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PRESCRIPTIONS FOR ETHICAL BLINDNESS: IMPROVING ADVOCACY FOR INDIGENT DEFENDANTS IN CRIMINAL CASES

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ABSTRACT

The reasons criminal lawyers so often fail to provide adequate legal representation to indigent defendants are well-known: severe underfunding, excessive workloads, and other disincentives for competent representation work together to encourage quick disposition of cases, with little regard for the quality of legal services that are provided. Yet, largely overlooked in this equation is whether defense lawyers who provide subpar representation are aware of their own shortcomings. To answer this question, this Article focuses on the psychology of ethical decision making. Relying on research that reveals the subtle ways that self-interest can cause people to overlook unethical behavior, it argues that defense lawyers will tend to be "ethically blind" to their own poor performance. Concluding that lawyers who suffer from ethical blindness cannot be expected to improve the quality of legal representation on their own, it recommends ways to reduce psychological barriers to competent representation that have proven successful in other contexts.

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INTRODUCTION

The persistent failure of indigent criminal defendants to receive adequate legal representation is so well documented that it is no longer news. Described variously as a "national crisis,"[1] as a matter of "continuing"[2] and "criminal"[3] neglect, and as a "broken promise"[4] of constitutional magnitude, the conclusion is the same: too frequently indigent defendants across the nation receive legal representation that fails to meet professional standards.[5] According

1. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1031 (2006).

2. NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL i (2009), *available at* http://www.constitutionproject.org/pdf/139.pdf.

3. Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L. J. 1169, 1169 (2003).

4. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, at i (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

5. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 50 ("Since the U.S. Supreme Court's *Gideon* decision in 1963, several organizations have conducted national studies of indigent defense over several decades. Invariably, these studies conveyed a grim view of defense services in criminal and juvenile cases . . . ."). *See generally* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 4 (discussing various financial and structural problems inherent in achieving appropriate indigent representation); ABA SPECIAL COMM. ON CRIMINAL JUSTICE,

to the most recent national study on the matter, for example, underfunded and overworked public defenders

> are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources.[6]

Nor is the crisis limited to public defenders.[7] Rather, lawyers who represent indigent defendants under contracts with the government, or who receive appointments directly from the court, too frequently engage in subpar performance on behalf of their clients.[8] Take, for

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CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE 37 (1988) ("[T]here is ample evidence that the quality of representation, particularly for the poor, is not what it should be."); NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES (1976) [hereinafter NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS] (discussing, among other things, the importance of competent and effective counsel); NAT'L LEGAL AID AND DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 70 (1973) [hereinafter NAT'L LEGAL AID & DEFENDER ASS'N, THE OTHER FACE] ("[T]he resources allocated to indigent defense services has been found grossly deficient in light of the needs of adequate and effective representation."); DEBORAH RHODE, ACCESS TO JUSTICE 122-43 (2004) (describing persistent problems in legal representation of indigent defendants in criminal cases).

6. NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 7; *see also* Green, *supra* note 3, at 1182-84 (describing state studies documenting persistent problems in indigent defense, including in Georgia, Arizona, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Minnesota, Montana, New York, Texas, and Mississippi).

7. Three primary models exist to provide defense counsel to indigent defendants in the United States. The first model is the public defender, an organization of lawyers who are employed by the jurisdiction or who have a contract to provide representation to clients. The second is the contract model, where one or more private attorneys bid on and receive a contract to provide representation under certain terms. The third model includes appointed lawyers who receive appointments directly from the court from a list of attorneys who have agreed to accept cases for a fixed rate per hour or per case. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 53; THE SPANGENBERG GRP., RATES OF COMPENSATION PAID TO COURT-APPOINTED COUNSEL IN NON-CAPITAL FELONY CASES AT TRIAL: A STATE-BY-STATE OVERVIEW 1–2 (2003).

8. *See* BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT (2000) (providing a representative sample of literature on the problems associated with contract lawyers and appointed counsel, and a description of the dangers of "low bid" contracts, where lawyers bid to represent large numbers of clients for the least possible cost to the locality, which increases the risk that lawyers will provide substandard representation); *Low-Bid Criminal Defense Contracting: Justice in Retreat,* CHAMPION, Nov. 1997, at 22 (discussing the failure of this "cost-driven contract system" to provide indigent

instance, Robert Surrency, who for seventeen years held the contract to represent indigent clients accused of crimes in Greene County, Georgia.[9] Known "as the quintessential 'meet 'em, greet 'em, and plead 'em lawyer,'" Surrency had a caseload more than double the recommended national standards, was poorly paid for his services, and had no assigned investigator to work on his cases, or funds assigned for expert witnesses.[10] Often his only meetings with his clients—many of whom were accused of serious felonies—were in the hallway of the courthouse where, having not performed an investigation or not knowing much about the case, he would transmit plea offers decreed by the prosecutor.[11] The results were predictable. Faced with a lawyer who spent little or no time working on their cases, the vast majority of his clients, surely fearful that rejecting the plea offer would result in far worse punishment after trial, pled guilty. Few had the temerity to insist on a trial or a better plea offer, knowing that Surrency was disinclined to invest additional time or energy into their cases.[12]

The causes of these deep and persistent problems in indigent defense are well known. Invariably, any discussion begins with the underfunding of defense services and the excessive workloads that result.[13] Simply put, lawyers with too many cases and too few resources cannot provide adequate representation to their clients. In addition, much has been written about the economic and other "perverse incentives" that encourage many defense lawyers to

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defendants with quality representation); Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 49 (1995) (addressing the dangers of the contract model); Green, *supra* note 3, at 1180-81 (describing how low pay for appointed counsel in many jurisdictions discourages effective representation).

9. *See generally* AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT (2009); *see also* Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331, 334 (2010) (recounting Amy Bach's description of Robert Surrency's approach to advocacy).

10. *See* BACH, *supra* note 9, at 12-15.

11. *Id.* at 14-15.

12. *See id.* Remarkably, Surrency often did not even conduct plea colloquies himself; instead, he outsourced the task to another attorney so that he could spend more time in the hallways chasing pleas. *Id.* at 17-18. By all accounts, Surrency was very effective at convincing his clients to plead guilty. For example, over a four-year period he tried only 14 out of 1493 cases, a plea rate of 99%. *Id.* at 14.

13. *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 52-53, 65-70; NORMAN LEFSTEIN, AM. BAR ASS'N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12-20 (2011); Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 777 (2010); Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 801-02 (2000) [hereinafter Brown, *Lawyering Norms*]; Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 820 (2004) [hereinafter Brown, *Rationing Criminal Defense Entitlements*].

minimize the amount of work they perform per case.[14] The role that local culture can play has also been studied, particularly how informal norms in local courthouses and in many public defender offices create an ethos in which subpar performance is accepted.[15] Together, this scholarship paints a rich picture of many of the factors that influence defense lawyer behavior and helps to explain the pressures that encourage deficient performance.

One area that has received much less attention, however, is whether defense lawyers who fail in their duties are aware of their own shortcomings. Most of the literature on indigent defense has overlooked this question, perhaps because it is assumed that lawyers with crushing caseloads and little incentive to provide adequate representation must know when they do not meet their professional obligations.[16] Some scholars, however, have argued that lawyers tend to be unaware of their misdeeds. For example, lawyer and journalist Amy Bach, who chronicled the experience of Robert Surrency in her excellent book, *Ordinary Injustice: How America Holds Court*,[17] has argued that all legal participants in the criminal justice system—including defense lawyers, prosecutors, judges, law enforcement, and court personnel—fail to restrain each other's actions, which discourages them from recognizing their own misbehavior.[18] The result, she argues, is that defense lawyers often fail to perceive the many ways in which they provide inadequate representation.[19] Other scholars have also briefly discussed the possibility that defense

14. *See, e.g.*, Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1618-19 (2002); Donald A. Dripps, *Ineffective Assistance Of Counsel: The Case for An* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 244, 251-53 (1997).

15. The classic study of the influence of local court culture on the quality of defense lawyering is Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 28-29 (1967). *See also* Brown, *Lawyering Norms*, *supra* note 13, at 803 (describing the influence of local norms in creating disincentives for effective representation for indigent defendants); LEFSTEIN, *supra* note 13, at 101-05 (describing how the culture in some public defender organizations discourages effective advocacy); Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008) (describing influence of local norms in New Orleans that create disincentives for effective representation).

16. In particular, none of the major studies about the indigent defense crisis has addressed the question of whether defense lawyers are aware of their own shortcomings. *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM., *supra* note 2; ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 4; ABA SPECIAL COMM. ON CRIMINAL JUSTICE, *supra* note 5; NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS, *supra* note 5; NAT'L LEGAL AID & DEFENDER ASS'N, THE OTHER FACE , *supra* note 5; RHODE, *supra* note 5, at 122-43.

17. *See* BACH, *supra* note 9.

18. *See id.* at 4.

19. *See id.* (noting that "[o]rdinary injustice seems to occur in a blind spot").

lawyers may not be aware of their own shortcomings.[20]

Once again, Robert Surrency illuminates the point. When asked about the perfunctory effort on behalf of his clients, Surrency seemed oblivious to the multiple ways in which he provided subpar performance.[21] Indeed, he did not, as might have been expected, shift blame from himself to the system that demanded that he handle too many cases under extremely trying circumstances.[22] Rather, he was "resolute" in his belief that he provided his clients with a valuable service, that is, that each one had his or her day in court.[23] According to Surrency, most of his clients wanted both to plead guilty to avoid stiffer sentences that would have been imposed after trial, and to move forward by putting their criminal conduct behind them.[24] From his perspective, he could assess the worth of a case, most of which he believed "were 'pretty open and shut,'"[25] without much time or energy. Had he worked harder on each case—such as expending time on investigations—many of his clients "would have languished in jail," he claimed.[26] "I think my clients are much happier because I didn't do that," Surrency concluded.[27]

Are criminal defense lawyers who provide subpar performance

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20. *See, e.g.*, LEFSTEIN, *supra* note 13, at 100 (citing Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from* Lawyers in the Dock, 22 GEO. J. LEGAL ETHICS 1549, 1552 (2009) (reviewing RICHARD ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS (2008)) (noting that lawyers often are unaware of their own wrongdoing); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292 (2006) (briefly discussing the possibility that defense lawyers unconsciously engage in "tunnel vision," a phrase that describes the cluster of cognitive biases that produce confirmatory and related biases that can cause participants in the criminal justice system to focus too much attention on the possibility of guilt); *cf.* Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 181 (2007) (discussing how defense lawyers may possess unconscious biases that compromise their ability to counteract the types of cognitive biases that induce many defendants to agree to faulty pleas bargains).

21. *See* BACH, *supra* note 9, at 13, 16.

22. *See id.* at 16.

23. *Id.*

24. *Id.*

25. *Id.* at 15.

26. *Id.* at 64.

27. *Id.* Surrency elaborated on why he did not investigate his cases, stating that the "fun part" was

> when you finally have enough experience to be able to make a long drawn-out practice into something pretty straightforward. That is when it really gets fun. Instead of having to spend sixteen hours investigating something or looking up some piece of the law. Just to be able to get right down to it. Just to be able to talk to these people—whoever these people are—and answer [them].

Id. (alteration in original).

generally unaware of their inadequate performance, or is Surrency an outlier whose views explain little about the perceptions of other defense lawyers? The answer matters. If defense lawyers for indigent clients generally do not perceive their own inadequacies, then efforts to encourage them to voluntarily become more effective will likely fail. For example, the profession's ethical rules require that "[a] lawyer's work load must be controlled so that each matter can be handled competently."[28] To reinforce this obligation, in 2006 the American Bar Association issued a Formal Ethics Opinion requiring all lawyers for indigent defendants to take appropriate steps to manage their workloads to ensure that obligations owed to each client—including the duties of competence, diligence, communication, and to be free from conflicts of interest—can be met.[29] Yet, despite the power and breadth of this opinion, which includes a series of specific steps that defenders and their supervisors must take to remedy excessive workloads, there is scant evidence of any appreciable effect.[30] Rather, the problem of inadequate representation for indigent defendants is as persistent today as it was decades ago.[31]

Relying on research by experts in ethical decision making, this Article seeks to determine whether defense lawyers who provide subpar performance are aware of their professional shortcomings. Its focus is on what has been described as ethical "blind spots"—the phenomenon that causes people to fail to perceive themselves as unethical in situations in which their own self-interest conflicts with duties owed to others.[32] Finding that most defense lawyers for indigent clients operate under circumstances where ethical blind spots can be expected to flourish, it concludes that many will believe that they are acting ethically, even in the face of strong evidence to the contrary.[33] Most perniciously, because these errors in judgment occur below the surface of consciousness, they remain invisible and

28. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2 (2003); *see also* Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 921-22 (2005) (discussing relevant ethical rules).

29. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006).

30. *See* LEFSTEIN, *supra* note 13, at 96-97 ("[T]he overwhelming majority of [public defenders] do the best they can for their clients under very difficult circumstances, [but] they do not seek to withdraw from cases as rules of professional conduct require.").

31. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 51-52 (discussing how the current crisis in underfunding and its associated problems is decades old).

32. *See* MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 4-5 (2011).

33. See Kath Hall, *Why Good Intentions Are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making*, *in* REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 210 (Reid Mortensen et al. eds., 2010), for an excellent account of how ethical blindness can infect decision making by lawyers in general.

hidden.[34] The result: ethically blind defense lawyers can be expected to continue to provide inadequate counsel, unimpeded by knowledge of their own misbehavior.

This Article proceeds in five parts. Part I frames the discussion by focusing on a core aspect of the defense function that is too often honored only in the breach: the duty of investigation. While failures of investigation are only one of many ways that lawyers for indigent clients neglect their professional duties,[35] the importance of the investigatory function makes it a useful starting point for discussion. Part II addresses the rich body of scholarship that has developed to help explain why so many defense lawyers for indigent clients prioritize the quick disposition of cases over quality representation. Underfunding of the defense function and the resulting perverse incentives that discourage competent representation, the local culture in which defense attorneys practice, and some of the psychological causes of poor performance are discussed. Part III turns to the psychology of ethical decision making. The emphasis is on research that demonstrates how everyone, lawyers included, is often blind to the influence of self-interest. Part IV addresses why defense lawyers who represent indigent clients can be expected to suffer from ethical blindness. Continuing with the notion that many defense lawyers benefit from resolving cases as quickly as possible, this section identifies specific reasons why the subtle power of self-interest is likely to cause these lawyers to overlook their own failures in advocacy. Part V addresses the implications of ethical blindness, particularly that defense lawyers who do not recognize their own limitations cannot be expected to protest the conditions that make their jobs so difficult. The Article concludes by offering suggestions about how ethical blindness might be remedied, focusing on strategies that have proven effective at reducing cognitive biases in other contexts.

I. DEFENSE LAWYERS AND THE DUTY TO INVESTIGATE

A. The Duty to Investigate

A prompt investigation into the facts is a core function of defense counsel.[36] Without it, a lawyer can be hamstrung in every aspect of

34. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 5 (discussing how our ethical judgments occur "outside of our awareness").

35. NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 7; *see also* Green, *supra* note 3, at 1176-77, 1182 (providing an example of various shortcomings of defense counsel and discussing insufficient funding issues).

36. *See* Backus & Marcus, *supra* note 1, at 1097 & n.351; ROBERT L. SPANGENBERG ET AL., THE SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 72-74 (2006).

representation.[37] In particular, a lawyer who fails to seek information relevant to the case may fail to uncover evidence that can help to secure the defendant's pretrial release, to support pretrial motions, to convince the prosecutor or judge to reduce or dismiss charges, and to provide leverage in plea negotiations.[38] Nor will the lawyer be well informed when advising the defendant on whether to plead guilty, or under what terms.[39] If the case goes to trial, the lawyer may be hampered in testing the strength of the prosecution's evidence, in securing exculpatory evidence, or in uncovering and presenting possible defenses.[40] Finally, if the defendant is convicted, a defense lawyer who has not investigated may have missed important information that could help convince the judge to impose a lesser sentence.[41] Essentially, a lawyer who does not investigate places the defendant at the mercy of other actors in the criminal process, most notably the prosecutor and judge, neither of whom is charged with the responsibility of protecting the defendant's interests.

Given its importance, the duty to investigate is clear. The duty of competence requires "thoroughness and preparation reasonably necessary for the representation,"[42] which in turn requires "inquiry into and analysis of the factual and legal elements of the problem."[43] The American Bar Association reinforced these obligations in a 2006 Formal Ethics Opinion, stating the duties of counsel include the obligation to "adequately investigate, analyze, and prepare cases" and to "act promptly on behalf of clients."[44] National standards concur: a prompt investigation must be conducted. For example, according to the ABA Standards on Criminal Justice Relating to the

37. *See* Backus & Marcus, *supra* note 1, at 1097; Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 844-45, 845 n.24 (1998).

38. As one of the nation's leading experts has stated, "Most cases turn on the presentation of evidence and not on legal argument. . . . The *facts* are counsel's most important asset not only in arguing before a jury but also in every other function counsel performs: seeking advantageous terms of bail, urging the prosecutor to drop or reduce charges, negotiating a plea bargain with the prosecutor, [and] urging a favorable sentencing . . . disposition on a judge. Investigation is counsel's instrument for getting the facts." 1 ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES § 106 (ALI/ABA 5th ed. 1988); *see also* SPANGENBERG ET AL., *supra* note 36, at 73-74 (noting the importance of investigation to create leverage in plea negotiations).

39. *See* 1 AMSTERDAM, *supra* note 38, § 106 (explaining that most cases depend on the evidence for success, rather than legal theories).

40. *See id*. at § 107 (discussing the limited time and resources available to counsel when collecting evidence).

41. *See supra* note 38 and accompanying text.

42. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

43. *Id*. R. 1.1 cmt. 5.

44. ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 3.

Defense Function, which have repeatedly been cited by courts and others as guides to the content of defense lawyer duties,[45] "counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities."[46]

The question, then, is not whether a lawyer should investigate, but rather under what situations counsel can curtail or limit an investigation. Because the language of the obligation itself is general—requiring conduct that is "reasonably necessary"—the scope of the required investigation will depend upon the contingencies of each case. Defense lawyers are afforded broad discretion to decide how best to represent their clients, including which avenues of investigation to pursue.[47] As a result, broad rules that demand particular forms of investigation in every case are difficult to articulate or apply. That said, some general parameters are identifiable.

To begin, defense counsel may not limit an investigation based on "opposition, obstruction or personal inconvenience."[48] Rather, counsel's duty of diligence requires that counsel "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[49] In other words, the lawyer must make decisions that are based on the interests of the client, rather than what is most convenient for, or in the interests of, the lawyer.

