing experiments that establish poverty as imposing a cognitive tax on decision making roughly equivalent to ten IQ points).

⁷³ Scheiber, *supra* note 56, at 31–32 (describing the associate’s work life as “soul-crushing”).

⁷⁴ See O’Grady, *Wrongful Obedience*, *supra* note 49, at 21 (citing Jennifer Smith, *Law Firms Keep Squeezing Associates*, WALL ST. J. (Jan. 30, 2012), <http://online.wsj.com/article/SB10001424052970203363504577186913589594038.html>).

⁷⁵ See Brian Z. Tamanaha, *The Failure of Critics and Leftist Law Professors to Defend Progressive Causes*, 24 STAN. L. & POL’Y REV. 309, 312 (2013); Debra Cassens Weiss, *Average Debt of Private Law School Grads Is \$125K; It’s Highest at These Five Schools*, A.B.A. J. (Mar. 28, 2012, 10:29 AM), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m/.

⁷⁶ 2013 *Law Graduate Employment Data*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_graduate_employment_data.authcheckdam.pdf (last visited Apr. 29, 2015); see also Scheiber, *supra* note 56, at 32–33 (noting the sharp decline in job placements from 2007–2012); Tamanaha, *supra* note 75 (noting that “[o]nly 55 [percent] of law graduates in 2011 had obtained permanent full-time lawyer jobs within nine months of graduation”).

⁷⁷ See NAT’L ASS’N FOR LAW PLACEMENT, EMPLOYMENT FOR THE CLASS OF 2013—SELECTED FINDINGS 3 (2014), available at <http://www.nalp.org/uploads/Classof2013SelectedFindings.pdf>. Of course, some newly employed lawyers earn a great

law firms frequently fear losing their jobs as they witness law firms collapsing entirely or significantly downsizing by firing attorneys.⁷⁸ In short, new attorneys in large number have significant financial concerns.⁷⁹ These real-time financial concerns likely result in diminished cognitive resources and a risk of prioritizing, either unconsciously or intentionally, money and profit over ethics. Decisions made under these contexts may result in the slide “down the slippery slope” with respect to ethical decision making and heightened vulnerability to situational pressures.

B. The New Attorney’s Uniquely Superior Ethical Perspective

The challenges discussed above make it all too easy to conclude that the new lawyer may not stand much chance to recognize and respond to ethical ambiguities in a situation.⁸⁰ Nevertheless, a behavioral ethics and decision-making analysis suggests that in important ways, a new attorney may actually be in a superior position to identify and respond appropriately to ethical situations. This section applies a behavioral approach to analyze the ways in which a new attorney may have an ability superior to more experienced lawyers to see ethical ramifications and integrate ethical considerations into professional decision making.

1. Moral Awareness, Problem Framing, and System 1 Thinking

Many experienced decision makers, including experienced lawyers, do not fully appreciate or even “see” an ethical issue looming before them as they engage in decision making throughout the lawyering process. The dynamics that involve the initial recognition of an ethical issue include the decision-making process associated with moral awareness, which is regarded as a critical component in the process of ethical decision making.⁸¹ Moral awareness is not as straightforward as simply recognizing a moral issue within the context of a decision; rather, moral awareness requires both seeing the moral complexities and placing the moral components in a frame that incorporates interactions with the decision maker and the situation, including the work environment and other

deal less than the median, while others earn more. Those who earn a great deal more may find that relief from poverty pressure is counteracted by an increase in other work-related pressures.

⁷⁸ Scheiber, *supra* note 56, at 26 (noting that in the past decade, twelve major law firms collapsed and that associates “regularly face mass layoffs” as firms increasingly rely on outsourcing a wide range of typical associate-type work to contract attorneys).

⁷⁹ See Robbenmolt & Sternlight, *supra* note 5, at 1142–43 (discussing economic pressures of law practice and of a lawyer living “hand-to-mouth”).

⁸⁰ Of course, all students are required to study professional responsibility in law school and take a national, multi-state examination on the rules of professional responsibility, but that does not mean they understand the issues well enough to apply them to entirely new situations that arise in their new practice.

