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**My Mind's Got a Mind of Its Own:
Why Even Good Lawyers Are Lured Into
Unethical Behavior by the Way Their Brains Work**

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MY MIND'S GOT A MIND OF ITS OWN

I. INTRODUCTION

Why do seemingly upstanding and highly respected lawyers sometimes do unethical things? For those 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. It turns out that the answer is rooted in science. Specifically, extensive research has revealed how our brains actually process information and how strikingly unaware we are of what our 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 is not 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 2016 book, *The Undoing Project*,¹ Michael Lewis (*Liar's Poker*, *The Blind Side*, *Money Ball*, *The Big Short*) tells the story of a 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*,² 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.

III. BEHAVIORAL ETHICS OVERVIEW

From the thirty-thousand-foot view, Kahneman and Tversky's work debunked 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,

¹ Michael Lewis, *The Undoing Project: A Friendship That Changed Our Minds* (2016).

² Daniel Kahneman, *Thinking, Fast and Slow* (2011).

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"³ and "behavioral finance."⁴ In the field of moral decision making, psychologists, cognitive scientists, evolutionary biologists, and academics from several related fields have done extensive research over the past 20 years that has been loosely denominated "behavioral ethics,"⁵ which studies how and why people make moral (and immoral) decisions.

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,⁶ 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."⁷ 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. . . ."⁸ 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 1.⁹ "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."¹⁰

³ See, e.g., COLIN F. CAMERER ET AL., EDS. *ADVANCES IN BEHAVIORAL ECONOMICS* (2004); RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991).

⁴ See, e.g., ROBERT J. SHILLER, *IRRATIONAL EXUBERANCE* (2000); RICHARD H. THALER, ED., *ADVANCES IN BEHAVIORAL FINANCE* (1993).

⁵ 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).

⁶ See Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate*, 23 *BEHAVIORAL AND BRAIN SCIENCES* 645 (2000).

⁷ KAHNEMAN, *supra* note 4 at 20.

⁸ *Id.* at 21.

⁹ 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.

¹⁰ KAHNEMAN, *supra* note 4, at 103.

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