In addition, a lawyer cannot cite the existence of an excessive workload as a justification for failing to investigate properly. Rather, as the rules of ethics make clear, defense counsel must manage workloads to ensure that each client is represented in a manner that satisfies counsel's ethical obligations.[50] The 2006 ABA Formal Ethics Opinion reinforced this obligation by setting forth a series of steps that a defense lawyer must take to ameliorate an excessive workload, up to and including seeking relief from appointments by the court.[51] For public defenders, this requires seeking approval within the office to decline new case assignments and, if such approval is not

45. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 387-400 (2005); Wiggins v. Smith, 539 U.S. 510, 522-24 (2003); Williams v. Taylor, 529 U.S. 362, 396 (2000).

46. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-4.1(a), at 181 (3d ed. 1993) [hereinafter ABA STANDARDS].

47. *See* Green, *supra* note 3, at 1175.

48. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003).

49. *Id.*

50. *See id.* cmt. 2.

51. *See* ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 1.

forthcoming, moving up the chain of command until it is granted.[52] As a last resort, the public defender must "file a motion with the trial court . . . to withdraw from a sufficient number of cases" so that an excessive caseload will be remedied.[53] For lawyers who receive appointments "directly from the court," the route is more direct—they must not request any new appointments until their existing cases can be handled competently.[54] Supervisors in public defender organizations are responsible for "monitor[ing] the workloads of subordinate lawyers" and taking appropriate measures to ensure that they are manageable.[55]

The ABA Standards provide additional guidance about the scope of the duty to investigate. In particular, the ABA Standards stress two important points. First, in a provision that the Supreme Court has cited with approval,[56] "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty."[57] This point goes to a central obligation of defense counsel. The lawyer's duty is not to decide whether a client is, in fact, guilty of the crime charged—a role that instead rests with the fact finder. Rather, counsel's duty is to test the strength of the prosecution's ability to prove what is alleged, irrespective of the probability of factual guilt.[58]

Second, "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed."[59] The

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52. *See id.* at 5-6.

53. *Id.* at 6.

54. *Id.* at 5. The opinion defines public defenders to include lawyers who work under a contract with the government. *See id.* at 2 n.3.

55. *Id.* at 7-8. Steps might include transferring responsibilities from the lawyer, supporting the lawyer in a motion to withdraw from enough cases to bring the workload within reasonable limits, and obtaining additional resources so that manageable workloads can be maintained. *See id.* at 7. See *infra* notes 302-08 and accompanying text, for additional discussion of the duties of supervisors.

56. *See* Rompilla v. Beard, 545 U.S. 374, 387 (2005).

57. ABA STANDARDS, *supra* note 46, § 4-4.1(a); *see also* Freedman, *supra* note 28, at 919 ("This duty to conduct fact investigation is incumbent on the defense lawyer even when her client admits facts that appear to constitute guilt, and even though the client expresses a desire to plead guilty.").

58. In the words of the commentary to the Standards:

> The lawyer's duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt *in law*, not in some moral sense. An accused may feel a sense of guilt, but the accused's subjective or emotional evaluation is not relevant; an essential function of the advocate is to make a detached professional appraisal independent of the client's belief that he or she is or is not guilty.

ABA STANDARDS, *supra* note 46, § 4-4.1 cmt.

59. *Id.* § 4-6.1(b). This standard is amplified in ABA CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(b) (3d ed.

importance of this point is hard to overstate. The defendant's decision whether to plead must be informed by the advice of counsel, which in turn requires counsel to conduct a proper investigation in advance of those discussions.[60] To take but one example, before the decision to plead is made, counsel should normally seek to enforce any discovery rights that would require the prosecution to disclose relevant information about the case to the defense.[61]

Finally, there are situations in which the prosecution makes an offer to resolve the charges against the defendant so early in the case that defense counsel has little time to investigate.[62] In such cases, the ABA Standards recognize that a defense attorney may appropriately recommend that the defendant accept the offer, even in advance of an investigation, if turning it down would generate an unacceptable risk of harm.[63] However, in such circumstances, counsel's decision must be based on what counsel believes to be in the best interests of the client, rather than any other impermissible consideration, such as what is most convenient for counsel.[64] And when the offer is not contingent on such a quick disposition of the case, the duty to investigate persists and, indeed, must be conducted.[65]

B. A Duty Honored in the Breach

Despite the importance of investigation, too often lawyers across the county—whether public defenders, contract lawyers, or appointed counsel—fail to properly investigate in a substantial number of cases.[66] The results can be and often are disastrous.

1993) ("Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.").

60. ABA CRIMINAL JUSTICE STANDARDS COMM., *supra* note 59, § 14-3.2(a)–(c).

61. *Id.* § 14-3.2(b) cmt.

62. *Id.* (providing, as an example, the situation in which "a highly favorable pre-indictment plea is offered"); *see also* Jane Campbell Moriarty & Marisa Main, "*Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1041 (2011) (discussing coercive pressures by prosecutors for quick plea bargains).

63. ABA CRIMINAL JUSTICE STANDARDS COMM., *supra* note 59, § 14-3.2(b) cmt.

64. *See id*. § 14-3.2(c) cmt. ("If . . . a lawyer has determined that a proposed plea is in the best interests of the defendant, the lawyer 'should . . . guide the client to a sound decision.' It is . . . 'unprofessional conduct . . . to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision.'" (citations omitted)).

65. *See id*. § 14-3.2(b) cmt.

66. *See* Freedman, *supra* note 28, at 912-13 (noting that appointed counsel generally conduct no investigations before trying cases); Zeidman, *supra* note 37, at 845 nn.24 & 33 (citing sources); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 90-91 (1986) (noting that one of the "major generic deficiencies of criminal defense attorneys" is a "[f]ailure to conduct an adequate pre-trial investigation");

On this point, statistics are telling. For example, in one of the largest studies conducted of defense lawyers in a single locale, researchers evaluated the percentage of cases in which appointed lawyers in New York City engaged in various representational activities—including investigating their cases—in both homicide and nonhomicide felonies.[67] Shockingly, lawyers engaged in any form of investigation in approximately 27% of homicide cases, 12% of nonhomicide felonies, and only 8% of misdemeanor cases.[68] Delving into the details of these statistics is even more disturbing. In cases in which the defendant was accused of homicide, lawyers failed to interview their clients in 75% of the cases—meaning that the matter was resolved by the lawyer without any attempt to gather essential factual information from the most important source for the defense: the client.[69] This number increased to over 80% in nonhomicide cases.[70]

Unfortunately, the results of the New York City study are not unique. In another study conducted of defense attorneys in Phoenix, Arizona, 47% of lawyers "entered plea agreements without interviewing any prosecution witnesses," and in 30% of the cases where a plea was entered, no defense witnesses were interviewed.[71]

Joseph D. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1246 (1970) ("[T]he problem of counsel's failure to investigate and prepare a defense is a real one.").

67. *See* Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 749 n.820 (1987). The study was conducted by evaluating claims for compensation for various services by attorneys appointed to represent defendants charged with all types of crimes in New York City. *See id.* Over 14,000 vouchers for compensation by attorneys (known as "18-B attorneys" pursuant to the provision of county law that authorizes their appointment) were analyzed. *Id.* The study was supplemented with qualitative assessments made by observing 124 attorneys during 401 court appearances. *Id.* at 750. One important aspect of the qualitative component was to assess the degree of accuracy in vouchers that were submitted for compensation. *Id.* The study determined that the lawyers who were observed overstated the amount of time devoted to services by twenty-seven percent. *Id.* at 750 n.822.

68. *Id.* at 762.

69. *Id.* at 758. Comparable statistics were obtained in another study of New York's appointed counsel, which found that lawyers in homicide cases visited clients at Rikers Island in only thirty-six percent of their cases. Jane Fritsch & David Rohde, *Lawyers Often Fail New York's Poor*, N.Y. TIMES, Apr. 8, 2001, at A1; *see also* 1 AMSTERDAM, *supra* note 38, § 76 (emphasizing the importance of gathering information from the client by intimating that "[t]he initial interview in a criminal case is probably the most important single exchange that counsel will have with the client. . . . At the least, it gravely influences all future dealings of the two."). Multiple meetings with a client are usually required to develop the necessary relationship of trust and to gather all relevant information for preparation of the case. 1 AMSTERDAM, *supra* note 38, § 76, at 123-24.

70. *See* McConville & Mirsky, *supra* note 67, at 758.

71. *See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1735 (1993).

In addition, defense attorneys visited the crime scene in only 55% of the felony cases that went to trial, and only 31% of defense lawyers interviewed all the prosecution's trial witnesses.[72] Remarkably, 15% of lawyers interviewed none of the prosecution's trial witnesses.[73] Others studies have come to similar conclusions.[74]

Investigatory failure is also evident by how infrequently defense attorneys utilize the services of trained investigators.[75] Underfunded defenders often must request appointment of trained investigators from the court, having no funds to hire them on their own.[76] Yet rarely are such requests made, much less granted. For example, in one study in Pennsylvania, few public defenders reported speaking to an investigator in the representation of a client.[77] Appointed counsel, who must also seek court appointment for investigators, similarly fail to seek these services. For example, in one study conducted in Alabama, virtually no attorneys requested the assistance of a court appointed investigator, despite the statutory and constitutional ability to do so.[78] When asked for an explanation, lawyers indicated there was an unwritten rule created by the judges in the courthouse: do not seek the assistance of an investigator or an expert witness.[79] Similar experiences have been recounted in other jurisdictions, including in New York, California, and Michigan.[80]

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72. *Id.* at 1734-35.

73. *Id.* at 1735.

74. For example, in one of the earliest studies of public defender activities, research indicated that "27% of public defenders spen[t] less than ten minutes with their clients, while 59% spen[t] less than half an hour." *Id.* at 1735; *see also* CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON FUNDING OF DEFENSE SERVICES IN CALIFORNIA 4 (2008), *available at* http://www.ccfaj.org/rr-pros-official.html (finding the failure to investigate produced forty-four percent of the cases where counsel was deemed ineffective).

75. When no investigator is used, the attorney will personally need to perform all of the investigatory functions, an extremely challenging task for anyone who is overburdened by a large caseload. In addition, investigations conducted by lawyers are of limited value, as the lawyer cannot be a witness in the case, meaning that any evidence uncovered by the lawyer may be unusable during the representation of the defendant. NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 93-94, 93 n.265.

76. *See id.* at 93-95 (citing lack of access to investigators in many jurisdictions, including New York, Virginia, California, and Michigan); SPANGENBERG ET AL., *supra* note 36, at 49-50 (describing the upstate New York experience).

77. *See* Backus & Marcus, *supra* note 1, at 1098 (citing THE SPANGENBERG GRP., A STATEWIDE EVALUATION OF PUBLIC DEFENDER SERVICES IN PENNSYLVANIA 69 (2002)).

78. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 4, at 19 (citing study of 1867 felony case files where funds for investigators or experts were only requested in 0.06% of the cases).

79. *Id.* at 21 (describing a practice by Nevada judges of disciplining attorneys who seek financial assistance to hire experts).

80. *See* SPANGENBERG ET AL., *supra* note 36, at 74-76; NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 94-95 (citing various jurisdictions where lawyers were discouraged from making requests for court appointed investigators).

The net result of these persistent investigative failures can be devastating. Potentially innocent clients invariably will be lost in the shuffle of excessive caseloads.[81] And clients who may be factually guilty lose the potential benefits that a dedicated lawyer with adequate resources can provide. As one scholar has noted:

> The lack of careful investigation that characterizes most felony prosecutions virtually guarantees that a significant number of innocent defendants are pressured to plead to crimes they did not commit. And within the much larger universe of guilty defendants, those who are punished most severely are often those who made the worst deals, not those who committed the worst crimes.[82]

II. EXPLAINING INADEQUATE ADVOCACY

A variety of reasons have been offered to explain why defense lawyers so often fail in their duties. The most obvious is a matter of simple arithmetic. As many have noted, systemic underfunding of defender services frequently means that too many lawyers handle too many cases with too few resources.[83] The result is that many lawyers labor under excessive caseloads[84] where they are unable to provide adequate representation. For example, it is not uncommon in some

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81. See BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 165-67 (2011), for a discussion of how poor defense lawyering contributes to wrongful convictions of innocent clients. *See also* EMILY M. WEST, COURT FINDINGS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN POST-CONVICTION APPEALS AMONG THE FIRST 255 DNA EXONERATION CASES (Sept. 2010), http://www.innocenceproject.org/docs/Innocence_Project_IAC_Report.pdf (surveying claims of ineffective assistance of counsel in cases where defendants were later exonerated based on DNA evidence). As one witness who recently testified before the Florida Innocence Commission stated: there is "no doubt that the workload of the public defenders has an impact on wrongful convictions. Everyone can agree that ferreting out innocence requires a competent attorney to investigate the evidence." FLA. INNOCENCE COMM., FINAL REPORT TO THE SUPREME COURT OF FLORIDA 148-49 (2012), *available at* http://www.flcourts.org/gen_public/finalreport2012.rtf.

82. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 58 (2011).

83. LEFSTEIN, *supra* note 13, at 12-20; *see also* Joy, *supra* note 13, at 777-78; Brown, *Lawyering Norms*, *supra* note 13, at 841; Brown, *Rationing Criminal Defense Entitlements*, *supra* note 13, at 820; ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 2 & n.7 (discussing the impact of unmanageable caseloads).

84. No exact numerical measure of what constitutes an excessive caseload is possible, as the amount of work that a lawyer must perform depends upon a qualitative assessment of each client's need. *See* ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 4. That said, in 1973 the National Advisory Commission on Criminal Justice Standards adopted guidelines recommending that the annual maximum caseloads for public defenders should not exceed 150 felony cases and 400 misdemeanor cases per attorney. LEFSTEIN, *supra* note 13, at 43. These guidelines are often cited as relevant in measuring attorney workloads. *See* ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 4; LEFSTEIN, *supra* note 13, at 43-49 (providing an excellent analysis of the history and propriety of these national standards, including reasons why they may overstate what should be deemed acceptable).

jurisdictions for lawyers to be responsible for caseloads that exceed national guidelines by more than 500%.[85] Some lawyers respond by effectively abdicating their responsibilities to their clients. Others engage in a form of legal "triage" in which some clients are selected to receive adequate representation, while the rest are relegated to the "assembly line" of quick, standardized guilty pleas in which the lawyer expends only minimal efforts.[86] In either case, time-consuming and labor-intensive tasks, such as investigations, too often are dispensed with out of expediency.

The problem of too much work is augmented by what some have described as "perverse incentives"[87] that can discourage defenders from providing competent representation. The agency costs that adhere in every attorney-client relationship are exacerbated by the economic realities of indigent defense practice.[88] Take, for example, the situation involving Robert Surrency, who was awarded a low-bid contract to represent indigent defendants.[89] The contract itself

85. *See Indigent Representation: A Growing National Crisis: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 50 (2009) (statement of John W. Hall, President, National Association of Criminal Defense Lawyers) [hereinafter *Indigent Representation*]. Examples of excessive caseloads abound. *See, e.g.*, *id.* (providing examples of excessive caseloads, including in New Orleans where part-time public defenders handled the equivalent of 19,000 cases per year per attorney; in Chicago, Atlanta, and Miami, where defense lawyers handled 2000 misdemeanor cases each per year; and in Dallas, Texas, where misdemeanor defenders handled 1200 cases per year); U.S. DEP'T OF JUSTICE, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE 10, 14 (2000), http://www.uta.edu/pols/moore/indigent/symp2000.pdf (indicating that some public defenders are assigned more than 700 cases a year). Not all jurisdictions, of course, underfund the defense function. Some provide sufficient funds to allow defenders to make rational calculations about how to expend allotted resources. *See* Brown, *Rationing Criminal Defense Entitlements, supra* note 13, at 815 (discussing funding availability in Indiana, which funds indigent defense through a combination of county and state budgets and is considered adequate to provide lawyers with the resources need to provide competent counsel).

86. *See* Green, *supra* note 3, at 1180-81; Brown, *Rationing Criminal Defense Entitlements*, *supra* note 13, at 821 n.78 (2004); Joy, *supra* note 13, at 778; Dripps, *supra* note 14, at 252.

87. *See supra* note 14 and accompanying text.

88. This is not to say that similar perverse incentives do not affect lawyers who are retained by paying clients. As Professor Alschuler has noted, because most paying clients are required to pay their defense lawyers a lump sum payment at the beginning of the case, privately paid counsel who do not work on an hourly basis will have an economic incentive to resolve "the case as rapidly as possible." Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE, 149, 150 (1986) [hereinafter Alschuler, *Personal Failure*]; *see also* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 184 YALE L.J. 1179, 1191-1205 (1975) [hereinafter Alschuler, *Attorney's Role*] (discussing various economic and noneconomic factors that can cause retained counsel to encourage guilty pleas).

89. *See* BACH, *supra* note 9, at 13.

ensured that Surrency's caseload would be excessive, given the number of people requiring representation in the county.[90] In addition, Surrency had no economic incentive to do anything but provide minimal efforts for most of his clients. After all, greater effort on any given case did not increase the amount that he was paid in most instances.[91] To the contrary, because each segment of effort he expended reduced the overall profitability of the contract, his economic incentive was to resolve most cases with the least amount of effort possible.[92] For Surrency and lawyers like him, any activity that diverts attention away from quick disposition of cases—such as pretrial investigations, which can take hours, days, or longer to accomplish—is discouraged by the nature of the contract itself.[93]

One might expect a different result for appointed lawyers who are paid per case to represent clients. However, because the hourly rate of pay is often so low, and the total amount of pay available per case often is capped well below the amount needed to compensate for competent representation, appointed lawyers also have economic incentives to expend minimal efforts per case.[94] Pushing quick plea bargains is the name of the game.[95] This is particularly true when the lawyer's appointed clients pay worse than the lawyer's paying clients, meaning that the lawyer has an incentive to minimize time spent on appointed cases so that more time can be focused on better compensated cases.[96] Many judges augment these incentives by making appointments not based on the competency of counsel, but rather on how quickly the lawyer can dispose of cases.[97]

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90. *See id.* at 13, 29-30. Surrency's contract required that he handle all routine cases for a fixed fee, but paid him hourly for the most serious cases, such as murder. *Id*. at 13.

91. *See id*.

92. *See id.*

93. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 195 ("Inadequate compensation of court-appointed lawyers and contract attorneys contributes to lawyers accepting a high volume of cases that can be disposed of quickly as a way of maximizing income and may serve as a disincentive to invest the essential time required to provide quality representation.").

94. *See* Green, *supra* note 3, at 1178-79; NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 64; Alschuler, *Personal Failure, supra* note 88, at 150; Stephen J. Schulhofer, *Plea Bargaining as Disaster,* 101 YALE L.J. 1979, 1989 (1992).

95. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2477 (2004).

96. *See* Green, *supra* note 3, at 1178-80. Alternatively, in jurisdictions where there is a greater chance of higher pay for cases that go to trial rather than those that end in a guilty plea, appointed counsel may have an economic incentive to take cases to trial without engaging in proper investigation, rather than encouraging a more prudent guilty plea. *See* Robert P. Mosteller, *Why Defense Attorneys Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 45 (2010).

97. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 82-84 (recounting numerous examples where ABA recommendations as to fair case assignments had

Public defenders also have incentives to minimize the amount of work they expend on each case. Of course, public defenders are not paid on a per case basis, meaning that they do not have the same economic incentives to turn over cases as quickly as appointed counsel.[98] But because so many defenders carry excessive caseloads, the only way that all of the cases can be resolved is to cap the amount of time devoted to each client.[99] Otherwise, they would be required to work around the clock—and even then would likely be unable to meet their professional obligations.[100] Additionally, because the public defender's office itself does not receive additional payments when a lawyer engages in robust advocacy, the incentive is for lawyers to neglect activities that do not produce financial benefits to the organization, such as expending resources to investigate cases or to take cases to trial.[101] In some cases, the economic incentives are more direct: because the defender's office is not paid on a per case basis, lawyers who expend too much time on each case may risk alienating supervisors who want cases resolved expeditiously.[102] Job security can be very motivating.[103]

The incentives that encourage minimal effort by lawyers are counterbalanced by few disincentives for subpar performance. Unfortunately, there are few costs for lawyers who fail to meet their professional duties. Because indigent clients do not control the appointment process, they are powerless to fire their attorneys without court approval.[104] Nor are there any likely penalties for poor

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been violated); Freedman, *supra* note 28, at 912; Brown, *Rationing Criminal Defense Entitlements*, *supra* note 13, at 812.

98. *See* Alschuler, *Personal Failure*, *supra* note 88, at 150 (noting that public defenders are salaried lawyers who are not affected by the kinds of economic temptations affecting private attorneys).

99. *See Indigent Representation*, *supra* note 85, at 6 ("If the lawyer never takes a day of sick leave and works 10 hours a day, five days a week, the attorney's schedule would only allow about one hour and 10 minutes per case if the lawyer had a caseload of 2,000 cases per year. A lawyer with a caseload of 1,200 would have less than two hours to spend on each case." (citation omitted)); Alschuler, *Personal Failure*, *supra* note 88, at 151 (noting that for public defenders it is "easier to banter with prosecutors about kids, lakehouses and justice than to march into the field to learn the facts or into the library to learn the law").

100. *See Indigent Representation*, *supra* note 85, at 6.

101. *See* Dripps, *supra* note 14, at 254; Schulhofer, *supra* note 94, at 1989-90.

102. *See* Dripps, *supra* note 14, at 253.

103. See *infra* notes 302-08 and accompanying text, for a discussion of the role that supervisors can play in perpetuating poor performance by trial lawyers.

104. *See* Curtis & Resnik, *supra* note 14, at 1620 (noting that indigent defendants "have little or no ability to monitor their own lawyers"); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 77-78 (1993) (noting that indigent defendants have no protection from attorneys who may not serve the "clients' interests even when they conflict with his own").

performance. As a matter of professional ethics, few defenders are sanctioned for failing to provide the type of representation expected by the rules of professional responsibility.[105] Nor is there much risk of civil liability.[106] The only other possible sanction is reputational harm that could result from a finding of ineffective assistance of counsel.[107] Unfortunately, the well-known obstacles to proving a claim of ineffectiveness—including the deep deference that is afforded to the choices of defense counsel and the almost insurmountable prejudice requirement—make it highly unlikely that most lawyers will ever be found ineffective.[108]

Given these realities, a lawyer whose primary focus is on his or her personal self-interest in deciding how to represent clients can be expected to engage in virtually no investigation on cases. For these lawyers,[109] the best way to maximize self-interest is for the lawyer to minimize the amount of work to the extent possible. Because there is little incentive to provide competent representation, and every incentive to do otherwise, the rational calculation is to perform the minimum amount necessary to convince clients to plead guilty as quickly as possible.[110] Investigations that divert attention from expediency are naturally avoided.

But what of the many other lawyers who are motivated, at least consciously, to provide each client with professionally competent representation? Many defenders enter the profession with a passion

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105. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 36-37; Green, *supra* note 3, at 1195-96.

106. *See id.* at 1195 n.115 (explaining the doctrinal barriers to successful malpractice claims—most notably that in many jurisdictions a "defendant must prove actual innocence" to obtain relief).

107. Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 75-76 (2009).

108. A defendant claiming ineffective assistance of counsel must prove that the attorney's conduct was objectively unreasonable and that, but for the deficient performance, "there is a reasonable probability that . . . the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694 (1984). In assessing whether a lawyer was ineffective, reviewing courts "must be highly deferential" to defense counsel and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Many have noted the almost insurmountable burden that this test places on defendants in most instances. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 39-43, 41 n.118 (citing sources). See Green, *supra* note 3, at 1185-88, for a discussion of the particular problems that defendants who plead guilty face in proving ineffectiveness.

109. Using an analogy to the famous Holmesian "bad man," these lawyers might best be described as "bad" lawyers. Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1302 (1998) (describing a model in which "bad" lawyers are those who, "when left to their own devices," would "try to get away with any behavior they can").

110. *See* Schulhofer, *supra* note 94, at 1989 (recognizing the economic incentives for most defense lawyers to seek guilty pleas for their clients as quickly as possible).

and commitment to defend those accused of crimes—especially clients from disadvantaged groups who have historically suffered prejudice and poverty.[111] While some idealistic defenders may lose their zeal after years of working hard under trying circumstances,[112] those who maintain their motivations to provide quality representation are likely to believe that they are making calculations in each case based on what is best for the client.[113] Why then do so many of these defenders persist in providing inadequate representation?

Much of the explanation resides in the circumstances in which so many defense lawyers practice. For example, a substantial body of literature has been amassed to study the role of "informal norms" that exist at a local level, where individuals decide how to act based on informal sanctions—most notably reputational harm—that can result from violating nonlegal norms of the community.[114] Applying these concepts to defense lawyers, Professor Darryl Brown convincingly demonstrates how in many local courts informal norms effectively rewrite the rules of professional responsibility.[115] That is, even though the rules of professional conduct might require a defense lawyer to take a zealous approach to advocacy, countervailing informal norms often develop in local courts to replace these formal obligations.[116] Essentially, the local community of criminal justice

111. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1271-81 (1993); Mosteller, *supra* note 96, at 10 (identifying "the idea of fairness" as a motivation of defenders).

112. Well known is the phenomenon of "burnout," where defenders become disillusioned about their work after years of handling too many cases, the toll taken by their difficult work, and the opprobrium they often experience from others. *See* Susan Bandes, *Repression and Denial in Criminal Lawyering*, 9 BUFF. CRIM. L. REV 339, 350-52 (2006); Ogletree, *supra* note 111, at 1241 n.9.

113. *See* Mosteller, *supra* note 96, at 50 (positing that "most defenders, particularly those that are ethically aware, recommend going to trial or taking a plea based on their assessment of what is most likely the best course of action for the client based on the goal of maximizing liberty and minimizing imprisonment").

114. *See, e.g.*, Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043 (2005); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991). See W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001), for a comprehensive discussion of the role of social norms in legal ethics.

115. *See* Brown, *Lawyering Norms*, *supra* note 13, at 803-04.

116. *See id.* at 831-33; *see also* Blumberg, *supra* note 15, at 38-31 (offering an earlier account of how defense lawyers are influenced by the culture of criminal courts). According to Blumberg, the institutional culture of criminal courts encourages its participants to expedite cases as quickly as possible. *See id.* at 31. Part of the reason comes from a court culture that encourages lawyers to be cooperative rather than confrontational in their advocacy—most notably, many lawyers are repeat players who must maintain cooperative relations with other court actors, such as judges and prosecutors, with whom they often share more in common than they do with their

actors collectively decides what is, and is not, acceptable. It is those informal norms, rather than the more formal rules, that guide conduct. There are numerous examples of this phenomenon, as Professor Brown notes, including the fact that despite the legal entitlement of the right to a trial, in many local courts informal norms have eviscerated that right by encouraging guilty pleas.[117] Defense lawyers who operate in such environments are expected to meet their informal professional duties rather than more formal rules.[118]

Informal norms help to explain the absence of proper investigations. For instance, despite the constitutional entitlement to funds to hire experts,[119] in many jurisdictions the informal norm is that no such funds should be requested by defense lawyers in misdemeanor cases.[120] Again, the point is that the rules of professional responsibility do not control these reputational decisions.[121] Indeed, in many instances, the lawyer who complies with informal norms does so despite countervailing formal duties imposed by law. Informal norms end up taking precedence.[122]

The organizational culture of public defender offices can also

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clients. *See id.* at 23-24. The result is that the role of defense counsel essentially becomes redefined: any nominal ethical and ideological commitments that lawyers might possess to work vigorously on behalf of clients are overshadowed by the cultural demands of criminal courts and the conditions of practice. *See id.* at 19.

117. *See* Brown, *Lawyering Norms*, *supra* note 13, at 826-28; Brown, *Rationing Criminal Defense Entitlements, supra* note 13, at 814 (citing studies documenting how courts and others signal that local practitioners should avoid costly and illegitimate jury trials).

118. *See* Brown, *Lawyering Norms*, *supra* note 13, at 808-13 (positing that legal communities develop their own methods of practice and those attorneys who do not conform their behavior to these standards face informal sanctions such as "negative gossip and verbal reprimand").

119. *See* Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (holding that the indigent defendant was entitled to "access to a competent psychiatrist who will . . . assist in evaluation, preparation, and presentation of his defense").

120. *See* Brown, *Lawyering Norms*, *supra* note 13, at 808 (explaining that indigent defendants exercising their due process rights to obtain funds for experts can lead to judges imposing harsher sentences if those defendants later lose at trial).

121. *See supra* notes 105, 115-16 and accompanying text.

122. Amy Bach has come to similar conclusions:

> Collegiality and collaboration are considered the keys to success in most communal ventures, but in the practice of criminal justice they are in fact the cause of system failure. When professional alliances trump adversarialism, ordinary injustice predominates. Judges, defense lawyers, and prosecutors, but also local government, police, and even trial clerks who process the paperwork, decide the way a case moves through the system . . . . Through their subtle personal associations, legal players often recast the law to serve what they perceive to be the interest of their wider community or to perpetuate a "we've-always-done-it-this-way" mind-set.

BACH, *supra* note 9, at 6.

contribute to subpar performance. To be sure, there are many notable examples of high-quality defender offices with an ethos that promotes effective advocacy.[123] But at the same time there are organizations where the culture prioritizes quick disposition of cases over quality representation. Professor Lefstein's exhaustive study of the problems of excessive caseloads illuminates these problems.[124] In one situation recounted in his study, "Pat" had a caseload of over 300 cases shortly after beginning employment at a large metropolitan public defender.[125] As a result, Pat realized quickly that he could not provide competent representation to many of his clients.[126] When Pat told his supervisor that he wanted to file motions to withdraw from cases to relieve his excessive workload, the supervisor threatened to fire Pat if he did.[127] According to Pat, the supervisor stated that filing motions to withdraw would cause a backlash against the public defender's office, jeopardize the organization's funding, and be "disastrous."[128] Confronted with these threats and explicit opposition from his supervisor, Pat ultimately decided not to move to withdraw on any cases, although he left the office voluntarily soon thereafter.[129]

Pat's story exemplifies the pressure that public defenders can experience. Pat learned from his supervisor exactly what was expected of him—namely, to perform his work without complaint or protest, even in light of excessive caseloads that made it impossible for him to be an effective lawyer. It is difficult to know the degree to which Pat's experience is representative. Professor Lefstein believes that the situation is "not unique,"[130] having known of other lawyers who were similarly threatened with termination for seeking judicial

123. There are many extremely competent and highly dedicated public defenders who work in organizations with adequate resources and a culture of providing effective representation. Perhaps the best well-known example is the Public Defender Service for the District of Columbia, which is often identified as the model of excellence. *See, e.g.*, LEFSTEIN, *supra* note 13, at 205-17 (detailing the development, structure, and management of the Public Defender Service); Charles J. Ogletree Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 91-93 (1995) (same).

124. *See generally* LEFSTEIN, *supra* note 13.

125. *Id.* at 2 ("Pat" is not the lawyer's real name, of course).

126. *Id.*

127. *Id.*

128. *Id.* at 3. Senior managers in public defender offices who value quick dispositions of cases over quality representation are likely responding to pressure from political entities to do more with less. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 80-82 (recounting examples, including in upstate New York and Nebraska, of pressure placed on chief defenders by legislatures and other political entities for low cost, quick disposition of cases).

129. LEFSTEIN, *supra* note 13, at 3.

130. *Id.* at 5 n.9.

relief from excessive caseloads.[131] Certainly, the persistent excessive caseloads that so many defense lawyers labor under suggests that many, like Pat, work in environments where the accepted norm is to dispose of a high volume of cases without much regard to the consequences for the clients.[132]

Nor is the pressure to remain silent about excessive caseloads, or the other forces that undermine effective advocacy, limited to public defender organizations. Rather, private lawyers who provide indigent defense services under low-bid contracts certainly know that complaining about their working conditions—for example, by seeking more resources or fewer cases—jeopardizes the chances of their contracts being renewed.[133] Robert Surrency admitted as much when explaining his silence in the face of perpetual pressure to accept more cases for less pay in Green County, Georgia.[134] Appointed lawyers can also expect that refusal to take on more cases than can be handled competently will likely result in fewer future appointments.[135]

Scholars have also explored some of the psychological factors that influence defense lawyer behavior. For example, according to Professor Brown, defense lawyers are subject to the same form of herd mentality that influences all human behavior.[136] Essentially,

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131. *See* Dripps, *supra* note 14, at 253 ("Public defenders have lost their positions for trying too many cases or otherwise litigating *too* vigorously on behalf of their putative clients.").

132. *See* Rapping, *supra* note 9, at 333 (discussing the problems of organizational culture inside many public defender offices that prize quick case disposition over quality representation).

133. *See, e.g.*, NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 82-84 (citing examples, including in Texas, Alabama, Nebraska, and North Carolina, where contract and appointed lawyers faced pressure to maintain good relations with judges and other entities who select and appoint lawyers to represent indigent defendants); BACH, *supra* note 9, at 30 (citing THE SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE – PART I (2002)) (describing an investigation by the Georgia State Bar that determined that "court-appointed and contract attorneys" believe they run the risk of certain judges removing them from "the *ad hoc* counsel appointment list" should they be viewed as zealous advocates).

134. *See* BACH, *supra* note 9, at 12-15 ("Holding onto his contract depended upon, among other things, expediting the process."). In the fourteen years that Surrency held the contract to provide defense services, his caseload increased tenfold, but the rate of pay did not keep pace. *See id.* at 13.

135. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 67, 82-84 (noting the "unfair selection or exclusion of certain counsel" in the case assignment process); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 4, at 44 ("[J]udges sometimes retaliate against counsel by refusing to reappoint them when they are deemed too aggressive in their representation.").

136. *See* Brown, *Lawyering Norms, supra* note 13, at 845-46. Professor Brown also cites two additional explanations for lawyers to comply with local norms. First is the general human tendency caused by "status-quo bias" to prefer inertia over action. *Id.*

defense lawyers default to the standard practices set by local norms to reduce the reputational costs of deviating from the group.[137] Making a slightly different point, Amy Bach has cited the psychological power of group dynamics to explain why all participants in the criminal justice system, including defense lawyers, reinforce each other's misconduct.[138] Professor Lefstein has noted that subordinate lawyers are likely to experience deep pressure to succumb to the authority of their superiors.[139] Citing research on the power of obedience—including famous experiments by Yale psychologist Stanley Milgram where study participants obediently followed orders to administer what they believed to be dangerous levels of electronic shocks to other participants—he argues that public defenders obediently and silently accept their excessive caseloads, even when no lawyer could represent clients competently under those circumstances.[140]

Finally, there has been some effort to determine the degree to which defense lawyers are conscious of their own transgressions. Amy Bach argues that defense attorneys are part of the machinery of the criminal process in which all participants blindly contribute to injustice.[141] In addition, Professors Keith Findley and Michael Scott have argued, as part of a much larger project on the problem of "tunnel vision"[142] in the criminal justice system, that defense lawyers may be subject to a "confirmation bias," which describes the well documented psychological phenomenon in which people unconsciously seek out information that confirms preexisting beliefs or opinions.[143] Arguing that most defense lawyers start each case believing their own clients are guilty, they suggest that defense lawyers are likely to engage in an unconscious effort to gather

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at 846-47. The second is the economic theory of "path dependency," which causes people to follow earlier choices made by "norm leaders" even when conditions change. *Id.* at 847-48.

137. *See id.* at 845-46.

138. *See* BACH, *supra* note 9, at 74-75, 219 (noting the work of Harvard Professor J. Richard Hackman on the "individual's capacity to oppose the cultural current of a group or organization" and discussing the influence of confirmation bias on decisions made by prosecutors).

139. *See* LEFSTEIN, *supra* note 13, at 98-100.

140. *See id.*; *see also* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 462-71 (2008) (discussing how the power of obedience can cause lawyers to act unethically).

141. *See* BACH, *supra* note 9, at 2.

142. *See* Findley & Scott, *supra* note 20, at 292 (defining "tunnel vision" as "that compendium of common heuristics and logical fallacies, to which we are all susceptible, that lead actors in the criminal justice system to focus on a suspect, select and filter the evidence that will build a case for conviction, while ignoring or suppressing evidence that points away from guilt" (citation omitted) (internal quotation marks omitted)).

143. *Id.* at 309.

information that is consistent with that conclusion.[144]

Together, these explanations provide a rich and textured picture of why indigent defendants so often receive inadequate representation, including the possibility that criminal defense lawyers may not even be aware of their professional transgressions. Yet, to date, there has been no effort to produce a comprehensive picture of the psychological reasons why defense lawyers may overlook their own unethical conduct. The result is that a number of important questions remain. Can defense lawyers recognize and check their own self-interest, or does self-interest exert its power below the level of consciousness, making it difficult to tame? What role, if any, can the rules of professional responsibility play in counteracting the pressures that cause defense lawyers to want to move cases quickly? What psychological self-defense mechanisms allow defense lawyers to believe they are providing competent representation, even when there is strong evidence to the contrary? Are some defense lawyers motivated to believe that their clients are guilty and, if so, what psychological ramifications result? To answer these and other important questions, the next two sections focus on why underfunded defense lawyers—many of whom carry excessive caseloads, possess incentives and pressures to resolve cases quickly, and practice in local settings where local norms reinforce these pressures—might fail to perceive their own ethical failures.