⁸¹ See *supra* notes 16–17 and accompanying text (describing the four-part framework for moral decision making).

people involved.⁸² Thus, “identifying a moral issue involves an interpretative process wherein the individual recognizes that a moral problem exists in a situation, or that a moral standard or principle is relevant to the circumstances.”⁸³

The ability initially to recognize the existence of an ethical issue can be undermined by the ethical decision maker’s reliance on both System 1 thinking and well-established business schemas. As noted above, intuition likely plays a dominant role in many ethical decisions, with deliberative thinking relegated to justifying moral decisions already made intuitively.⁸⁴ Intuitive ethical decision makers quickly employ learned schemas to frame a situation; thus, they are less likely to see moral issues or frame a situation in moral terms, relying instead on business schemas, that focus on the strategic rather than the moral components of the decision.⁸⁵ Relying intuitively and exclusively on strategic business schemas as opposed to moral issues to define and frame a problem or assignment is explained and underscored by two decision-making dynamics: “ethical fading” and “bounded awareness.” Ethical fading, discussed earlier, refers to a process by which ethical dimensions are faded from view and eliminated from a decision-making frame because other aspects of the decision dominate.⁸⁶ Bounded awareness in problem framing refers to the “common tendency to exclude important and relevant information from our decisions by placing arbitrary and dysfunctional bounds around our definition of a problem.”⁸⁷ Thus, experienced, intuitive decision makers may place arbitrary boundaries around a problem’s initial definition without pausing to include or even recognize ethical considerations when framing the problem.

Primed by the work environment, the experienced manager is more inclined to make rapid decisions, with little or no moral component, based on learned business schemas and intuition. Less experienced workers, on the other hand, are more likely to see ethical issues in a problem’s definition or framing.⁸⁸ Milton C. Regan, Jr. notes that the research suggests “the default perceptual framework that people use in the work setting is less likely to include moral concerns” and “experienced managers are less likely to frame a situation in moral terms than are less experienced ones.”⁸⁹ Moreover, experienced decision

⁸² Regan, *supra* note 16, at 952.

⁸³ Treviño et al., *supra* note 4, at 953.

⁸⁴ See *supra* text accompanying notes 18–21 (describing intuitionist approach to moral judgment).

⁸⁵ Regan, *supra* note 16, at 965 (noting that intuitive responses from managers may often fail to recognize moral dimensions or contain moral components because they are “primed . . . to pay attention to the strategic, rather than the moral, components of the environment”).

⁸⁶ See *supra* text accompanying note 38.

⁸⁷ BAZERMAN & TENBRUNSEL, *supra* note 1, at 7.

⁸⁸ Regan, *supra* note 16, at 965 (noting that in contrast to less experienced workers, those with more experience possess and rely on “well-developed business-schemas”).

⁸⁹ *Id.* (citing Jeremy I.M. Carpendale & Dennis L. Krebs, *Situational Variation in Moral Judgment: In a Stage or On a Stage?*, 21 J. YOUTH & ADOLESCENCE 203 (1992); Jennifer Jordan, *Business Experience and Moral Awareness: When Less May Be More* 38 (Tuck

makers may be more susceptible to ethical fading and bounded awareness.⁹⁰ In both ethical fading and bounded awareness terms, experienced decision makers framing a situation will be more inclined than their inexperienced counterparts to focus on business, client, or other issues and interests, allowing the ethical issues to fade away. For example, a senior lawyer on a class action litigation team negotiating a settlement is likely to be aware of any number of business and strategic concerns that would not burden the team's new attorney: the senior lawyer would be acutely aware of the cost of the litigation to the firm, time concerns, the firm's reputation with regard to future class action clients, the pragmatic difficulties of securing waivers from nearly all the class clients, and the difficulties the firm would encounter if a hard fought negotiated settlement were unraveled. These concerns will naturally dictate the way the senior lawyer frames the team's decisions and are likely to narrow the issues. The new attorney, on the other hand, is less reliant on System 1 thinking and thus more likely to contemplate a broader problem frame, including foundational ethical considerations such as identifying who gets to decide whether to accept a settlement offer and how a lawyer might appropriately advise or guide clients in this decision but not remove it from them.

