

# UNETHICAL OBEDIENCE BY SUBORDINATE ATTORNEYS: LESSONS FROM SOCIAL PSYCHOLOGY

*Andrew M. Perlman\**

## I. INTRODUCTION

Consider the plight of a lawyer—fresh out of law school with crushing loan debt and few job offers—who accepts a position at a medium-sized firm. A partner asks the young lawyer to review a client’s documents to determine what needs to be produced in discovery. In the stack, the associate finds a “smoking gun” that is clearly within the scope of discovery and spells disaster for the client’s case. The associate reports the document to the partner, who without explanation tells the associate not to produce it. The associate asks the partner a few questions and quickly drops the subject when the partner tells the associate to get back to work.

We would like to believe that the young lawyer has the courage to ensure that the partner ultimately produces the document. We might hope, or expect, that the lawyer will report the issue to the firm’s ethics counsel, if the firm is big enough to have one, or consult with other lawyers in the firm, assuming that she has developed the necessary relationships with her colleagues despite her junior status.

In fact, research in the area of social psychology suggests that, in some contexts, a subordinate lawyer will often comply with unethical instructions of this sort.<sup>1</sup> This basic, but crucial, insight into human behavior suggests that there is often a significant gap between what the legal ethics rules require and how lawyers will typically behave. Indeed, lawyers will too often obey obviously unethical or illegal instructions or fail to report the wrongdoing of other lawyers.<sup>2</sup>

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\* Associate Professor of Law, Suffolk University Law School. B.A., Yale College; J.D., Harvard Law School; LL.M., Columbia Law School. Several friends and colleagues have given me valuable suggestions for this Article, including Lisa Aidlin, Thomas Blass, Robert Keatinge, Sung Hui Kim, Jeffrey Lipshaw, and John Steele. I also benefited enormously from the assistance of research librarian Ellen Delaney and from comments and questions during presentations at Cumberland and Suffolk Law Schools and at the Hofstra Legal Ethics Conference. I also received very useful insights from several students in my professional responsibility classes at Suffolk.

1. See *infra* Parts II and III. Although there is limited research on whether lawyers tend to obey authority figures, there is no reason to think that attorneys are somehow immune from the pressures that lead to obedience. See, e.g., *infra* note 80.

2. See MODEL RULES OF PROF’L CONDUCT R. 5.2(a)-(b) (2007) (subjecting subordinates to the Rules of Professional Conduct unless the supervisory lawyer’s instructions reflect a “reasonable

This Article explores what lessons we can learn from social psychology regarding a lawyer's willingness to comply with authority figures, such as senior partners or deep-pocketed clients, when they make unlawful or unethical demands. Part II reviews some of the basic literature in social psychology regarding conformity and obedience, much of which emphasizes the importance of context as a primary factor in predicting people's behavior.<sup>3</sup>

Part III contends that lawyers frequently find themselves in the kinds of contexts that produce high levels of conformity and obedience and low levels of resistance to illegal or unethical instructions. The result is that subordinate lawyers, like the attorney in the initial example, will find it difficult to resist a superior's commands in circumstances that should produce forceful dissent.

Part IV proposes several changes to existing law in light of these insights, including giving lawyers the benefit of whistleblower protection, strengthening a lawyer's duty to report the misconduct of other lawyers,<sup>4</sup> and enhancing a subordinate lawyer's responsibilities upon receiving arguably unethical instructions from a superior.<sup>5</sup> These proposals, however, are ultimately less important than the insights that underlie them. Namely, by gaining a deeper understanding of social psychology, the legal profession can more effectively prevent and deter attorney misconduct.

## II. BASIC LESSONS FROM SOCIAL PSYCHOLOGY ABOUT CONFORMITY AND OBEDIENCE

Studies on conformity and obedience suggest that professionals, whom we would ordinarily describe as "honest," will often suppress their independent judgment in favor of a group's opinion or offer little resistance in the face of illegal or unethical demands.<sup>6</sup> These studies

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resolution of an arguable question of professional duty"); MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007) (requiring a lawyer to report another lawyer's misconduct if that conduct "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer").