III. THE POWER OF ETHICAL BLINDNESS

Unconscious psychological processes play a powerful, often dominant, role in human decision making.[145] Indeed, as decades of research from fields such as social and cognitive psychology, behavioral economics, neuroscience, and other disciplines have demonstrated, the choices that people make often deviate in systematic ways from what the rational choice model of behavior would predict.[146] These many ways that human rationality is "bounded" have been well documented elsewhere, including by legal scholars who have described how unconscious aspects of decision

144. *Id.* at 331-33.

145. *See* Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 948-51 (2007).

146. *See generally* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) [hereinafter Kahneman, JUDGMENT UNDER UNCERTAINTY] (discussing the classic standard works in these areas); BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000) (analyzing how cognitive psychology and behavioral economics relate to legal decision making); DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011) [hereinafter KAHNEMAN, THINKING FAST AND SLOW] (explaining the cognitive biases that play a role in judgment and decision making); Alan G. Sanfey et al., *Neuroeconomics: Cross-Currents in Research on Decision-Making*, 10 TRENDS IN COGNITIVE SCI. 108, 111 (2006) (providing an overview of the role that neuroscience plays in these discussions).

making can influence legal judgments.[147]

Recognizing the importance of these psychological explanations for behavior, scholars of ethical decision making have focused on how the systematic bounds that apply to other aspects of human behavior also apply in the realm of ethics.[148] Recently described as "behavioral ethics,"[149] this area of research has generated a growing body of data to determine how ethical decisions are actually made. The thesis running through this body of work is that, contrary to the assumption that ethical choices are primarily the product of deliberate calculation, significant evidence demonstrates that unconscious aspects of decision making play a substantial role in ethical judgments.[150]

Following this path, legal scholars have focused greater attention on the unconscious aspects of how lawyers make ethical decisions.[151] The result has been recognition that the study of professional ethics requires more than parsing the rules of professional conduct. Rather, many of the same systematic errors

147. *See* Christine Jolls & Cass Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 203 (2006). The wide-ranging ways in which cognitive distortions, also known as cognitive biases or heuristics, can affect choices that relate to legal decision making have been often cited. *See, e.g.*, *id.* at 203-05; Alafair Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1592 (2006) (providing examples, including "juries, judges, the regulation of risk, federal rulemaking, corporate disclosures, contract law, consumer choice, employment discrimination, and group deliberations"); Eldred, *supra* note 107, at 64 n.102 (listing areas).

148. *See* MAX H. BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 3 (6th ed. 2006); Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, *in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74-75 (Don A. Moore et al. eds., 2005) [hereinafter CONFLICTS OF INTEREST].

149. BAZERMAN & TENBRUNSEL, *supra* note 32, at 2.

150. *See* Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85, 96 (2012); Jonathan Haidt & Selin Kesebir, *Morality*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 797, 806-07 (Susan T. Fiske et al. eds., 5th ed. 2010); Regan, *supra* note 145, at 949-50.

151. *See, e.g.*, Kath Hall, *Why Good Intentions Are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making*, *in* REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS (Kieran Tranter et al. eds., 2010); Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from* Lawyers in the Dock, 22 GEO. J. LEGAL ETHICS 1549, 1553-54 (2009); Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 5 (2009); Kath Hall & Vivien Holmes, *The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically*, 11 LEGAL ETHICS 137 (2008); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1506 (1998); David J. Luban, *The Ethics of Wrongful Obedience*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 94, 94-95 (Deborah L. Rhode ed., 2000); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1325-28 (2006).

that can influence decisions in other realms have also been found to apply to the types of ethical decisions lawyers make.

Drawing upon research by behavioral ethicists, this section reviews the psychological reasons people often fail to perceive their own misbehavior, which have been aptly described as ethical "blind spots."[152] It then focuses on the most salient aspects of the research applicable to defense lawyers—namely, the powerful yet unconscious influence that self-interest can exert on the decision-making process.

A. The Foundations of Ethical Blindness

Scholars of behavioral ethics question the prevailing assumption that ethical misconduct can be explained as the product of intentional behavior.[153] Their core finding is that predictable and systematic unconscious biases help to explain many of the ethical failures that occur.[154] In addition, because these forces go unnoticed, people often fail to perceive the wide gulf between actual and desired behavior. In a nutshell, many people are blind to their own unethical conduct.[155]

The starting point for understanding these conclusions is the relationship between conscious and unconscious aspects of human decision making. It is now generally accepted that humans engage in a "dual process" of information processing in which both of these

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152. BAZERMAN & TENBRUNSEL, *supra* note 32, at 1.

153. *See, e.g.*, Max H. Bazerman et al., *Why Good Accountants Do Bad Audits*, HARV. BUS. REV., Nov. 2002, at 97; BAZERMAN & TENBRUNSEL, *supra* note 32, at 5.

154. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 4-5. Often called "bounded ethicality," the idea is that psychological processes "lead even good people to engage in ethically questionable behavior that contradicts their own preferred ethics. Bounded ethicality comes into play when individuals make decisions that harm others and when that harm is inconsistent with these decision makers' conscious beliefs and preferences." *Id.* at 5; *see also* Shahar Ayal & Francesca Gino, *Honest Rationales for Dishonest Behavior*, *in* THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL 149, 152 (Mario Mikulincer & Phillip R. Shaver eds., 2012) (defining "bounded ethicality" as the process that causes people to "make unconscious decision errors that serve their self-interest but are inconsistent with their consciously espoused beliefs and preferences . . . decisions they would condemn upon further reflection or greater awareness"); Dolly Chugh et al., *supra* note 148, at 75. In an earlier work, I relied upon the literature on bounded ethicality to assess the Supreme Court's jurisprudence on conflicts of interests in criminal cases. *See* Eldred, *supra* note 107, at 48.

155. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 5. The notion that people are blind to their own biases has been well documented outside the realm of ethical decision making for some time. *See, e.g.*, Emily Pronin, *The Introspection Illusion*, *in* 41 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 6-7 (Mark P. Zanna ed., 2009); Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1, 2 (2005); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002).

processes play a significant role.[156] Although the subtle differences of these categories are debated, the general distinction between them is well established: unconscious processes, which are often described as "automatic" or "implicit," are marked by relatively effortless aspects of thought, which occur without the deliberate intention of the decision maker.[157] Hallmarks of such automatic processes are that they are fast, effortless, involuntary and, importantly, not accessible to introspection.[158] In other words, the decision maker is unaware of their existence or influence.[159] In contrast, conscious or "controlled" processes are slow, effortful, voluntary, and accessible to introspection.[160] They are typified by the common experience of deliberate and rational choice.[161]

Applying research on the dual process model helps explain how ethical judgments are actually made.[162] Contrary to moral philosophy's traditional argument that ethical judgment is solely the product of rational judgment—which requires nothing more than the conscious application of articulated principles to a given set of

156. *See* KAHNEMAN, THINKING FAST AND SLOW, *supra* note 146, at 20-24; Jonathan St. B. T. Evans, *Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition*, 59 ANN. REV. PSYCHOL. 255, 256 (2007). Many scholars refer to this dual system as System 1 and System 2, using terminology employed from its earliest descriptions. *See* KAHNEMAN, THINKING FAST AND SLOW, *supra* note 146, at 20-21.

157. *See id.* at 20; Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 190 (2004). A significant question addressed in psychological research is the role that affect, or emotion, plays in automatic processes. Much of the data indicates that there is a core emotional component to automatic responses. However, as psychologist Jonathan Haidt notes, it would be a mistake to argue that the automatic component of ethical decision making be categorized as emotional as opposed to cognitive. Rather, the significant affective component to ethical decision making is part of the cognitive processes involved in decision making. *See* Haidt & Kesebir, *supra* note 150, at 802.

158. *See* KAHNEMAN, THINKING FAST AND SLOW, *supra* note 146, at 21-22; Moore & Loewenstein, *supra* note 157, at 190-91.

159. Examples include everyday experiences, such as orientating toward sounds, knowing the sum of two plus two, and recognizing the meaning of facial expressions—all which happen effortlessly and without any conscious experience of reason or judgment. KAHNEMAN, THINKING FAST AND SLOW, *supra* note 146, at 21.

160. *Id.* at 22-23.

161. *See id.* at 22 (listing examples of conscious or "controlled" processes, including focusing on a particular person in a crowded room, bracing for the starter gun at the beginning of a race, and filling out a tax form). Eschewing the notion of an "either/or" dichotomy, contemporary psychology recognizes that both automatic and controlled aspects of thought, although distinct, play an important role in the way that decisions are made. Peter H. Ditto et al., *Motivated Moral Reasoning*, *in* 50 PSYCHOLOGY OF LEARNING AND MOTIVATION 307, 308 (Daniel M. Bartels et al. eds., 2009) ("The dominant view in contemporary social cognitive research is one in which affect, intuition, and analytical thinking are all recognized as necessary characters in a comprehensive narrative of mental life . . . .").

162. *See* Chugh et al., *supra* note 148, at 74-91; Mary C. Kern & Dolly Chugh, *Bounded Ethicality: The Perils of Loss Framing*, 20 PSYCHOL. SCI. 378, 378-79 (2009).

circumstances—considerable evidence now suggests that deliberation plays a far less significant role in decision making than previously believed.[163] The point is not that conscious deliberation is absent. Rather, research demonstrates that the types of automatic thinking that pervade other cognitive processes often precede, and have a significant influence over, moral choices.[164] In addition, because automatic processes are not capable of introspection and occur silently, decision makers are unaware of them and thus fail to recognize how they influence ethical decisions.[165] The result is that decision makers will be blind to the true reasons for their decisions.[166]

B. Self-Interest and Ethical Blindness

In theory, decision makers should be able to tame their own self-interest when making ethical judgments. And, of course, many do.[167] However, behavioral ethicists argue that because self-interested goals are generated automatically, they occur before effortful and slower process of deliberation gets underway. This starts a cascade reaction, in which the decision that is ultimately reached will often be based on self-interest rather than the dictates of professional responsibility. As a result, everyone—lawyers and other professionals included—tend to be unaware of the ways in which self-interest exerts influence over the decision-making process.[168]

To understand how this process operates requires focus on the

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163. *See* Nicholas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 SOC. JUST. RES. 171, 172 (2004); Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001).

164. *See* Chugh et al., *supra* note 148, at 78-81; Hall, *supra* note 151, at 212; Haidt & Kesebir, *supra* note 150, at 802-06 (summarizing studies supporting the concept of "intuitive primacy"); Haidt, *supra* note 163, at 818 (noting that the precipitating cause of a moral judgment is "moral intuition," which is "the sudden appearance in consciousness of moral judgment" that occurs "without any conscious awareness of having gone through steps of searching, weighing evidence, or inferring a conclusion").

165. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 5 (noting there is "substantial evidence that our ethical judgments are based on factors outside of our awareness").

166. *See id.*

167. Rational deliberation can override the power of automatic processes. The point is not that automatic processes are uncontrollable. Rather, it is that they exert much more power than most people are aware. Moore & Loewenstein, *supra* note 157, at 193-94; Haidt & Kesebir, *supra* note 150, at 807-08. Some of the situations in which the automatic processes are accentuated, and thus more likely to control an actor's decision, are discussed *infra*, notes 269-308.

168. *See* Moore & Loewenstein, *supra* note 157, at 190-91; BAZERMAN & TENBRUNSEL, *supra* note 32, at 81; Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 137 (2011) (describing "the decades of social cognition research showing that we are motivated by our own economic self-interest and that we tend to conflate 'fairness' with that which benefits ourselves financially").

dual model process of decision making. Most professionals—including lawyers, accountants, doctors, and others—believe that they will not be corrupted, meaning that they will be able to act according to their duties as professionals even when doing so is at odds with their own self-interests.[169] However, as in other realms, these determinants of behavior are processed differently: self-interest exerts its power over the decision maker primarily through automatic processes, whereas professional duties are invoked more often through controlled processes.[170] The result is that the automatic preference for self-interest will often be the driving force behind a decision, even when the decision maker believes that the choice resulted from an objective evaluation of relevant considerations. Self-interest remains hidden, lurking behind the scenes but influencing the result.[171]

Three factors are primarily responsible. The first is the speed with which the different processes occur. Because self-interest is processed quickly, it tends to occur prior to controlled processes associated with ethical deliberation. Thus, when there is a conflict between self-interest and professional duties,[172] automatic processes can be expected to exert significant power over rational deliberation.[173] Moreover, because the preference for self-interest is experienced automatically, its influence is not noticeable. Essentially, the decision maker is tricked into believing that self-interest can be managed when, in reality, it will exert powerful influence over the choices that are made.[174]

The second factor contributing to the power of self-interest is the biased way that people tend to both seek out and interpret

169. *See* Chugh et al., *supra* note 148, at 3.

170. *See* Moore & Loewenstein, *supra* note 157, at 190.

171. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 5; Hall, *supra* note 151, at 213 ("[P]sychological research suggests that ethical decision-making is influenced by a strong unconscious bias towards maintaining our self-interest.").

172. Self-interest and professional duty are not always in conflict, of course. And when there is no tension between the two, the dual processes will work in unison to produce an outcome. *See* Moore & Loewenstein, *supra* note 157, at 190.

173. *See id.* at 190-91; BAZERMAN & TENBRUNSEL, *supra* note 32, at 81 (citing, as an example of bounded ethicality and the automatic preference for self-interest, the feeder funds that benefitted so handsomely from Bernard Madoff's Ponzi scheme. Because of the self-interest, these fund managers had an implicit motivation to not question the source of Madoff's profits, even when there were hints from readily available evidence that Madoff's over-performance was statistically impossible).

174. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 81. Additional evidence of the automatic nature of self-interest comes from studies on ego-depletion, which demonstrate that the degree of cheating in study participants increases as their abilities to control their selfish impulses become more constrained. *See* Francesca Gino et al., *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 191, 199 (2011); Nicole L. Mead et al., *Too Tired to Tell the Truth: Self-Control Resource Depletion and Dishonesty*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 594, 595-96 (2009).

information when making decisions.[175] A substantial body of research demonstrates the people do not seek out information in a neutral fashion. Rather, because of the well-known phenomenon of confirmatory bias, there is a robust tendency to search for evidence that is consistent with preexisting beliefs.[176] This process occurs bi-directionally, that is, people tend to both seek out information that confirms preexisting beliefs and also selectively recall from memory information that is consistent with those beliefs.[177] One explanation for this phenomenon is purely cognitive—confirmatory evidence is easier to deal with cognitively because it takes less mental energy to find positive evidence of a hypothesis than it does to prove a negative.[178] The power of confirmation bias has been documented in various studies, including of lawyers and other professionals.[179]

There is also a significant motivational component as well. Demonstrating the truth to Francis Bacon's seventeenth century insight, "For man always believes more readily that which he prefers,"[180] there is substantial evidence that information, once obtained, is evaluated and interpreted in a biased manner.[181] Instead

175. Scholars of criminal justice have explored in considerable detail the role that confirmation and related biases play in the decision-making process, with an emphasis on the conduct of prosecutors and law enforcement personnel. *See* Burke, *supra* note 147, at 1594 (discussing the major works in this area); Findley & Scott, *supra* note 20, at 19-23; DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 22-26 (2012) (providing a recent and extensive discussion).

176. *See* PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 278 (2010) (defining confirmation bias as "a pervasive tendency to seek evidence supporting . . . prior beliefs or hypotheses, and to ignore or denigrate evidence opposing them"); DAVID DUNNING, SELF-INSIGHT: ROADBLOCKS AND DETOURS TO THE PATH TO KNOWING THYSELF 47 (2005) ("[O]nce a question has been asked or a hypothesis advanced, people assess their answers by looking for positive evidence that the hypothesis is true and neglecting searching for evidence that the hypothesis is false."); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. OF GEN. PSYCHOL. 175 (1998) (providing an exhaustive review of the research on confirmation bias).

177. *See* THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE 31-37 (1991).

178. *Id.* at 31-32 (discussing the ease with which people understand confirming evidence and the difficulty of cognitively processing disconfirming information). There are other explanations as well, including the desire for consistency in decision making. *See* Nickerson, *supra* note 176, at 198-200 (discussing information processing explanations).

179. *See id.* at 191-97 (discussing research in various professional settings, including science, medicine, and judicial reasoning).

180. Sir Francis Bacon, *Novum Organum*, *in* 30 GREAT BOOKS OF THE WESTERN WORLD 105, 111 (Robert Maynard Hutchins et al eds., 1955).

181. *See* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480 (1990) (discussing how motivated reasoning leads to biased interpretations of information); *see also* Antony Page, *Unconscious Bias and the Limits of Director*

of processing information neutrally—for example, as a scientist would be expected to test a hypothesis—people subject evidence that disconfirms a preexisting belief to greater scrutiny than evidence that confirms that belief.[182] The cause is "motivated reasoning," a phenomenon in which new information is assessed through the prism of preexisting wishes, wants, and desires.[183] The result is that, while disconfirming evidence is not ignored, it is treated more skeptically and is tested with greater care than is evidence consistent with prior wishes or desires.[184] As one notated psychologist has stated, when confronting confirming evidence, people ask themselves, "Is this something I can believe"; whereas when confronting unfavorable evidence, they ask, "Is this something I must believe"—a much more demanding standard.[185] People are thus more likely to discount disconfirming evidence—not because it is less powerful—but because it is less likely to satisfy the heightened scrutiny that it typically receives. Professionals such as lawyers, doctors, accountants, and auditors have demonstrated motivated reasoning in various contexts.[186]

Independence, 2009 U. ILL. L. REV. 237, 269-77 (2009) (discussing how motivational biases influence interpretation of the quantity and quality of evidence, the weighing of evidence, and resistance to disconfirming evidence).

182. *See* Page, *supra* note 181, at 274-76.

183. *See* Kunda, *supra* note 181, at 480; JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 84 (2012) ("Psychologists now have file cabinets full of findings on 'motivated reasoning.'"); Erica Dawson et al., *Motivated Reasoning and Performance on the Wason Selection Task*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 1379, 1379 (2002) ("There is now a great deal of evidence that people are inclined to draw conclusions that suggest positive outcomes for themselves; provide support for pre-existing opinions; and confirm their status, success, and wellbeing." (citation omitted)). Recognizing the power of motivated reasoning, scholars have discussed its impact in various legal contexts. *See, e.g.*, Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011); Kim, *supra* note 168, at 143-45 (discussing how motivated reasoning discourages corporate lawyers from engaging in their gatekeeping function).

184. *See* Page, *supra* note 181, at 274.