These decision-making principles suggest that an opportunity exists for the new lawyer to think broadly and ethically when framing issues. A new lawyer is not in a position to rely on intuition or business schemas when framing a decision because the new lawyer has no experience to warrant the application of intuitive or expertise decision making.⁹¹ Indeed, it is troubling to contemplate the possibility of a new lawyer with little business or professional experience succumbing to System 1 intuitive thinking when faced with an ethical problem as the decision would be based on very little to inform that intuition. Unlike her more experienced colleague, the new lawyer's automatic awareness of business, client, or other interests is limited, which allows ethical concerns to play an important role in initial problem framing instead of fading away in deference to other business priorities. Thus, the hesitation that naturally precedes a new lawyer's recognition and framing of a complex situation should be the impetus for ethical considerations. As noted earlier, workplace stress, situational factors, and other heuristics naturally make thoughtful framing of the ethical components presented by a decision challenging for any lawyer.⁹² Yet, while it is exceedingly difficult for experienced lawyers to overcome bounded awareness and ethical fading problems associated with learned schemas, it is much less

School of Business at Dartmouth, Social Science Research Network, Working Paper No. 26, 2005)).

⁹⁰ *See id.*

⁹¹ *See* BREST & KRIEGER, *supra* note 2, at 25–29 (describing the nature of expertise that underlies and empowers the use of intuition in decision making).

⁹² *See* Prentice, *supra* note 11, at 1091–92 (noting that “in conditions of high stress—from competitive environments, compensations structures, or just company politics—the high stress tends to distance moral reflection”).

difficult for the new lawyer who has no basis of learned schemas reflexively to prioritize in framing a problem for decision.

2. “WYSIATI”—*Expanding the Readily Available Information in the Room*

Poor ethical decision making is sometimes a result of making decisions on the basis of limited information. The tendency to jump to conclusions based on limited information is so central to decision making that Nobel-prize-winning psychologist Daniel Kahneman gave the problem an abbreviation: WYSIATI, which stands for “What You See Is All There Is.”⁹³ WYSIATI captures our System 1 tendency to use whatever information exists to create a sensible narrative and make decisions based only on that information. Indeed, as Kahneman notes, it is consistency, not quantity, of information that makes a convincing story, and it is generally simpler to fit all you know into a coherent arrangement when you in fact know very little.⁹⁴

The 1986 Challenger space shuttle explosion provides one of the most oft-cited examples of decision makers relying only on the information in the room and fading ethical ramifications as they framed their decision on whether to launch the shuttle in low temperatures.⁹⁵ The Challenger exploded because an O-ring on one of the rocket boosters failed to seal at low temperatures.⁹⁶ The night before the launch, senior managers and experienced engineers with NASA met with the shuttle contractor, Morton Thiokol, to discuss whether it was safe to launch. Under “intense time pressure,” Morton Thiokol engineers prepared a presentation that recommended against the launch based on their judgment that a connection existed between low temperatures and O-ring failures. It was a startling example of WYSIATI because the experienced engineers, trained in rigorous analytic thinking, had looked only at a subset of relevant data—the temperature information available for the seven shuttle launches that experienced O-ring failures—but they did not ask for or evaluate temperature information for the past seventeen launches in which a failure did not occur. As a result, their judgment and recommendations were based on modest data that failed to persuade the managers to attach sufficient importance to the reasons not to launch and move off their decision to frame the question as a “management decision.” If the engineers had evaluated all the available data and not just a readily available subset of data, they would have found that the Challenger had a 99 percent chance of failure—a conclusion that certainly would have been hard for their superiors to ignore. These “well-intend[ed]” decision makers succumbed to a common psychological failure that “caused sev-

⁹³ KAHNEMAN, *supra* note 13, at 85–88.

⁹⁴ *Id.* at 87.