3. As explained in more detail in Part II, social context plays a significant role in human behavior. See LEE ROSS & RICHARD E. NISBETT, *THE PERSON AND THE SITUATION* xiv (1991) ("[W]hat has been demonstrated through a host of celebrated laboratory and field studies is that manipulations of the immediate social situation can overwhelm in importance the type of individual differences in personal traits or dispositions that people normally think of as being determinative of social behavior.").

4. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

5. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2007).

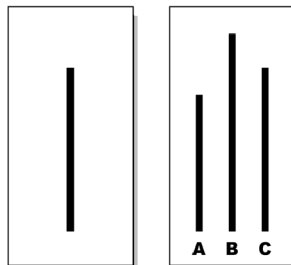
6. Although there is a growing legal ethics literature that draws on social psychology, there is surprisingly little scholarship that draws on social psychology to explain the particular problem of wrongful obedience among lawyers. For a few notable exceptions, see MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 307, 323-24 (2004); David J. Luban, *The*

demonstrate that we ascribe too much weight to personality traits like honesty,<sup>7</sup> and that contextual factors have far more to do with human behavior than most people recognize.<sup>8</sup> Social psychologists have called this tendency to overemphasize individual personality differences and underestimate the power of the situation “the fundamental attribution error.”<sup>9</sup> Indeed, a number of experiments have amply demonstrated that situational forces are often more powerful predictors of human behavior than dispositional traits like honesty.

#### A. Foundational Studies on Conformity

The importance of context is apparent from a number of experiments related to conformity, the most celebrated of which is a 1955 study by Solomon Asch.

Asch wanted to determine how often a group member would express independent judgment despite the unanimous, but obviously mistaken, contrary opinions of the rest of the group.<sup>10</sup> To make this determination, Asch designed a study involving two cards similar to those shown on the next page.<sup>11</sup>



In one version of the study, the experimenter told the subject that he

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*Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 94, 95 (Deborah L. Rhode ed., 2000); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*, 74 *FORDHAM L. REV.* 983, 1001-26 (2005).

7. See generally JOHN M. DORIS, *LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR* (2002) (arguing that context explains far more about human behavior than individual differences in character traits). For a detailed examination of the importance of context in determining lawyer behavior, see REGAN, *supra* note 6, at 4-6, 10, 294-95, 302-04.

8. ROSS & NISBETT, *supra* note 3, at 4.

9. *Id.* (citation omitted); see also DORIS, *supra* note 7, at 93.

10. Solomon E. Asch, *Opinions and Social Pressure*, *SCI. AM.*, Nov. 1955, at 31, 32.

11. *Id.* This image appears at [http://en.wikipedia.org/wiki/Image:Asch\\_experiment.png](http://en.wikipedia.org/wiki/Image:Asch_experiment.png) (last visited Jan. 20, 2008).

was about to participate in a vision test and asked the subject to sit at a table with four other individuals who were secretly working with the experimenter.<sup>12</sup>

All five people were shown the two cards and asked to identify which line in the card on the right (A, B, or C) was the same length as the line shown in the card on the left.<sup>13</sup> Each person was asked his opinion individually and answered out loud,<sup>14</sup> with the subject of the experiment going near the end.<sup>15</sup> After each person had answered, a new set of cards was produced, and the participants were once again asked their opinions.<sup>16</sup>

During the initial rounds, all of the confederates chose the obviously right answer.<sup>17</sup> Not surprisingly, under this condition, the subject also chose the right answer.<sup>18</sup>

In some subsequent rounds, however, Asch tested the subject's willingness to conform by prearranging for the confederates to choose the same wrong answer.<sup>19</sup> Even though the four confederates were obviously mistaken, subjects of the experiment nevertheless provided the same wrong answer as the confederates 35.1% of the time,<sup>20</sup> with 70% of subjects providing the wrong answer at least once during the experiment.<sup>21</sup>

Most importantly, Asch found that the introduction of certain variables dramatically affected conformity levels. For example, Asch found that conformity fell quickly as the confederate group size dropped from three (31.8% of the answers were wrong) to two (13.6% were wrong) to one (3.6% were wrong), but did not increase much in groups larger than seven (maxing out at about 37%).<sup>22</sup> Moreover, conformity fell by more than 50% in most variations of the experiment when one of

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12. Asch, *supra* note 10, at 32.