185. *See* HAIDT, *supra* note 183, at 84; Findley & Scott, *supra* note 20, at 313-15 (discussing the same research). By using a variety of subtle psychological mechanisms, including "employing a partial or truncated search for evidence," assembling evidence in a biased manner, "and relatively superficial processing of available information, motivated reasoners can very often find grounds for accepting a desirable hypothesis." Dawson et al., *supra* note 183, at 1379 (citations omitted).

186. *See* Page, *supra* note 181, at 263; Samuel Issacharoff, *Legal Responses to Conflicts of Interest*, *in* CONFLICTS OF INTEREST, *supra* note 148, at 189-90; Jerome P. Kassirer, *Physicians' Financial Ties with the Pharmaceutical Industry: A Critical Element of a Formidable Marketing Network*, *in* CONFLICTS OF INTEREST, *supra* note 148, at 138-39; Mark W. Nelson, *A Review of Experimental and Archival Conflicts-of-Interest Research in Auditing*, *in* CONFLICTS OF INTEREST, *supra* note 148, at 41, 50-51; Don A. Moore et al., *Conflict of Interest, and the Unconscious Intrusion of Bias*, 5 SOC'Y FOR JUDGMENT & DECISION MAKING 1, 37-53 (2010).

Together, these cognitive and motivational components of information gathering and assessment help to explain the power of self-interest in the decision-making process. Because self-interest is experienced automatically, and thus occurs faster and more efficiently than the controlled process of deliberation, decision makers are likely to start with the view that the self-interested option is morally justified.[187] From there, there will be a bias in favor of seeking out additional information consistent with that belief, and subjecting any disconfirming evidence to heightened scrutiny.[188] Motivated toward the self-interested conclusion, new information will also be assimilated in a biased manner so as to achieve the desired, self-interested goal.[189] And the whole process will happen below the level of consciousness, allowing the decision maker to live comfortably with the illusion that the decision resulted from an objective process, free from bias.[190]

Third and finally, people work to maintain a positive view of their own ethicality, resisting the notion that they can be corrupted by their own self-interest.[191] Driven by a need to maintain a positive self-image, there is a tendency to perceive the self "in a positive light, even when the evidence suggests otherwise."[192] Yet, despite these self-enhancement techniques, people rarely perceive their own self-serving biases and instead tend to believe that they are objective in their own assessments.[193] Often called the "illusion of objectivity,"[194]

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187. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1030 (2005). Kim articulates that, because people are "imperfect information processors, [they] first automatically determine [their] 'preference for a certain outcome on the basis of self-interest and then justify this preference on the basis of fairness by changing the importance of attributes affecting what is fair.'" *Id.* (quoting Max H. Bazerman et al., *The Impossibility of Auditor Independence*, 38 SLOAN MGMT. REV. 89, 91 (1997)).

188. *See* Page, *supra* note 181, at 268 & n.203 (noting that the power of confirmation bias "may well be strongest in those instances where the decision maker is self-interested").

189. *See generally id.* at 268-69 (recounting several experiments that have demonstrated this phenomenon).

190. *See* Nickerson, *supra* note 176, at 175-76 (noting that confirmation bias tends to occur unwittingly and without awareness); Kunda, *supra* note 181, at 483 (arguing that "people do not realize that the [reasoning] process is biased by their goals").

191. *See* Chugh et al., *supra* note 148, at 80.

192. Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 37 (2007); *see also* Chugh et al., *supra* note 148, at 81-83; David. Dunning, *A Newer Look: Motivated Social Cognition and the Schematic Representation of Social Concepts*, 10 PSYCHOL. INQUIRY 1, 1-2 (1999).

193. *See* Pronin, *supra* note 192, at 37-40; David Dunning et al., *Why People Fail to Recognize Their Own Incompetence*, 12 CURRENT DIRECTIONS IN PSYCHOL. SCI. 83, 84-85 (2003) (describing people's inability to recognize their own incompetence under the rubric of "double curse").

194. *See* Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*,

this phenomenon exists in a wide variety of situations, including ethical judgments.[195] Indeed, it is now well established that people tend to believe that they are "more honest, trustworthy, ethical and fair than others."[196] One manifestation of this phenomenon is the stubborn belief held by most people that they will not be influenced by self-interest, even when believing that others will be.[197] For professionals, these egocentric biases are also present, causing them to be overconfident in their own morality, competency, and deservingness.[198] Clinging to these perceptions, they tend to resist the notion that they have acted unethically, even when there is compelling evidence to the contrary.[199] It is as if the person is in the grips of a "totalitarian ego," blindly resisting any notion that unethical behavior is possible.[200]

Drawing on these insights, legal scholars have identified the power of self-interest as a significant factor in biased decision making in various settings. Take, for example, independent directors who sit on the boards of publicly traded companies and are supposed to make decisions based on the merits, free from their own self-interests or attachments to any corporate constituencies. As Professor Antony Page has exhaustively demonstrated, this idealized notion of the independent director is largely an illusion.[201] Rather,

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20 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 297, 302 (1987). Research demonstrates the many ways that people persistently maintain an above average view of themselves, for example, by believing that they possess desirable skills, such as driving a car, managerial prowess, productivity, and other traits. *See* Chugh et al., *supra* note 148, at 84; Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110-11 (1997). Similar biases have been documented when people estimate their contribution to a joint task, persistently estimating their own contributions to be more than fifty percent. *Id.*

195. *See* Chugh et al., *supra* note 148, at 81.

196. *Id.*; *see also* David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 SLOAN MGMT. REV. 9, 17-20 (1996); Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others,* 31 PERSONALITY & SOC. PSYCH. BULL. 680, 680-81 (2005).

197. *See* Pronin, *supra* note 155, at 38; Nicholas Epley & David Dunning, *Feeling "Holier Than Thou": Are Self-Serving Assessments Produced By Errors in Self- or Social Prediction?*, 79 J. PERSONALITY & SOC. PSYCHOL. 861, 867-68 (2000); Dale T. Miller & Rebecca K. Ratner, *The Disparity Between the Actual and Assumed Power of Self-Interest*, 74 J. PERSONALITY & SOC. PSYCHOL. 53, 60-61 (1998).

198. *See* Chugh et al., *supra* note 148, at 81.

199. *Id.* at 80. The need to maintain self-esteem can also contribute to the powerful process of rationalization, in which people tend to automatically shift blame away from their own negative behavior and toward an external source, such as another person, institution, or external pressures. Hall, *supra* note 151, at 213.

200. *See* Chugh et al., *supra* note 148, at 80 (citing Anthony G. Greenwald, *The Totalitarian Ego: Fabrication and Revision of Personal History*, 35 AM. PSYCHOLOGIST 603, 606-08 (1980)).

201. *See* Page, *supra* note 181, at 240-41.

the psychological processes that favor self-interest exercise significant influence on the decision-making process.[202] The result is that on countless decisions where shareholder and director interests can diverge—e.g., whether to approve executive compensation, how to respond to a derivate suit, or whether to approve a corporate takeover—the director, unaware of his or her biases, can nonetheless be expected to act in a self-interested manner.[203]

Similar phenomena explain why corporate lawyers so frequently fail to exercise their duties as "gatekeepers."[204] As Professor Sung Hui Kim has documented, the notion that lawyers will be able to ferret out and constrain corporate wrongdoing through their putative obligations to the public and capital markets fails to take into account the subtle ways that self-interest exercises its influence.[205] Relying on much of the same research cited here, the conclusion is that lawyers, like everyone, make decisions that benefit their own interests at the expense of others.[206] For example, because of motivated reasoning, corporate lawyers tend to approach decisions from the perspective of preexisting wishes and desires.[207] The result is that corporate counsel will have a tendency to make choices that are aligned with the interests of their clients, even in the face of substantial wrongdoing.[208] Again, the cause is not explicit bias, but instead the subtle ways that self-interest influences the decision-making process.[209]

Similar findings have been documented in other professional settings, including accountants,[210] doctors,[211] public policy

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202. *See id.* at 258.

203. *See id.* at 253-55.

204. *See* Kim, *supra* note 187, at 986 n.11. Kim defines "the term 'gatekeeper' broadly, not only to include private parties who can disrupt misconduct by withholding support, but also parties who may have duties to 'blow the whistle' on [primary] wrongdoers or to resign from, discharge, or otherwise punish wrongdoers.'" *Id.* (alteration in original) (quoting John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 309 (2004)).

205. *See id.* at 985-88; Kim, *supra* note 168, at 135-36.

206. *See* Kim, *supra* note 168, at 144.

207. *See id.*

208. *See id.* at 149-50.

209. *Id.* at 144 ("[L]awyers, like everyone else, are generally motivated to espouse positions that favor their perceived self-interest. But this generally happens not through any overt or explicit cost-benefit calculation 'but through a subtle and implicit reconfiguration of preferences, self-conception, and motivation.'" (quoting Kim, *supra* note 187, at 997)).

210. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 82-83 (describing a series of studies demonstrating unconscious bias of auditors); Moore et al., *supra* note 186, at 37-40; Bazerman et al., *supra* note 153, at 97.

211. *See* Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 JAMA 252, 252-55 (2003); Kassirer, *supra* note 186, at 133.

professionals,[212] and other professionals whose ethical obligations are supposed to constrain self-interest.[213] In each domain, the conclusion has been the same: conflicts of interest that arise because of self-interested motivations are hard to purge through rational deliberation.

In sum, self-interest can be expected to exert powerful, automatic influence over the types of ethical choices lawyers make. Believing that a decision will be the product of rational deliberation, lawyers will be unaware of the ways their own decisions can be biased in favor of their own self-interested perspective. As two scholars have noted, "Moral reasoners consistently conclude that self-interested outcomes are not only desirable but morally justifiable, meaning that two people with differing self-interests arrive at very different ethical conclusions. Such self-interested ethics often do not *feel* subjective, and are therefore perceived to be relatively objective."[214]

IV. ETHICAL BLINDNESS AND THE CRIMINAL LAWYER

The dual model of ethical decision making provides a window into how many defense lawyers are likely to perceive their work. At a conscious level, they may believe that they are engaged in representation that serves the best interests of their clients. But the research on the automatic preference for self-interest suggests that such self-descriptions may well be deceiving, and that lawyers may often fail to perceive the many ways in which their conduct does not comport with their professional duties. Drawing on the research from behavioral ethics, this section focuses on the reasons defense lawyers representing indigent clients may experience ethical blindness.

A. Ethically Blind Lawyers

Recall Robert Surrency, whose story started this discussion.[215] The remarkable aspect of his narrative was not his failures as an advocate. After all, he is only one of many lawyers across the country who, working under crushing caseloads and without adequate resources, faces persistent pressure to expedite cases on a daily basis. Rather, what makes Surrency's story notable is that he remained firm in his belief that he served his clients effectively. It is possible

212. *See* Robert J. MacCoun, *Conflicts of Interest in Public Policy Research*, *in* CONFLICTS OF INTEREST, *supra* note 148, at 233-34.

213. *See* Max H. Bazerman & Deepak Malhotra, *Economics Wins, Psychology Loses, and Society Pays*, *in* SOCIAL PSYCHOLOGY AND ECONOMICS 263 (David De Cremer et al. eds., 2006) (describing research on biased economic reasoning in various professions, including doctors, lawyers, accountants, investment bankers, and policymakers); Page, *supra* note 181, at 248-59 (describing the biases of corporate directors).

214. Epley & Caruso, *supra* note 163, at 172.

215. *See supra* text accompanying notes 9-12, 19-27.

that Surrency was aware of his own failings, but was simply unable to admit to them publically. But behavioral ethics suggests an alternative explanation, one that is more consistent with the available research—i.e., he and other similarly situated lawyers are susceptible to the forces that produce ethical blindness, which create a false experience of meeting professional duties, even in the face of clear evidence to the contrary.

Take, for example, one well-known study of Chicago public defenders.[216] As part of the data collected for the study, lawyers were asked whether the large volume of cases they were required to handle undermined the quality of representation provided. One lawyer's response, highlighted in the study's findings, was that "numbers don't tell the whole story."[217] The lawyer elaborated:

> You get a guy who was caught red-handed with the proceeds, with the stuff, and he's already confessed . . . . The state's attorney offers a good deal, and my guy's happy with it. As long as my client is happy with it, and especially as long as I can't see how by pushing it we could do better, then I tell him to go ahead and cop, and take the plea. So, essentially the case is over. It maybe only took a half hour; hell, it maybe only took five minutes. But why should I spend any more of my time on it? Sometimes I pick up maybe 15 cases like that in one morning. Sometimes more.[218]

Is this an example of ethical blindness? Is it possible that the lawyer accurately described the situation? After all, there are instances in which the evidence of guilt is so clear and overwhelming from the start of a case, and the dangers of any delay in disposition so apparent, that a lawyer may be justified in recommending a quick plea bargain that will reduce the possibility of greater punishment that might occur if the lawyer pursued an investigation or engaged in other forms of advocacy.[219] But the research on behavioral ethics

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216. LISA MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 3-9 (1987).

217. *Id.* at 64.

218. *Id.*

219. *But see* THE S. CTR. FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER . . .": A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM 36 (2003) ("It is impossible for lawyers who meet indigent defendants at arraignment and advise them to plead guilty that day to render meaningful representation. The lawyers make no independent assessment of the facts, but rely on information provided by the prosecution and police . . . [t]his is not legal representation. It is processing, and requires no legal skill."). Moreover, often a defendant will agree to plead guilty at a first appearance in a case, not because the client is factually guilty and there is no viable defense to the charge, but rather because the cost of fighting the prosecution's charges outweighs the benefit of plea disposition. This is especially true in misdemeanor cases, where the punishment that will result from pleading guilty is often less than what might occur if the defendant decided to contest the charges. The result is that innocent clients may make a rational calculation to plead guilty. *See* ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL

suggests that this lawyer, and others who possess similar views, are likely to fail to perceive how they are motivated by their own automatic self-interests rather than the best interests of their clients.

A number of reasons support this conclusion. To begin with, because self-interest exercises its power through automatic processes, lawyers such as Robert Surrency or the respondent in the Chicago study are apt to be unaware of the how their desire for quick case dispositions influences their reasoning.[220] While they may believe they are acting in accordance with their professional obligations, the fact that conscious deliberation occurs only after self-interest sets in suggests otherwise.[221] Possessed with powerful reasons to rid themselves of cases quickly, they will be hard pressed to control the power of self-interest that is likely to influence their decisions.[222]

Confirmation bias and motivated reasoning are also likely to come into play.[223] In what may be a surprise to many lay observers, most lawyers do not harbor an illusion about the innocence of their clients. Rather, they know what Professor Alan Dershowitz has famously pointed out: the "open secret" of the criminal justice system is that most defendants charged with a crime are factually guilty of some or all of the acts for which they are accused.[224] Even many of the nation's most zealous defense advocates do not dispute this point.[225] As one noted sociologist observed a year ago, the presumption of guilt "permeates the entire system of justice. . . . All involved in the system, the defense attorneys and judges, as well as the prosecutors and policemen, operate according to a working

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OF AMERICA'S BROKEN MISDEMEANOR COURTS 32-34 (2009).

220. *See supra* notes 164-66 and accompanying text.

221. *See supra* Part III.B.

222. *See supra* Part III.B.

223. *See* Findley & Scott, *supra* note 20, at 309-10, 331-33 (describing that defense lawyers' experiences shape their perceptions and resultant actions).

224. *See* ALAN DERSHOWITZ, THE BEST DEFENSE, at xxi (1982) (stating that "[a]lmost all criminal defendants are, in fact, guilty" and that "[a]ll criminal defense lawyers, prosecutors and judges understand and believe" that to be true).

225. *See* Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 116-17 & n.181 (2003) (quoting Alan Dershowitz and noting that "[t]he reality is that most criminal defendants are guilty of something, if not the precise charges they face. As a former public defender put it: 'One of the awkward truths about being a public defender is that you are in the practice of representing people who are indeed guilty.'"); Ogletree, *supra* note 111, at 1269 ("Public defenders know that frequently their clients are guilty beyond any reasonable doubt."); Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 182 (1983) ("[M]ost defendants are guilty of something along the lines of the accusation."). This is not to say that defendants are always guilty of the exact crime for which they are charged. Indeed, prosecutors have an incentive to overcharge as a way to obtain leverage in plea negotiations. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System,* 61 CATH. U. L. REV. 63, 84 (2011).

presumption of the guilt of persons accused of crime."[226]

In addition, for some lawyers who start with the premise that their clients are guilty, the incentive to want to resolve cases as quickly as possible may even encourage them to hope the evidence of guilt is strong. Documenting the existence of such a motive is difficult in the hidden world of plea -bargaining as it is practiced, but there are good reasons to believe it exists.[227] To begin, the standard strategy for lawyers who want to encourage (some say coerce) a guilty plea from a client is to explain the prospect of a much longer sentence that could be imposed after losing at trial.[228] The stronger the evidence, the more leverage there will be to extract a guilty plea, and therefore a lawyer who desperately wants a client to plead guilty may hope that there is strong evidence of guilt to assist in that effort. Second, the stronger the evidence of guilt, the less likely it will be that the client will be factually innocent, which in turn can reduce the lawyer's anxiety about contributing to the wrongful conviction of an innocent person.[229] Finally, when the evidence of guilt is substantial, the lawyer can convince herself that to put in additional work on the case would be fruitless or even counterproductive. For example, the lawyer may be able to convince herself that any additional investigation would only uncover unhelpful incriminating

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226. JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN A DEMOCRATIC SOCIETY 241 (1966); *see also* Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 380 (1994) ("[J]aded by their daily interaction with defendants, the overwhelming majority of whom have committed the acts with which they are charged, criminal defense attorneys tend to presume, whether consciously or not, that their clients are guilty." (footnote omitted)).

227. The veiled nature of plea-bargaining, which occurs away from the spotlight of scrutiny and oversight, is well known. *See* Caldwell, *supra* note 225, at 82-83 ("Plea bargaining is often undertaken in the shadows—in phone calls and e-mails between lawyers or in the corridors outside the courtroom.").

228. *See* Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1422-23 (2003) ("Some lawyers report that they go 'almost to the point of coercion' to obtain their clients' confessions, and some describe conferences with clients that have the flavor of backroom stationhouse interrogations. These lawyers regard themselves, not as saving their clients' souls, but as encouraging them to make sound tactical decisions. They may be influenced by the fact that a guilty plea can save the lawyers themselves days of work. From a defense attorney's perspective, a guilty plea can be a quick buck." (footnote omitted)).