⁹⁵ See BAZERMAN & TENBRUNSEL, *supra* note 1, at 13–15.

⁹⁶ *Id.* at 15. For more information on the decision-making process that resulted in the disastrous launch of the Challenger, see *id.* at 14–15.

en astronauts to lose their lives and delivered an enormous blow to the space program.”⁹⁷

As the NASA example illustrates, the WYSIATI problem and ethical fading as a result of “business decision” framing often go hand-in-hand. Experienced managers are generally accustomed to making rapid decisions for clients on the basis of whatever information they have and relying on their expertise and intuition to produce results that make sense of the limited information available. Similarly, senior lawyers generally analyze research and data prepared for their review by someone else, and they have developed the expertise and ability to make rapid intuitive decisions grounded in that information. The new attorney, on the other hand, expects to conduct legal research, which should include ethics research, as a fundamental part of her work. The new attorney is, in fact, likely the team’s “expert” on legal research, as she has presumably been more recently trained in current legal research methods in law school. Possibly unlike her more experienced counterparts, she understands and is comfortable using the newest technologies to gather relevant and current information.⁹⁸ Moreover, in contrast to the senior lawyer who may feel confident in his knowledge, law school recently instilled in the new attorney a realization of and appreciation for all he does not know.⁹⁹ Thus, unlike her senior colleagues, the new attorney’s first instinct will likely be to conduct the research necessary to expand the quantity and quality of information available to the decision and diminish both the WYSIATI and ethical fading problems.

3. Power

Power has been shown to introduce numerous ethical decision-making landmines. Studies have indicated that people who feel powerful tend to engage in more unethical behavior.¹⁰⁰ In general, power makes people “more attuned to the attraction of rewards, feel more entitled, be more goal directed, be more overconfident, and be less concerned about social censure than are those who

⁹⁷ *Id.* at 15.

⁹⁸ See COMP TIA, GENERATIONAL RESEARCH ON TECHNOLOGY AND ITS IMPACT IN THE WORKPLACE 2–3 (2013), available at <http://www.unify.com/~media/internet-2012/documents/report/CompTIA-Generational-Study.pdf> (reporting from IT industry’s nonprofit association that companies make the best use they can of new “Gen Y” workers’ extraordinary skills and comfort level with technology).

⁹⁹ Law school’s consistent reliance on classroom questioning, deep case analysis, and exams is a constant reminder for students that they have much to learn and will need to rely on research skills to provide them with knowledge. This is consistent with a widely held view of Socrates’s definition of “wisdom” as expressed by Plato in *The Apology*. See *Wisdom*, STAN. ENCYCLOPEDIA PHIL. (Feb. 4, 2013), <http://plato.stanford.edu/entries/wisdom> (discussing Socrates’s definition of wisdom as including components of humility and a recognition of what is not known).

¹⁰⁰ Robbenolt & Sternlight, *supra* note 5, at 1143–44.

feel more powerless.”¹⁰¹ Moreover, powerful people tend to have less empathy, which is associated with unethical behavior.¹⁰²

Jennifer Robbennolt and Jean Sternlight conclude that lawyers in general tend to perceive themselves as functioning with high status and power, which should lead them to be cautious and aware of the impact of that feeling of power on ethical behavior.¹⁰³ Yet, new lawyers enjoy considerably less power than their more experienced colleagues, and in fact, they are likely to feel quite powerless at the outset of their careers. There is nothing like being at the bottom of an entrenched hierarchy to make one feel anxious and powerless. While this means, as previously discussed, that new lawyers are more vulnerable to situational pressures that could result in wrongful obedience, it also suggests, more optimistically, that new lawyers may be better situated to respond ethically in situations where their more powerful colleagues would be blinded.

Thus—happily—lack of power, widely perceived as a negative, might be viewed positively as providing a new lawyer with a beneficial perspective to ethical situations. In a recent book, Malcolm Gladwell suggests that the powerless—described as “underdogs” and “misfits”—have numerous underappreciated advantages in our culture because they have no preconceived notions that limit their consideration of options and no investment in the established status quo.¹⁰⁴ Similarly, the new participant to legal problem solving and ethical decision making is freer to think broadly about problems and more open to solutions that are not available to those more experienced and more rooted in accepted methodologies.