229. Defending clients that the lawyer believes to be innocent, as one scholar has noted, "is an extraordinary burden. It is constant and unrelenting. It is both a professional burden and a deeply personal one." Abbe Smith, *Defending the Innocent,* 32 CONN. L. REV. 485, 522 (2000) [hereinafter Smith, *Defending the Innocent*]; *see also* ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY 55-56 (2008) [hereinafter SMITH, CASE OF A LIFETIME] (noting the difficulty of trying a case when the lawyer believes the client to be innocent); Bandes, *supra* note 112, at 369-70 (describing the emotional toll on a defender who believes that a client is innocent).

evidence against the client.[230]

Together, the belief about a client's guilt that most lawyers possess, and the desire for evidence of guilt that some may possess, are likely to trigger the psychological factors that produce ethical blindness. Because of confirmation bias, a lawyer who believes that his or her client is guilty can be expected to seek out evidence confirming guilt, whereas disconfirming evidence that might raise questions about guilt will be avoided.[231] In addition, lawyers who start each case hoping that a client is guilty can be expected to experience a motivated response that may become a self-fulfilling prophesy.[232] For example, when confronted with potential exculpatory evidence, the lawyer may discount it not because it would be unhelpful to the client, but rather because it is inconsistent with the lawyer's wishes and desires. Because these processes occur automatically, they will happen outside of the lawyer's conscious awareness.[233] The result: defense lawyers for indigent clients who have a strong interest in quick case dispositions may become, in effect, surrogate prosecutors, unknowingly engaging in conduct that makes a conviction more likely, all the while believing that they are serving the client's best interests.

Finally, because lawyers, like everyone, seek to maintain a positive self-image, they are likely to deceive themselves into believing they are more moral, competent, and deserving than others.[234] These illusions can contribute to ethical blindness.[235] For example, an overconfidence in one's morality can cause a defense lawyer to think that the decisions made for a client are ethically justified, even in the face of compelling evidence to the contrary.[236] Belief in one's competence can cause a lawyer to think that self-interest can be managed in a manner that comports with ethical duties.[237] And believing that one is more deserving than others can cause a lawyer to believe that the quick disposition of cases is not the product of self-interest, but rather the result of considerations about what is in the best interests of clients.[238] Because these illusions occur unconsciously, lawyers can be expected to misconstrue the

230. *See* Harrington v. Richter, 131 S. Ct. 770, 789-90 (2011) (noting that a lawyer may reasonably limit an investigation that would be fruitless or counterproductive).

231. *See supra* notes 175-79 and accompanying text.

232. *See supra* notes 180-86 and accompanying text.

233. *See supra* Part III.B.

234. Eldred, *supra* note 107, at 66-68.

235. *See id.* at 74-77 (discussing how the illusion of self as moral, competent, and deserving can undermine the ability of criminal defense lawyers to appreciate their own unethical behavior when assessing conflicts of interest).

236. *See id.* at 67.

237. *See id.* at 66-67.

238. *See id.*

causes of their own behavior.[239]

The natural rejoinder to the idea that defense lawyers are likely to experience ethical blindness is to recall that, as a matter of professional responsibility, they are supposed to ignore any private reservations they might possess about the possible factual guilt of their clients.[240] Anecdotal evidence suggests that most defense lawyers concur with this basic tenet of professional ethics, at least if self-reports are to be believed. As one scholar has noted:

> [T]he fundamental mind-set of most criminal defense lawyers toward defending the guilty is one of staggering indifference to the question. From lawyers of impeccable professional integrity to those with whom we might be embarrassed to share a profession, all reiterate that innocence or guilt is of no real concern in their daily work.[241]

It is hard to dispute this claim. Take, for example, the question consistently posed to defense lawyers: "How can you defend a person you know is guilty?"[242] Rarely is the response from a defender that "most of my clients are innocent."[243] Rather, the answer is usually some variation of the many institutional and personal justifications for defending the guilty, even those who have committed heinous crimes.[244] A defense lawyer who proffers any of these justifications can proudly claim to be utterly indifferent to the possible guilt if their clients.

The problem with this rejoinder is that it fails to account for the dual process of ethical decision making. It is undoubtedly true that most defenders believe that they can consciously ignore the possible guilt of their clients. And for lawyers who do not have a vested interest in the quick disposition of cases, it is likely that they can act on that belief, especially if they are practicing under conditions that do not accentuate the power of automatic processes. Take, for

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239. *See supra* Part III.B.

240. *See supra* notes 57-59 and accompanying text.

241. Babcock, *supra* note 225, at 180; *see also* MCINTYRE, *supra* note 216, at 151-52 (noting that "[p]ublic defenders are quick to admit that they usually *do not* ask their clients whether they are guilty or innocent . . . [claiming that] it was simply not relevant" and that an admission of guilt by a client can limit available defenses).

242. Babcock, *supra* note 225, at 175; *see also* SMITH, CASE OF A LIFETIME, *supra* note 229, at 19.

243. *See* Ogletree, *supra* note 111, at 1269 n.121 (indicating that many defense lawyers believe most of their clients are culpable of some wrongdoing).

244. These include the belief that every defendant, guilty or not, deserves a vigorous defense; that aggressive defense of even factually guilty clients helps to protect the rights of everyone, including the innocent; and that many people who have committed crimes are themselves victims who deserve to be defended. *See* Babcock, *supra* note 225, at 177-79; Ogletree, *supra* note 111, at 1254-60; Smith, *Defending the Innocent*, *supra* note 229, at 491 & n.46 ("The annals of criminal defense scholarship are replete with discussions of—and justifications for—representing the guilty.").

example, a lawyer who is paid hourly by a wealthy client and who has the time and resources to engage in high quality representation. It would hardly be surprising that under such circumstances the lawyer would be able to be a faithful agent for the client, meeting the full range of professional duties expected of the lawyer.[245] All of the psychological forces are aligned to the client's benefit. Similarly, lawyers who are not overburdened with work—meaning those that work in an environment in which they are able to maintain proper caseloads and that encourages quality representation—will have sufficient time to dedicate to each client and will have access to the resources needed for a proper defense.[246] They can be expected to find little conflict between their own interests and their professional responsibilities.

But for many of the lawyers who represent indigent clients, the perverse incentives and cultural influences that encourage them to dispose of cases quickly can produce a very different result. For them, the power of self-interest can be expected to counteract any conscious effort to be indifferent to a client's guilt. Believing that decisions made during representation are the product of reasoned deliberation, and based on calculations of what is in the best interests of the client, these lawyers may be unaware of the true force behind their decisions.

B. Examples of Ethical Blindness

Because the processes that induce people to overlook their own misbehavior occur below the level of consciousness, they cannot be gleaned through introspection.[247] As a result, there will be little direct evidence of ethical blindness; rather, it must be inferred. Such clues are not hard to find.

Take, for example, the case of *State v. A.N.J*, where a twelve-

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245. *See* Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979, 1988 (1992) ("Attorneys compensated on an hourly basis generally do not face financial pressure to minimize the time spent on a case, so they do not have a personal incentive to settle quickly."). A notable example is O. J. Simpson, whose defense team in the murder case against him was able to expend millions of dollars to fund his "Dream Team" of leading defense lawyers. *See* George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 991 n.147 (1997) (citing sources, including members of the defense team, who estimated the cost of the defense to be substantially more than that of the prosecution); Lorraine Adams & Serge F. Kovaleski, *The Best Defense Money Could Buy; Well-Heeled Simpson Legal Team Seemed One Step Ahead All Along*, WASH. POST, Oct. 8, 1995, at A1 (quoting a member of the defense team as saying "[m]oney meant everything in this case. . . . If this were a poor defendant without resources, there is no chance he could have challenged the forensic evidence in this case").

246. *See* LEFSTEIN, *supra* note 13, at 193-219 (describing high quality indigent defender organizations that control caseloads in Massachusetts, the District of Columbia, and San Mateo County in California).

247. *See supra* notes 156-59 and accompanying text.

year-old juvenile defendant pled guilty to first-degree child molestation.[248] Working under a contract very similar to the one that plagued Robert Surrency, the defendant's lawyer maintained a large caseload for a fixed fee, which required that he pay for all of the costs that might arise during representation, including the costs for any investigations or experts.[249] In the defendant's case, the lawyer engaged in minimal effort before encouraging a guilty plea—he filed no motions, made no discovery requests, and engaged in virtually no investigation.[250] On appeal, the Supreme Court of Washington set aside the plea agreement, finding that the defendant's lawyer rendered ineffective assistance of counsel.[251] In particular, the Court relied on evidence that the lawyer had done virtually nothing to find two witnesses who might have produced evidence that someone other than the defendant may have committed the crime.[252]

Did defense counsel in this case knowingly commit misconduct? One possibility, of course, is that the lawyer, fully aware of the constraints imposed by his contractual arrangements, recognized his own poor performance as it was happening. But one passage of the Court's opinion suggests otherwise. In rejecting the notion that a defense lawyer's duty to investigate ends when a defendant indicates a desire to plead guilty, the Court noted, "[T]he fact that [defense counsel] seemed to believe that his client was going to confess, or even was guilty, was not enough to excuse some investigation."[253] Not only is this an accurate statement of law, but it also suggests that, at least in the Court's view, the defense lawyer believed in the defendant's guilt during the pendency of the proceedings. If so, then the circumstances would have been ripe for ethical blindness to set in. Overwhelmed by cases, with a deep incentive to plead cases quickly, and with no economic incentive to expend any resources on an investigation, defense counsel's belief in his own client's guilt could have influenced the decision-making process. For example, the automatic power of self-interest could have caused him to overstate the odds that the defendant would be convicted if the case went to trial, making it easier to advise and convince the client to plead guilty. Confirmatory bias and motivated reasoning might have reinforced this belief, causing the lawyer to focus only on evidence consistent with guilt (such as the police report that recounted the

248. 225 P.3d 956 (Wash. 2010).

249. *Id.* at 960-61.

250. *Id.* at 961.

251. *Id.* at 959.

252. *Id.* at 965-66. In addition, the Court concluded that the lawyer misadvised the defendant about the consequences of his plea, in particular with regard to whether the conviction could be removed from the defendant's record after reaching the age of maturity. *Id.* at 967-69.

253. *Id.* at 966.

victim's allegations[254]) and discouraging him from seeking exculpatory evidence (such as the witnesses who might have revealed another possible culprit of the crime[255]). And the illusion of objectivity would have allowed him to engage in the entire reasoning process, unaware of the degree to which his own self-interest was influencing the decision-making process.

In other instances, evidence that a defense lawyer believes in a client's guilt is much more direct. For example, in one of the more notorious capital cases in recent memory, Texas executed Todd Willingham, who many are convinced was innocent of the crimes for which he was convicted.[256] The allegations against Willingham were horrendous: he was accused of intentionally setting fire to his own home, killing his three young children.[257] Too destitute to hire his own counsel, Willingham was represented by two appointed lawyers at a time when Texas paid paltry sums for such services.[258] Although the lawyers encouraged Willingham to plead guilty, he steadfastly maintained his innocence and demanded a trial, which by all accounts was a one-sided affair in favor of the prosecution.[259] Found guilty after "barely an hour" of jury deliberations, he was sentenced to death.[260] Years later, the case received renewed attention because of overwhelming new evidence revealing that the prosecution's experts had relied on "junk science" to prove that Willingham had intentionally started the fire.[261] During the height of the media's

254. Indeed, defense counsel admitted that his only information about the case came from the police report that had been filed in the case. *Id.* at. 962 n.8.

255. *Id.* at 965.

256. *See Cameron Todd Willingham: Wrongfully Convicted and Executed in Texas*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Cameron_Todd_Willingham_Wrongfully_Convicted_and_Executed_in_Texas.php (last visited Mar. 11, 2013); Patrick S. Metze, *Death and Texas: The Unevolved Model of Decency*, 90 NEB. L. REV. 240, 325 (2011).

257. *See* David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann; Paul C. Giannelli, *The Execution of Cameron Todd Willingham: Junk Science, An Innocent Man, and the Politics of Death* (Case Research Paper Series in Legal Studies, Working Paper No. 2011-18, 2011), *available at* http://ssrn.com/abstract=1917454.

258. *See* THE TEX. APPLESEED FAIR DEF. PROJECT, THE FAIR DEFENSE REPORT: ANALYSIS OF INDIGENT DEFENSE PRACTICES IN TEXAS 35-36 (2000) (recounting various reasons for inadequate compensation of appointed counsel in Texas death penalty cases).

259. *See* Giannelli, *supra* note 257, at 3-4, 13 & n.12 (discussing details of the two day guilt-phase portion of the trial, in which the prosecution presented numerous witnesses and experts to support its position that the defendant committed arson, whereas the defense presented only one witness, a baby sitter for the victims, to claim that he did not).

260. Grann, *supra* note 257.

261. *See* Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279, 1286 (2010) (discussing report by Craig Beyler,

scrutiny, one of the lawyers who had represented Willingham made startling statements about the case. Instead of decrying the injustice of an innocent man wrongfully convicted based on faulty evidence, the lawyer repeatedly stated that he continued to believe, as he did before and during the trial, that Willingham was guilty.[262] In one interview, the attorney went so far as to analogize Willingham to a "monster" who "like[d] killing."[263] Not surprisingly, the lawyer resisted any notion that he had contributed to the wrongful conviction of an innocent man.[264]

It is not hard to imagine why Willingham's trial lawyer could be blind to the possibility of his own inadequate performance. For example, the lawyer refused to accept the opinions offered by half a dozen leading arson experts who, after reviewing the prosecution's evidence, determined that there was no valid scientific basis to conclude that an accelerant started the fire.[265] Remarkably, the lawyer even rationalized his own continuing belief in Willingham's guilt by citing an absurd and unscientific test that he had performed himself—in which the lawyer set a carpet on fire with lighter fluid to see how it burned—as "evidence" that the fire in Willingham's house began as the prosecution claimed.[266] Why would this lawyer go so far and be so firmly entrenched in these views? Ethical blindness provides the likely answer: starting with the firm belief of his client's guilt and having possessed a strong financial interest to minimize his efforts on behalf of Willingham, the lawyer would be expected to rationalize his own behavior as ethical, even when there was compelling evidence to the contrary. Free from the burdens of appreciating how his own self-interest influenced the choices he made during representation, his egocentric biases would allow him to

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"a highly respected fire scientist," who had been engaged by The Texas Forensic Science Commission to study the evidence in the Willingham case).

262. *See* Grann, *supra* note 257; *Frontline: Death By Fire* (PBS television broadcast Oct. 19, 2010) (transcript on file with the *Rutgers Law Review*) (quoting the defense attorney as saying, "I thought he was guilty. How stupid would you be, how incompetent would you be as a defense attorney if you just went in and swallowed the story the defendant gave you? The real fact of the matter is that Willingham was guilty. He wasn't innocent. He really set that fire and killed those kids").

263. *See* Janet Jacobs, *No Doubts*, CORSICANA DAILY SUN (Sept. 7, 2009), http://corsicanadailysun.com/thewillinghamfiles/x46870673/-09-06-09-No-doubts.

264. For example, in an interview with Anderson Cooper of CNN, the defense attorney refused to consider the possibility that he should have worked harder to obtain the services of an expert who could have contested the state's claim that the fire had been started by an accelerant. *See Anderson Cooper 360: Governor Covering Up Execution of Innocent Man?* (CNN television broadcast Oct. 15, 2009) (transcript on file with the author). According to other accounts, the defense lawyer had attempted to contact only one expert during their pretrial investigation who had concurred that the fire was arson. *See* Grann, *supra* note 257.

265. *Anderson Cooper 360*, *supra* note 264.

266. *Id.*

remain convinced of his own ethical behavior, despite the mountain of evidence demonstrating that an innocent man had most likely been executed.

These and other similar cases provide a flavor of how defense lawyers who convince themselves of their clients' guilt and who have a self-interest in quickly resolving cases may become ethically blind to their own misbehavior.[267] Additional support for the likely prevalence of ethical blindness can be found in the situational forces under which so many defenders of indigent clients operate.

C. Factors that Contribute to Ethical Blindness

Research on behavioral ethics has documented various factors that can contribute to the possibility that automatic responses will dominate ethical decision making.[268] Identifying and applying these factors to the situations in which most defense lawyers who represent indigent defendants operate, this section concludes that ethical blindness can be expected to occur with frequency when these factors are present.

1. Ambiguity in Controlling Rules

One of the most important factors that can accentuate the power of automatic processes is ambiguity in controlling rules, which makes it easier for people to unconsciously believe that they are acting in a responsible manner, even when they are not.[269] The source is the

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267. *See* Rapping, *supra* note 9, at 337-38 (describing the case of Eddie Joe Lloyd). Lloyd's appointed appellate lawyer responded to complaints about his own performance by suggesting that Lloyd "is a sick individual who raped, kidnapped and strangled a young woman on her way to school. His claim of my wrongdoing is frivolous, just as is his existence. Both should be terminated." *Id.* Lloyd was subsequently exonerated for the crime based on DNA evidence gathered by another lawyer. *Id.* Likewise, in the case of Christopher Ochoa, who served more than a dozen years on a rape conviction before being exonerated with DNA evidence, his trial attorney stated that "there was 'not a chance' that Ochoa [was] innocent," when confronted with the possibility of Ochoa's innocence. *See* Findley & Scott, *supra* note 20, at 332 (alteration in original).

268. Behavioral ethicists do not dispute that controlled processes can override automatic aspects of decision making, although there is some disagreement about exactly the mechanism by which it occurs. Some, for example, believe that the controlled processes of decision making act with sufficient independence from automatic processes that, under the right conditions, can be used to "veto" conclusions reached automatically. *See* Haidt & Kesebir, *supra* note 150, at 808. Others believe that moral reasoning works as the agent of automatic processes, effectively doing its client's bidding by seeking justifications for conclusions that are reached automatically, but occasionally resisting those conclusions when they go too far and seek arguments that the controlled processes know are absurd. *Id.* While these questions remain unanswered, what are well documented are the types of situations in which automatic processes are either emboldened or hampered. *Id.* at 807.

269. *See* Chugh et al., *supra* note 148, at 81-82; Bazerman et al., *supra* note 153, at 99; Ayal & Gino, *supra* note 154, at 152-53.

same self-serving biases previously described, including people's confidence in their own morality, competency, and deservingness.[270] Ambiguous standards enable these illusions. When the standard for measuring the ethicality of a decision is clear and objective, the illusion of objectivity is harder to maintain.[271] In contrast, when the decision maker's self-assessment is measured against an ambiguous standard—meaning that it is harder to confirm or disconfirm the ethicality of a decision—the illusion of objectivity can flourish.[272]

For defense lawyers, the rules of professional conduct contain enough ambiguity to permit the automatic preference for self-interest to thrive. Once again, the duty of investigation is illustrative. While the obligation is firmly rooted as a matter of ethics, because it is couched in terms of what is "reasonable" under the circumstances,[273] lawyers possess substantial discretion to decide the scope of the appropriate investigation in each case. While the discretion is not unfettered, and the wholesale abdication of the duty to investigate can rarely be justified, in many instances, lawyers will need to make careful calculations based on the circumstances of each case—for example, which potential witnesses to interview, whether to seek the assistance of an expert, or whether to visit physical locations that could have potential evidentiary value. Because these decisions are not made in a vacuum, but instead depend on the particular issues involved in each case, bright line rules are hard to formulate. The result is that some degree of ambiguity will always exist in determining appropriate conduct in any particular matter. And while such ambiguity is necessary in defining the content of the rules, the

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270. *See* Chugh et al., *supra* note 148, at 81-86.

271. *See* Chugh et al., *supra* note 148, at 82; Scott T. Allison et al., *On Being Better but Not Smarter than Others: The Muhammad Ali Effect*, 7 SOC. COGNITION 275, 289-294 (1989) (finding that people are less likely to exaggerate self-assessments of their intelligence, which is more easily identified by objective criteria, than they are to exaggerate self-assessments of their morality, which is harder to confirm or disconfirm); Ayal and Gino, *supra* note 154, at 152-53.

272. *See* Chugh et al., *supra* note 148, at 81-82. For example, in a study of environmental commitment, researchers found that the accuracy of self-assessments of environmental commitment varied with the degree of ambiguity involved in measuring the participants' behavior. *Id.* at 82. Those who were asked to assess their own commitment as environmentalists, a concededly abstract and ambiguous concept that is difficult to confirm or disconfirm, reported overly optimistic appraisals. *Id.*; *see also* Kimberly A. Wade-Benzoni et al., *The Malleability of Environmentalism*, 7 ANALYSES OF SOC. ISSUES & PUB. POL'Y 163, 163 (2007). However, assessments by participants of their own commitments when measured against specific behavior—e.g., whether they recycle, make contributions to environmental organizations, or use energy saving light bulbs—proved to be more accurate because such conduct is easier to confirm or disconfirm. Wade-Benzoni et al., *supra*, at 167, 175. Other studies have come to the same conclusion. *See* Chugh et al., *supra* note 148, at 81-82.

273. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003); MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2.

absence of bright line rules will enhance the power of unconscious motivations, making it more likely that lawyers will be ethically blinded by their own self-interest.

In addition, the decision whether a defendant should plead guilty tends to be fraught with uncertainty, as most of the time there is no way to know what will happen if the case goes to trial. Take, for example, the situation in *State v. A.N.J.*[274] At the time that the lawyer encouraged the guilty plea, he did not know what would happen if the defendant opted for trial. As a result, it would have been easy to conclude, even in the absence of a proper investigation, that the best way to reduce the risks of greater punishment after trial was to encourage the defendant to plead guilty. The point is not that the lawyer was correct; indeed, he certainly violated his duty to investigate before advising the client to plead guilty. Nevertheless, because of the uncertainty inherent in the situation, the automatic preference for self-interest could, and in all likelihood did, flourish.[275]

2. Cognitive Load and Time Pressure

Decision makers have less ability to correct for automatic processes when their reflective abilities are busy or constrained—such as when they are fatigued by having exerted significant mental energy.[276] In one study, for example, more cheating occurred immediately after the decision maker had been engaged in activity that required significant mental work.[277] The point is that it takes effort to curtail the natural impulse toward selfish behavior and, as a result, the ability to exercise self-control to comply with ethical standards depletes over time. In another study, researchers found that the ability to control negative stereotyping decreased the more the decision maker's cognitive load increased.[278] Because the self-

274. 225 P.3d 956 (Wash. 2010); *see also supra* notes 249-55 and accompanying text.

275. The difficulty in measuring the outcome of failures in advocacy by defense lawyers can also cause another psychological phenomenon known as "outcome bias," which describes the unconscious tendency of people to evaluate the ethicality of a decision by its result. *See* Francesca Gino et al., *No Harm, No Foul: The Outcome Bias in Ethical Judgments* 3 (Harvard Bus. Sch., Working Paper No. 08-080, 2009), *available at* http://ssrn.com/abstract=1099464. For example, the defense lawyer in *A.N.J.* would have been predisposed to evaluate the quality of his own conduct by the result—namely, that the plea bargain he arranged reduced the possible punishment that the defendant could have received had he lost at trial—rather than the process that produced it. *See id.*

276. *See* KAHNEMAN, THINKING FAST AND SLOW, *supra* note 146, at 41; BAZERMAN & TENBRUNSEL, *supra* note 32, at 34-36; Moore & Loewenstein, *supra* note 157, at 193; Epley & Caruso, *supra* note 163, at 174.

277. *See* Mead et al., *supra* note 174, at 594-97; Moore & Loewenstein, *supra* note 157, at 193 (finding people made less healthy choices when "under cognitive load").

278. *See* Moore & Loewenstein, *supra* note 157, at 194; Katherine L. Milkman et al., *How Can Decision Making Be Improved*, 4 PERSP. ON PSYCHOL. SCI. 379, 380 (2009).

control needed for deliberation requires attention, conduct that diminishes the decision maker's mental energy can hamper the ability to curtail selfish impulses.[279]

These factors reinforce the possibility that defenders of indigent clients will experience ethical blindness. Almost by definition, defense lawyers who work under the time pressure caused by crushing caseloads and inadequate resources are under heavy cognitive loads as a matter of simple arithmetic: there are too many cases for each client to receive the type of reasoned and considered judgment contemplated by the rules of professional conduct. Compounding this problem is the pressure for quick decisions that can result from other actors in the criminal justice system, especially judges and prosecutors who may want to force defense lawyers to make fast decisions—for example, when a prosecutor offers a favorable plea bargain on the condition that it is accepted immediately.[280] Working under these pressures reduces the amount of time that a defender will have to decide whether and how to investigate each case, and ensures that many defenders will often be mentally fatigued by the overwhelming amount of work expected of them. Lawyers for whom time pressure and mental fatigue are a common occurrence can be expected to be more susceptible to their own automatic biases in favor of self-interest.[281]

3. Routinization

Another factor that can increase the power of automatic processes is the repetitive aspect of the decision-making process. Persistent exposure to the same stimuli can produce a form of "psychological numbing" caused by the repetition.[282] In addition, the decision maker can become susceptible to a slippery slope of unethical conduct, in which prior past decisions become the building block for subsequent almost identical decisions. Just as a small lie

279. *See* Mead et al., *supra* note 174, at 597 ("[W]hen self-control has been weakened by depletion of its resources, selfish and dishonest behavior may readily ensue."); KAHNEMAN, THINKING FAST AND SLOW, *supra* note 146, at 41.

280. *See* Jane Campbell Moriarty & Marisa Main, "*Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1041 (2011). The time pressures facing defenders may be most prevalent in misdemeanor cases, where defenders are often forced to represent dozens of clients in one court session. *See* M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding "Zero-Tolerance" Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 403 (2011) (discussing what he describes as the "auction" process in which defenders and prosecutors work under extreme time pressure to bid with each other to resolve cases at the first appearance).

281. *See* Moore & Loewenstein, *supra* note 157, at 195-96 (discussing the automatic processing of self-interest and its ability to frustrate professional norms).

282. *See* Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior,* 17 SOC. JUST. RES. 223, 228 (2004).

can presage bigger ones, so too can other past unethical decisions. Often small in nature, they can become the building blocks for larger acts of immorality.[283] The process becomes one of "routinization," in which an unethical practice becomes mundane, acceptable, and routine.[284]

This factor can be expected to augment the power of automatic self-interest in defense lawyers. Often, the only way that defenders can respond to overwhelming caseloads is by mechanically processing cases—as if on an assembly line where the decisions about how to represent a client are "rote, routinized, and perfunctory."[285] The result is a one-size-fits-all approach in which clients often are encouraged to quickly plead guilty at the "the going rate" in the locality.[286] When cases are funneled into standardized categories, the unique circumstances of each case are lost, eliminating the need for lawyers to think critically, or ethically, about each matter. In such cases, for example, an investigation may not occur—not because the lawyer makes a conscious choice that none is required—but rather because noninvestigation is the default response.

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283. *Id.*; *see also* Moore & Loewenstein, *supra* note 157, at 196.

284. *See* Tenbrunsel & Messick, *supra* note 282, at 228; John A. Bargh & Tanya L. Chartrand, *The Unbearable Automaticity of Being*, 54 AM. PSYCHOLOGIST 462, 469 (1999) (describing how repetition of an experience can increase the power of automatic processes); Moore & Loewenstein, *supra* note 157, at 194, 197.

285. Martha Rayner, *Conference Report: New York City's Criminal Courts: Are We Achieving Justice?,* 31 FORDHAM URB. L.J. 1023, 1028, 1030 (2004); *see also* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?,* 86 COLUM. L. REV. 9, 53 (1986) ("Even with continuous representation, overworked, underpaid public defenders—who, along with private appointed counsel, ordinarily handle routine cases in squalid courts on behalf of unglamorous, hostile defendants—may take on the faceless demeanor of government bureaucrats, mere processors of cases and people, instead of appearing as personal champions of the accused."); Alschuler, *Attorney's Role*, *supra* note 88, at 1249 ("A public defender's caseload is at once his greatest burden and his greatest asset in the plea-negotiation process. Although the caseload may tend to grind some defenders into a perfunctory bureaucratic routine . . . .").

286. Babcock, *supra* note 225, at 182 (noting that the myth of a functioning adversary system in which defense lawyers zealously defend their clients is at odds with reality in which "[o]verburdened defense lawyers, without investigation or preparation, arrange for the going rates on cases"); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1141 n.119 (2011) ("[F]inding, in a qualitative empirical study before the advent of sentencing guidelines, that defense lawyers develop confidence in their ability to predict plea-bargained outcomes and learn to cite prior dispositions to prosecutors, establishing going rates for particular crimes" (citing MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 90, 120-21 (1977))); Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 L. & SOC'Y REV. 461, 462-64 (1979) (discussing plea bargaining at "going rates" for crimes).

4. Framing

The way that a decision is framed can also reduce the power of conscious, ethical deliberation. For example, when a choice between alternatives is couched in terms that do not highlight its ethical dimension, there is a greater chance the decision maker will be deceived into believing that the path taken is socially acceptable rather than ethically improper.[287] The decision maker does not realize the ways in which conduct that is otherwise perceived to be morally neutral, in fact, possesses moral content.

This factor can contribute to the ethical blindness of defense lawyers. Others have noted that too frequently lawyers fail to perceive the likelihood that their decisions implicate professional ethics.[288] This is particularly true of defense lawyers in criminal cases. For example, the constitutional standards that define whether defense lawyers have provided effective assistance of counsel can cause lawyers to devalue the ethical rules by leading them to mistakenly believe that judicial decisions on constitutional standards set forth the minimum expectations of lawyers in all respects.[289] As a doctrinal matter, the ethical and constitutional standards are separate, although they inform each other.[290] Yet because the constitutional test requires proof of prejudice, whereas the ethical rules do not, conflating the two can have the unintended consequence of crowding out, and maybe even superseding, the ways in which lawyers conceive of their own professional obligations. From a psychological perspective, the standards of constitutional law can thus have the perverse effect of displacing consideration by defense lawyers of the ethical component of their decisions.

In addition, framing unethical behavior as an act of omission rather than commission can lead a decision maker into misperceiving its ethical import. When an unethical choice is framed as the product of inaction, there is less ability to assign responsibility, making it easier for the decision maker to believe through self-biased

287. *See* Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCHOL. REV. 193, 195 (1999) (noting that sanitizing euphemisms are common. For example, language often used to describe conduct during war can strip away its moral component, such as the phrases "collateral damage" or "surgical strikes" to describe bombing missions that kill civilians); *see also* BAZERMAN & TENBRUNSEL, *supra* note 32, at 123-24.

288. *See* Levin, *supra* note 151, at 1561-62.

289. *See* Green, *supra* note 3, at 1185-90; Brown, *Rationing Criminal Defense Entitlements*, *supra* note 13, at 812-13 (arguing that the notoriously lax standard of *Strickland v. Washington* and its progeny "signals to attorneys and trial courts how little assistance will pass constitutional muster, allowing defense functions to be funded more thinly" (footnote omitted)).

290. *See* Green, *supra* note 3, at 1185-88; Nix v. Whiteside, 475 U.S. 157, 166-67 (1986) (noting the distinction between ethical and constitutional doctrines).

perception that the cause of the behavior resides elsewhere.[291] The failure to investigate will usually be an act of omission, in that the lawyer will have failed to engage in conduct that otherwise should have been performed. In contrast to acts of commission—such as when a lawyer decides to call a particular witness at trial or to introduce a particular type of evidence—omissions are more easily rationalized as ethically acceptable. Omission bias predicts that lawyers will tend to overlook the ethical nature of such failures.

5. Social Norms

Finally, social norms also play a significant role in ethical choices. According to social-identity theory, people tend to follow social norms that provide them with "in-group identity."[292] In other words, because people tend to want to conform to a group with which they identify, the behavior of others will influence the decision maker's own ethical choice. Researchers have found, for example, that peer influence is an important factor in producing unethical behavior, but only when the peer is part of the "in-group" with which the decision maker seeks to belong.[293] So, for example, observing an in-group peer member engage in unethical behavior increases the likelihood that the decision maker will act unethically.[294] In contrast, observing an "out-group" member—that is, someone with whom the decision maker does not identify—will have the opposite effect and reduce the likelihood of unethical conduct.[295] The result is what can be called an ethical "contagion," where unethical conduct from an "in-group" member has a contagious effect causing others to act unethically.[296]

Informal norms can have a powerful influence over a defense lawyer's conduct.[297] In places where the professional norm is to

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291. *See* Tenbrunsel & Messick, *supra* note 282, at 236 (citing works on "omission bias"—the tendency for people to view unethical acts of commission as more blameworthy than similar acts of omission); Jonathan Baron & Ilana Ritov, *Omission Bias, Individual Differences, and Normality*, 94 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 74, 74-75 (2004); Mark Spranca et al., *Omission and Commission in Judgment and Choice*, 27 J. EXPERIMENTAL SOC. PSYCHOL. 76, 76-77 (1991).

292. *See* Francesca Gino et al., *Contagion and Differentiation in Unethical Behavior, The Effect of One Bad Apple on the Barrel*, 20 PSYCHOL. SCI. 393, 394 (2009); Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 ANN. REV. PSYCHOL. 591, 606, 609-11 (2004) (offering an extensive review of the literature on conformity and compliance, including the role of social norms).

293. *See* Gino et al., *supra* note 292, at 394.

294. *Id.*

295. *Id.*

296. *Id.* The power of in-group bias to exert automatic influence over decision-making processes has been extensively documented. *See* Page, *supra* note 182, at 250 (noting "nearly one hundred studies" that have demonstrated in-group bias).

297. *See supra* notes 114-20 and accompanying text.

discourage a defense lawyer from engaging in vigorous advocacy on behalf of a client, and where this norm is shared and accepted by the group with whom the defender identifies, defense lawyers can be expected to conform. The point here is not that all local norms will dictate unethical behavior. However, when the norm of the "in-group" encourages quick disposition of cases, it will be much easier for lawyers to convince themselves that their self-interested behavior is ethically justified.

In sum, behavioral ethics demonstrates how even well-meaning and otherwise honorable lawyers can engage in unethical misconduct despite their best intentions. Many subtle psychological factors influence the degree to which the decision maker can be blind to these transgressions. Of course, not every misdeed is the result of psychological biases and, to be sure, there are many instances where intentional misconduct is to blame. But where malevolence is absent, ethical blindness predicts the systemic ways in which defense lawyers can fail to perceive the unethical aspects of their own conduct.

V. IMPLICATIONS AND REMEDIES

The research on ethical blindness fills in an important explanatory gap about how indigent defenders operate: namely, under the right conditions, they can be expected to ignore their own professional transgressions because of the tendency to discount the powerful influence of self-interest.[298] In addition, defense lawyers who fail to perceive their own ethical limitations are unlikely to seek ways to improve the conditions in which they work.[299] This will dull efforts that depend upon the initiative of defense lawyers themselves, such as the ethical rules that mandate that lawyers manage their workloads effectively. Recognizing ethical blindness as a problem for defense lawyers is also an important step in addressing the underlying causes of the pervasive neglect that has been so well documented.

A. Limits of Lawyer Initiated Remedies

Efforts to address inadequate representation of indigent defendants often start with defense lawyers themselves. For example, the 2006 ABA Formal Ethics Opinion concerning excessive workloads states that the responsibility to manage workload begins with the attorney herself, who must decide whether she "believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client."[300]

298. *See supra* notes 162-64 and accompanying text.

299. *See supra* notes 194-203 and accompanying text.

300. ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 4. It is only

The research on ethical blindness raises questions about whether defense lawyers can recognize when workloads are unmanageable. While as a pure rational matter it may be obvious that a lawyer with too many cases cannot be an effective advocate, defense lawyers with incentives to process cases quickly may not be able to do so, even when the objective evidence indicates otherwise. The result is that ethically blind lawyers are unlikely to initiate the remedial efforts contemplated by the 2006 ABA Formal Ethics Opinion, a conclusion buttressed by the paucity of motions that have been filed since the Opinion was issued. [301]

Nor is a remedy likely to come from the requirement that supervisors with direct managerial authority in a public defender organization take reasonable efforts to ensure that a subordinate lawyer possess manageable workloads.[302] For this obligation to be meaningful, supervisors themselves must be able to recognize when caseloads are excessive. No doubt, many supervisors will be able to determine when their subordinates are saddled with too many cases.[303] Yet, too often a supervisor's primary focus will be on whether the office works within its budgetary constraints, which can mean that the incentive for quality representation is tempered with

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after the lawyer concludes that her caseload is excessive that the ethical obligations imposed by the Opinion are triggered. *See* Heidi Reamer Anderson, *Funding* Gideon's *Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 425 (2012).

301. *See supra* note 30 and accompanying text. This is not to say that lawyers never attempt to seek judicial intervention for excessive caseloads—they do. *See, e.g.*, State v. Jones, No. 2008-P-0018, 2008 WL 5428009, at *4-5 (Ohio Ct. App. Dec. 31, 2008) (reversing the conviction of public defender who was held in contempt for refusing to participate in the trial of his client because the defender's caseload was so large that the defender did not have time to investigate or prepare his case). The point is that such attempts are few and far between and have not become the normal course of business for lawyers with excessive workloads.

302. *See* ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 7-8. Of course, this requirement is only relevant in situations where an attorney is supervised, as in public defender organizations, and thus has no applicability to other lawyers, such as contract lawyers or appointed counsel, who work on their own and without supervision.