4. *Client Relationship Conflicts of Interest*

Conflicts of interest blind ethical decision makers in numerous ways and play perhaps one of the most important roles in behavioral ethics and decision-making studies. For example, a direct financial gain from unethical behavior contributes to the inability to see even obvious unethical conduct. Bazerman and Tenbrunsel have noted that in the circumstances surrounding Bernie Madoff’s Ponzi scheme, managers of feeder funds had ample evidence that Madoff was operating unethically because Madoff funds were outperforming markets at levels that were described as statistically impossible. Yet, while evidence and hints on unethicity abounded, those benefitting directly and financially from such outstanding performance “lacked the motivation” to see what was right before them.¹⁰⁵ In the legal context, attorneys are similarly blinded by the prospect of financial gain and promotion or prestige in the work place. Thus, for example, an attorney may be tempted to ignore conflicts or other eth-

¹⁰¹ *Id.* at 1144.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* 6 (2013).

¹⁰⁵ BAZERMAN & TENBRUNSEL, *supra* note 1, at 11.

ical considerations and accept a new client who will bring financial profit to the attorney or recognition within the firm.¹⁰⁶

New attorneys working in the hierarchy of a typical legal workplace face conflicts of interest grounded in financial incentives and career advancement because they often receive increased year-end bonuses and increased likelihood of moving up the career ladder in their work place if they are successful.¹⁰⁷ Yet, in a law firm, new attorneys are generally not the ones who benefit financially in a direct way from unethical conflicts of interest related to new and existing client business because unlike firm partners, law firm associates do not share *directly* in firm profits. Although this distinction may not be as strong as the others discussed, it does place the newer attorney at some distance, at least one step removed, from the conflict problems that attend to direct financial gain. Thus, a new lawyer will likely be less clouded by the attraction of new business or other decisions tied to the bottom-line profit of the firm, putting the new lawyer at an advantage under such circumstances to see and respond to ethical considerations.

Table 1 summarizes the various ways that new lawyers may have both strengths and weaknesses under a behavioral legal ethics analysis.

TABLE 1: NEW ATTORNEYS: STRENGTHS AND WEAKNESSES

Strengths	Weaknesses
<ul style="list-style-type: none"> • Less dependent on business schemas, intuition, and System 1 thinking; thus, more likely deliberately to frame situations in terms of the ethical dilemmas they pose. • Less powerful in work environment; thus, less vulnerable to the attraction of financial rewards over ethics. • Less likely to succumb to the WYSIATI problem. • More likely to conduct the depth of research necessary to avoid framing issues too narrowly. • Less vulnerable to conflicts of interest grounded in financial incentives because removed from directly sharing in firm profits. 	<ul style="list-style-type: none"> • Uniquely vulnerable to certain situational work place pressures such as motivated blindness and pluralistic ignorance. • More likely to engage in wrongful obedience when directed by superiors to do something ethically questionable. • More tempted to cheat and engage in self-puffery for advancement reasons. • More likely to be overwhelmed and stressed by unfamiliar situations leading to cognitive overload and tired brain. • Particularly susceptible to financial pressures due to high student loan debt, depressed job market, and insufficient starting salaries.

When considered together, a behavioral ethics lens provides us with the following picture of the new attorney as an ethical decision maker: working

¹⁰⁶ For a stunning example, see REGAN, *supra* note 31, at 1–12 (recounting the ethical downfall of a John Gallene, a respected senior lawyer who was sentenced to prison because he accepted representation of a profitable new client without revealing a conflict of interest).