303. For example, the Deputy Public Defender in Missouri, testifying before a state commission investigating problems facing indigent defense, analogized the situations to a "M.A.S.H. style operating procedure" in which public defenders must "divvy effective legal assistance to a narrowing group of clients" and "choose among clients as to who will receive effective legal assistance." NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 69. This supervising attorney was quite aware that "excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling . . . their ethical obligations and responsibilities as lawyers." *Id.* (citations omitted) (internal quotation marks omitted); *see also* Theresa Schmidt, *Calcasieu Public Defenders Withdrawing from 400 Cases*, KPLC7NEWS (July 27, 2012), http://www.kplctv.com/story/19134209/calcasieu-public-defenders-withdrawing-from-400-cases?clienttype=printable (noting that, because of budget shortfalls, the public defender in Calcasieu, Louisiana, decided to lay off staff and, as a result, withdrew from about 400 felony cases).

the reality that cases need to be processed quickly.[304] This can create the same automatic preference for self-interest that causes subordinate lawyers to overlook their own ethical lapses.[305] Indeed, researchers have identified a particular species of the automatic preference for self-interest at work in such situations. Dubbed "motivated blindness," there is a "common failure of people to notice others' unethical behavior when seeing that behavior would harm the observer."[306] Essentially, people tend not to perceive unethical conduct by others when it is in their self-interest to remain ignorant.

Examples of motivated blindness are plentiful. Take, for instance, the steroid scandals that have plagued major league baseball over the last decades, culminating with Barry Bonds' tainted home run record. One question is why those in a position of authority—such as Major League Baseball, Commissioners, team owners, or the players union—did not act sooner to investigate and ferret out the use of banned substances by players. The answer appears to lie in motivated blindness. Those in authority had a vested interest in the financial benefits generated by the excitement caused by the chase for home run records and, as a result, may have been motivated to turn a blind eye to the obvious increased use of steroids by baseball players.[307]

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304. *See* Schulhofer & Friedman, *supra* note 104, at 84-85 (discussing the economic and budgetary priorities that can cause supervisors in public defender offices to prioritize case management and the quick disposition of cases over quality representation). The culture of the defender office will dictate these matters. There are many high quality defender offices where the primary focus is high quality representation rather than case disposition. *See id.* ("Some [Chief Defenders] have . . . challenged defective arrangements, by declining to accept new cases or suing the court system for inadequate financial support.").

305. The automatic preference for self-interest could manifest itself in various ways. For example, supervising attorneys might claim that rookie defense lawyers are not qualified to make accurate assessments of whether their caseloads are manageable, or might allege that underperforming attorneys, instead of becoming more productive, might try to use the 2006 ABA Formal Ethics Opinion as leverage to demand caseload relief. *See* Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION, Dec. 30, 2006, at 10, 14 (reporting comments by the head of the Los Angeles County Public Defender's Office prior to the adoption of the 2006 ABA Formal Ethics Opinion).

306. *See* BAZERMAN & TENBRUNSEL, *supra* note 32, at 81.

307. *Id.* at 83-84. The final report by former U.S. Senator George Mitchell, launched to investigate the problem of steroid use in baseball, confirmed the shared responsibility of the collective baseball community. *See* GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL SR-36 (2007), *available at* http://files.mlb.com/mitchrpt.pdf ("Obviously, the players who illegally used performance enhancing substances are responsible for their actions. But they did not act in a vacuum. Everyone involved in baseball over the past two decades—Commissioners, club officials, the Players Association, and players—shares to some extent in the

Motivated blindness nicely describes how many supervising attorneys may conceive of their ethical duties: because excessive caseloads trigger the ethical obligation to reduce the workload of attorneys, supervisors may be motivated to conclude that caseloads are manageable, even when they are not. The result is that efforts, such as the 2006 ABA Formal Ethics Opinion, that rely on the oversight of supervisors to monitor caseloads of subordinate attorneys, are likely to be unsuccessful as long as ethical blindness goes unaddressed.[308]

B. Remedying Ethical Blindness

Remedying ethical blindness will not be easy. Because many of the forces that cause people to overlook their own ethical limitations occur below the surface of consciousness, they go unnoticed at the time that decisions are made.[309] As a result, simply exhorting defense lawyers—who can be expected not to recognize their own poor performance—to act in a more professionally competent manner is unlikely to succeed. Nor can these biases be purged simply by educating defense lawyers about them. As many studies demonstrate, merely calling attention to the existence of unconscious biases and asking people to counteract them voluntarily rarely changes behavior.[310] This said, strategies have been identified to help ameliorate the influence of unconscious biases in decision making. This section reviews possible solutions to ethical blindness, including strategies that have been found to be effective in other contexts. It then addresses how they might be implemented with regard to defense lawyers who represent indigent clients.

The most direct way to ameliorate ethical blindness would be to change the ways that defense lawyers calculate self-interest. For example, a substantial expansion in the resources available for indigent defense would reduce the pressure for cases to plead

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responsibility for the steroids era. There was a collective failure to recognize the problem as it emerged and to deal with it early on. As a result, an environment developed in which illegal use became widespread.").

308. The point here is not that ethical blindness is the sole impediment to redressing excessive caseloads or underfunding of defense services. No doubt, the paucity of efforts under the 2006 ABA Formal Ethics Opinion can be attributed to other factors as well, such as the risks that might confront lawyers who publically admit that their caseloads are excessive—some may fear repercussions from the court, while others may fear ridicule or worse from their peers and supervisors. However, if lawyers and their supervisors fail to perceive a problem in the first place, there is little chance they will act, adding a significant hurdle that must be addressed before efforts such as the 2006 Formal Ethics Opinion are likely to succeed.

309. *See supra* notes 150-51 and accompanying text

310. Milkman et al., *supra* note 278, at 380; Jolls & Sunstein, *supra* note 147, at 205-06; Dana & Loewenstein, *supra* note 211, at 252-53; Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW AND SOC. INQUIRY 913, 916 (1997).

quickly, making it easier for defense lawyers to become faithful agents for their clients. Unfortunately, if the half-century since the right to counsel was constitutionalized has taught anything, it is that there is no legislative appetite to expend significant resources on indigent defense.[311] Nor is there any indication that the toothless disincentives for poor performance—including potential civil liability, disciplinary sanction, or the jurisprudence of ineffective assistance of counsel[312]—will become better deterrents of unethical conduct anytime soon. As a result, other strategies will be needed to attack the problem of ethical blindness for indigent defenders.

One strategy that has proven effective in counteracting the types of biases that contribute to ethical blindness involves encouraging decision makers to engage in counter-factual thinking about decisions before they are made.[313] Essentially, the decision maker must consciously make an effort to take positions inconsistent with those that will result from the bias.[314] This can include, for example, considering the opposite of whatever decision is about to be made, or by considering an "outsider's perspective" by consciously attempting to remove oneself from the specific situation.[315] By engaging in such strategies, the decision maker can lessen the power of self-serving biases that contribute to the unconscious aspects of decision making.

The success of such strategies has been documented elsewhere. For example, after determining that self-serving biases were a significant cause of bargaining impasse in negotiations, researchers wanted to know if those biases could be reduced. In a subsequent study, they asked negotiators to "think carefully about the weaknesses" in their bargaining positions prior to engaging in negotiations.[316] The results were revealing; the self-serving biases that caused bargaining impasse evaporated.[317] Other studies have come to similar conclusions.[318]

These types of debiasing strategies can be employed to help

311. *See* Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 915-21 (2010) (discussing the history of impoverished funding of the indigent defense function).

312. *See supra* notes 104-08 and accompanying text. In addition, there is little evidence that increasing penalties for the purposes of encouraging a different cost-benefit analysis by decision makers can reduce ethical blindness. *See* Page, *supra* note 181, at 285-86.

313. *See* Babcock et al., *supra* note 310, at 916, 920; Milkman et al., *supra* note 278, at 381; Burke, *supra* note 147, at 1618.

314. *See* Burke, *supra* note 147, at 1618.

315. *See* Milkman et al., *supra* note 278, at 381.

316. *See* Babcock et al., *supra* note 310, at 918-21.

317. *Id.*

318. *Id.* at 916 (finding that hindsight bias, which is the human tendency to overpredict the likelihood of past events, was reduced by instructing subjects to explain why events other than those that happened could have occurred).

reduce the power of ethical blindness in defense lawyer decision making. Because the starting point for most defense lawyers is the belief that their clients are likely guilty of the crimes charged, any effort to reduce confirmation bias must seek to counteract that predisposition. For example, if lawyers are encouraged to engage in counterfactual reasoning by consciously starting each case with an agnostic view of the possibility of the defendant's guilt, or by affirmatively considering the possibility that the client might be factually innocent of the crimes charged, the forces that contribute to ethical blindness could be lessoned.[319] The point here is not to suggest, as others have, that defense lawyers should expend their limited resources only, or primarily, on cases where there is a likelihood of factual innocence.[320] Rather, by consciously focusing on the possibility that every client is factually innocent, lawyers can reduce the power of the unconscious forces that lead to ethical blindness in the first place.

A slightly different approach might also help reduce ethical blindness in defense lawyers. Recognizing the difficulty in counteracting unconscious biases through conscious behavior, prominent scholars in behavioral economics have suggested that legal rules can be constructed to use one unconscious bias to counteract another.[321] For example, consumers tend to make poor decisions, in part, because they are overly optimistic that the dangerous risks associated with consumer products will not befall them.[322] These scholars have suggested that one way to counteract this "optimism bias" is by creating legal rules that require consumers be provided with concrete examples of where a consumer product resulted in serious injury.[323] In so doing, the law would use one type of unconscious reasoning—in this case, the "availability heuristic," which describes the tendency of people to estimate the probability of an event after assessing how easily examples of the event can be

319. Similar strategies have been suggested for prosecutors in an effort to counteract cognitive biases, such as confirmation bias. *See, e.g.*, Burke, *supra* note 147; MEDWED, *supra* note 175, at 25-28 (suggesting the creation of an internal review committee to monitor and to evaluate charging decisions).

320. *See, e.g.*, Randolph Braccialarghe, *Why Were Perry Mason's Clients Always Innocent? The Criminal Lawyer's Moral Dilemma - The Criminal Defendant Who Tells His Lawyer He Is Guilty*, 39 VAL. U. L. REV. 65, 77-79 (2004) (proposing to "Stop Defending the Guilty Client"); Brown, *Rationing Criminal Defense Entitlements*, *supra* note 13, at 816-18 (discussing the rationing of resources based on one's likelihood of factual innocence); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1288 (1994). See generally Freedman, *supra* note 28, for a cogent response to the proposal that defense lawyers prioritize the claims of factually innocent clients.

321. *See* Jolls & Sunstein, *supra* note 147, at 207-10.

322. *Id.* at 207 ("[O]ptimism bias may lead many consumers to underestimate their personal risks even if they receive accurate information about average risks.").

323. *Id.* at 210.

called to mind—to counteract optimism bias.[324] Made aware of vivid and concrete examples of the dangers of a product, consumers will be less likely to be overly optimistic when assessing the risks of injury from the product.

A similar approach could be employed to address the problem of ethical blindness for criminal defense lawyers, again focusing on the question of factual innocence. To counteract the tendency of defense lawyers to seek out and interpret data consistent with the likelihood of their client's guilt, lawyers might be made to consider concrete examples of situations in which defendants were wrongfully convicted, especially when bad lawyering was to blame. Again, the point here is not to encourage defense lawyers to work hard *only* on cases where there is some evidence of factual innocence; rather, it is to raise the visibility of concrete examples of wrongful convictions to counteract the factors that produce ethical blindness in the first place. The goal would be for lawyers to take action, such as seeking exculpatory evidence in every case, which will reduce the risk that any one client would be wrongfully convicted.

The obvious hurdle to these proposed remedies is that defense lawyers with a powerful self-interest in the quick disposition of cases will have little reason to engage in such strategies. Similarly, managers in public defenders offices where the institutional culture favors fast disposition of cases are unlikely to develop strategies to highlight examples of wrongful convictions, especially if the result is to discourage lawyers from processing heavy volumes of cases quickly. Rather, the incentives that cause lawyers and their supervisors to engage in poor lawyering practices make it unlikely that these debiasing strategies will be adopted voluntarily.

Answers must come, therefore, from outsiders such as bar leaders and others who can be convinced to participate in improving the quality of legal representation for indigent defendants, without themselves being subject to ethical blindness.[325] They should take the lead in advocating and litigating for improvements without waiting for criminal defense lawyers who toil in the trenches to do so.[326] It also means that these leaders should consider the causes of ethical blindness when attempting to formulate remedies for indigent defense services.

One fertile area for possible reform is through the oversight

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324. *Id.*

325. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 207-09 (calling on state and local bar associations to take an active role in seeking remedies).

326. Many already do. For example, a local bar association in New York City was responsible for initiating litigation that resulted in a substantial increase in the rate of pay available to appointed counsel throughout the state. *See, e.g.*, N.Y. Cnty. Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 410 (N.Y. Sup. Ct. 2003) (ordering a rate of pay increase for appointed counsel to ninety dollars per hour).

bodies that have been created in many states. To date, forty-two states have some form of statewide authority that oversees some or all of the ways that indigent defense services are provided.[327] In many states, a statewide commission provides oversight regarding almost all aspects of indigent defense services, while in others, state and local authorities share oversight responsibilities.[328] While these entities vary widely in terms of the degree of independence they possess from the political pressures that induce lawyers to represent large numbers of clients with insufficient resources, there have been some promising trends over the last decade. For example, since 2000, eleven states have passed legislation or adopted new procedures to increase the oversight capabilities of state agencies.[329] These oversight entities, especially those that are insulated from political pressure, are in a better position than the lawyers who represent defendants themselves to adopt policies that can improve the defense function. Further, an oversight commission could encourage (or mandate) public defender offices to adopt policies meant to counteract the pernicious effects of ethical blindness. This could include requiring that each public defender office adopt training policies to teach lawyers (and supervisors) the importance of engaging in counterfactual thinking. They could also require defender offices to adopt policies that highlight cases of wrongful convictions, especially where bad lawyering was to blame. Reaching lawyers who receive court appointments, or who enter into contracts with localities to provide indigent defense services, might be harder, but is also possible. For example, oversight agencies could require that every lawyer who wants to represent indigent clients attend training sessions that teach about strategies that can counteract the pernicious effects of ethical blindness. Programs focused on how to avoid wrongful convictions would be particularly helpful, given that confirmation bias for defense lawyers comes from the presumption that defendants are likely to be factually guilty.

To be sure, reducing the psychological barriers that prevent lawyers from recognizing their own limitations is not, in itself, a panacea to the indigent defense crisis. As long as deep underfunding of defense services continues, lawyers will not be able to provide each client with professionally competent representation. It is for this reason that some commentators favor a regime of rationing defender services to prioritize clients with plausible claims of factual innocence.[330] Reducing ethical blindness, however, suggests that other options are available. If lawyers learn to recognize their own

327. *See* NAT'L RIGHT TO COUNSEL COMM., *supra* note 2, at 148.

328. *Id.*

329. *Id.* at 149-50.

330. *See, e.g.*, Freedman, *supra* note 28, at 914-15.

ethical limitations, they will be better positioned to resist representing clients for whom they cannot provide competent representation. For example, ethically aware lawyers may start engaging in the type conduct required by the ABA Formal Ethics Opinion to withdraw from cases or to refuse new appointments when caseloads become excessive.

These strategies need to be complemented by efforts to change the culture of indifference that surrounds indigent defense, so that every lawyer who represents an indigent client practices in an environment where they are encouraged to provide effective and competent representation. Judges who make appointment decisions should appoint lawyers based on their competency to provide adequate representation rather than to process cases.[331] Contracts for the provision of defense services to indigent clients should be structured so that the lawyers who provide those services receive sufficient resources.[332] And public defenders should work in offices where the organizational culture encourages them to be effective advocates rather than facilitators of assembly line justice.[333] By taking the research of ethical blindness into account, advocates for greater resources and quality defense lawyering will be better equipped to develop strategies needed to achieve these goals.

In the end, there is some reason to be cautiously optimistic, as the epilogue to Robert Surrency's story reveals. After Surrency lost his contract to represent indigent defendants in Green County, he was hired by the public defender's office in another county in Georgia that, by all accounts, possesses a culture that prides itself on providing high quality representation to its clients.[334] Amy Bach reports that Surrency's approach to his work improved dramatically.[335] While he still carried a heavy caseload, he no longer was "slipshod and ineffective."[336] Rather, he had been transformed into a tenacious lawyer who worked hard on behalf of his clients.[337] If Surrency's case is illustrative, then altering the culture in which defenders operate can make a remarkable difference. But because local culture does not change by fiat, practical solutions that will encourage improvement are needed. Reducing the barriers that prevent lawyers from recognizing their own limitations in the first place is an important step in the right direction.

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331. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 4, at 43-44 (discussing the long-standing recommendations of the ABA).

332. *See id.* at 41 (discussing the "significant inequality" of funding and resource distribution between prosecutorial and defense services).

333. *See* Rapping, *supra* note 9, at 333-34.

334. *See* BACH, *supra* note 9, at 73-74.

335. *Id.*

336. *Id.* at 74-75.

337. *Id.*

CONCLUSION

Almost thirty years ago, Professor Barbara Allen Babcock, a leading advocate for the rights of the accused, reframed the classic question posed to defense attorneys. Instead of asking, "How can you defend a person you know is guilty?"[338] she posited that overburdened and underperforming criminal defense lawyers should be asked, "How can you participate in such a process?"[339] An even more blunt form of the question might be, "How can you live with yourself, knowing that the representation you provide so often fails to meet basic ethical standards?"

The research on ethical blindness provides an answer: many defense lawyers simply may not perceive their own misconduct. The self-interested motivation to resolve cases quickly, borne out of the persistent underfunding of the defense function, can trick lawyers into believing that they are serving as effective advocates, even when they are not. Believing that most of their clients are guilty, and in many cases wanting them to be so, lawyers can be expected to seek out and interpret evidence consistent with that conclusion. Self-serving biases can help shield lawyers from acknowledging their poor performance. And because the biases that produce ethical blindness occur below the level of consciousness, lawyers will continue to provide substandard representation, unaware that they are doing so.

Addressing the causes of ethical blindness is an important step in solving these problems. As long as ethical blind spots continue to mask the reality of how lawyers practice, efforts such as the 2006 ABA Formal Ethics Opinion,[340] that require lawyers to manage their workloads properly, are likely to have only minimal impact. Solutions that can reduce the psychological barriers to effective advocacy, such as those recommended here, are needed and should be implemented.

338. Babcock, *supra* note 225, at 175.

339. *Id.* at 182.

340. ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 29, at 2.