¹⁰⁷ See also *supra* text accompanying notes 55–58 (discussing new attorney's conflict of interest based on desire to look good and succeed within legal work group settings).

within a legal organization, a new attorney is hypersensitive to the social dynamics of the workplace and vulnerable to the cultural cues and heuristics associated with work environments and teamwork. Moreover, new attorneys, whether working in legal organizations or in solo practice, are frequently cognitively overloaded, tired, and under financial stress, all of which have been shown to impact ethical decision making and inappropriately trigger heuristics. On the other hand, the new attorney does not have a foundation of established business schemas to draw on reflexively in making decisions; thus, the new attorney actually may be in a better position to see moral and ethical dimensions that her more experienced senior colleagues would miss. In addition, the new attorney is more likely to expand the information, including ethical information, within which to frame a problem. Finally, the new attorney will be in a better position to avoid certain ethical landmines triggered by power and direct financial conflicts of interest.

This article provides a foundation based on a behavioral theory of legal ethics for understanding a new attorney's ethical decision making. The broad implications of the behavioral legal ethics insights explored in this article impact attorneys, law firms, legal organizations, bar associations, and clients, and these insights should be considered in future works and experiments.¹⁰⁸ For example, the new attorney who contemplates and accepts the possibility that he may recognize ethical considerations missed by senior lawyers likely wonders what to do with these insights. A new attorney needs to know how to raise these kinds of issues with senior attorneys in a way that earns them respect and appreciation, or at least does not hurt their chance to succeed within the firm.¹⁰⁹ Of course, new attorneys, like all attorneys, have a professional responsibility to engage in ethical behavior, but a behavioral theory of legal ethics suggests, at a minimum, that if an ethical conversation is not welcome by senior lawyers or would even engender negative career consequences for a new attorney, the new attorney will likely suppress ethical urges and ultimately, albeit unconsciously, refuse to see future problems through an ethical lens. This is not a desired result for clients, the justice system, law's work groups, or individual attorneys. Law firms, law schools, senior lawyers, and new attorneys can all play a role in responding to this conundrum. Law firms and senior lawyers, for example, can recognize the unique insights of new attorneys discussed in this article, expressly invite candid ethical inputs from new attorneys, and create sys-

¹⁰⁸ See *supra* note 7 and accompanying text.

¹⁰⁹ When I presented this paper at the 2013 Annual Meeting of the Young Lawyers Division of the American Bar Association, this was the primary concern of the attorneys in attendance. Such concerns are heightened by an economy and job market that makes lawyer positions harder to find, as well as the high student loan debt that underscores for the new lawyer the essentiality of retaining their position. See *supra* Part II.A.3 (discussing impacts of the economy, tight job market, and debt). I have argued here and elsewhere that such dynamics contribute to and motivate the new attorney's tendency to feel like an "employee" in the work place rather than an autonomous professional, making difficult but important conversations of competing judgments harder, riskier, more stressful, and less likely to occur.

tems that are designed to work to advance an ethical environment by accounting for and understanding behavioral influences.¹¹⁰ Law schools can do a better job of teaching students how to talk to senior lawyers about uncomfortable subjects and how to cultivate in their working collaborations both individual professional autonomy and effective professional working relationships.¹¹¹ Finally, individual new attorneys can learn effective communication skills and make the best use of their recent training in legal research and writing to expand formally the ethical information considered in a legal work team's problem framing and decision making.

CONCLUSION

A behavioral theory of legal ethics provides a foundation for understanding a new attorney's ethical decision making. This article posits that principles and predictions grounded in behavioral legal ethics are not homogeneous across attorneys; rather, they impact new lawyers differently than more experienced lawyers. Using behavioral legal ethics and decision-making constructs to better understand the new attorney's unique perspectives can help shape and perhaps profoundly influence the new attorney's professional development and growth.

¹¹⁰ See, e.g., O'Grady, *Wrongful Obedience*, *supra* note 49, at 29–45 (suggesting specific ways law firms and law's work groups can guard against wrongful obedience in the practice of law).

¹¹¹ See O'Grady, *Preparing Students*, *supra* note 50, at 522–29 (suggesting specific ways law professors can consciously use case work examples and classroom simulation exercises to teach students how to preserve individual autonomy and exercise judgment within hierarchical working collaborations).