13. *Id.*

14. *Id.* All of the subjects were male college students. Subsequent work has revealed that women are, under certain circumstances, even more susceptible to conformity than men. *See, e.g.,* Alice H. Eagly & Carole Chvala, *Sex Differences in Conformity: Status and Gender Role Interpretations*, 10 *PSYCHOL. OF WOMEN Q.* 203, 217 (1986).

15. Asch, *supra* note 10, at 32.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 35.

21. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 263 (2007). Some subjects always went along with the wrong answer, while other subjects never chose the wrong answer. Still others chose the wrong answer occasionally. Overall, though, the "wrong" answer was given thirty-five percent of the time. Asch, *supra* note 10, at 33, 35.

22. Asch, *supra* note 10, at 35.

the confederates dissented from the group opinion.<sup>23</sup>

Not surprisingly, other studies have shown that conformity levels increase when (as is true in the law) the answer is more ambiguous. For example, in studies pre-dating Asch's, Muzafer Sherif placed a subject in a dark room and asked the person to look at a projected spot of light and guess how far it moved.<sup>24</sup> Notably, the light did not move at all, but only appeared to move due to an optical illusion called the autokinetic effect.<sup>25</sup> The precise extent of the perceived movement was thus impossible for subjects to determine objectively.<sup>26</sup>

In one variation of the experiment, a subject gave individual assessments and was subsequently put in a room with a confederate, whose opinion intentionally varied from the subject's.<sup>27</sup> As expected, the subject's assessments quickly came into line with the confederate's or (when the subject was placed in a group) with the group's.<sup>28</sup> Thus, Sherif found that questions with ambiguous answers tended to produce more conformity, because people were understandably less certain of their original assessments.

The Asch and Sherif studies offer compelling evidence—also supported by more recent experiments—that a group member's opinion is easily affected by the group's overall judgment.<sup>29</sup> Critically, the studies also reveal that this effect varies considerably, depending on situational variables, such as the level of ambiguity in the assigned task, the number of people in the group, the status of the person in the group (e.g., high status people feel more comfortable offering a contrasting view), and the existence of dissenters.<sup>30</sup> The situation, in short, has a powerful effect on human behavior.

### B. Foundational Studies on Obedience

Not long after Asch's provocative study, Stanley Milgram focused

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23. *Id.* at 34-35.

24. MUZAFER SHERIF, *THE PSYCHOLOGY OF SOCIAL NORMS* 95-96 (1973).

25. *Id.* at 91-92.

26. *Id.* at 92.

27. *Id.* at 93.

28. *Id.* at 100-08; *see also* Muzafer Sherif, *A Study of Some Social Factors in Perception*, in 27 *ARCHIVES OF PSYCHOLOGY* 5, 32-41 (R.S. Woodworth ed., 1935).

29. ROSS & NISBETT, *supra* note 3, at 33 (explaining that “studies [have] demonstrated again and again that arbitrarily constructed groups, even ones that hold no long-term power to reward conformity or punish dissent, can exert potent conformity pressures”).

30. *Id.* at xiv (noting that “what has been demonstrated through a host of celebrated laboratory and field studies is that manipulations of the immediate social situation can overwhelm in importance the type of individual differences in personal traits or dispositions that people normally think of as being determinative of social behavior”).

on a different but related question: When will people follow the unethical or immoral orders of an authority figure?<sup>31</sup>

The answer turned out to be both surprising and alarming. Milgram found that, under the right conditions, an experimenter could successfully order more than sixty percent of people to administer painful and dangerous electric shocks to an innocent, bound older man with a heart condition, despite the man's repeated pleas to be let go.<sup>32</sup>

These results came out of Milgram's brilliantly staged and oft-cited experiment. It typically<sup>33</sup> began with a subject and a secret accomplice of the experimenter drawing lots to determine who would be a "teacher" and who would be a "learner" in a study that the subject believed to be about the learning process.<sup>34</sup> In fact, the experiment had nothing to do with learning theory, and the drawing was "rigged so that the subject was always the teacher and the accomplice always the learner."<sup>35</sup>

The teacher (the subject) and the learner (the accomplice) were then taken to another room where the teacher watched the experimenter connect electrical wires to the learner.<sup>36</sup> The experimenter explained that the teacher was soon going to have to ask the learner a series of questions and that, after each wrong answer, the teacher was going to have to administer an electric shock through the attached wires using a generator in another room.<sup>37</sup>

After the experimenter applied a gel that was supposed to help the electrical current flow to the learner without causing blistering or burning,<sup>38</sup> the learner (in one version of the study) informed the experimenter and the teacher that he had a heart condition.<sup>39</sup> The experimenter explained that, although the shocks might be painful, they would not be dangerous.<sup>40</sup> While in the teacher's presence, the experimenter then strapped the learner to a chair to ensure that he could not break free.<sup>41</sup> The teacher/subject was subsequently brought back to the original room and placed in front of the electric shock generator.<sup>42</sup>

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31. For a discussion of the differences between conformity and obedience, see *infra* Part III.

32. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 55-57, 60 (1974).

33. Milgram conducted many versions of this experiment, but the variation described here is among the most commonly described.

34. MILGRAM, *supra* note 32, at 18-19.

35. *Id.* at 19.

36. *Id.*

37. *Id.* at 19-21.

38. *Id.* at 19.

39. *Id.* at 55-57.

40. *Id.* at 56.

41. *Id.* at 19.

42. *Id.* at 3.

The experimenter instructed the teacher to ask the learner questions through an intercom (the subject could not see the learner in this variation of the experiment) and to shock the learner for each wrong answer, starting with 15 volts.<sup>43</sup> With every additional wrong answer, the experimenter explained that the teacher had to increase the shock by one increment on the generator, with each increment producing an extra 15 volts of electricity.<sup>44</sup> The generator, which was clearly marked, went as high as 450 volts.<sup>45</sup> At 375 volts, the generator read: “Danger: Severe Shock,” and between 435 and 450 volts, the generator’s label simply indicated “XXX.”<sup>46</sup>

Unbeknownst to the teacher, the learner was not actually attached to the generator and was instructed to provide numerous wrong answers through a nearby key pad.<sup>47</sup> Milgram’s objective was to measure how long the teachers would continue to follow the experimenter’s orders to apply the shocks.<sup>48</sup>

In the initial stages, nearly all of the subjects/teachers willingly applied the lowest level of shocks on the generator. But as the experiment continued, the learner/confederate produced increasingly loud and forceful objections to the experiment, including (as time went on) requests to be let out of the experiment and complaints about heart pain.<sup>49</sup> Eventually, the learner refused to answer and became ominously silent.<sup>50</sup> The subject, of course, had no idea that these objections and protests were pre-recorded and played at precise points during the experiment.

Despite the learner’s pleas to be released, his complaints about heart pain, his refusals to answer, and his eventual silence, Milgram found that the majority of subjects complied with the experimenter’s instructions fully, including repeated applications of the 450 volt shock lever. A startling sixty-five percent of subjects obeyed the instructions to the bitter end in this scenario.<sup>51</sup>

Critically, Milgram, like Asch and Sherif before him, found that context was essential. Obedience varied a great deal depending on a number of situational factors, such as whether the learner was in the

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43. *Id.* at 20-21, 28.

44. *Id.* at 20-21.

45. *Id.* at 28.

46. *Id.*

47. *Id.* at 19-20, 22.

48. *Id.* at 23-24, 26.

49. *Id.* at 22-23, 56-57.

50. *Id.* at 23.

51. *Id.* at 60. In fact, compliance levels varied and were even higher in other versions of the experiment. *Id.* at 35, 60-61, 119.

same room as the teacher,<sup>52</sup> whether the person issuing the orders was in the same room as the teacher,<sup>53</sup> whether subjects assisted a confederate with the shocks instead of administering the shocks themselves,<sup>54</sup> and whether someone dissented (such as when the experiment occurred in a group setting).<sup>55</sup>

Milgram's findings have been replicated throughout the world, with similar results in both genders, different socioeconomic groups, and different countries.<sup>56</sup> Moreover, because of new ethics guidelines that make Milgram's work difficult to reproduce today,<sup>57</sup> his work still stands as one of the most significant contributions to our understanding of human obedience to authority. We know from his work that, given the right situation, most people will follow orders that they would ordinarily consider blatantly immoral.

### C. *The Power of the Situation*

The basic point of these studies is not that people are social conformists, mindless followers of authority, or latent sadists. Indeed, the studies do not suggest that "people are disposed to obey authority figures unquestioningly."<sup>58</sup> Rather, the point is that "manipulations of the immediate social situation can overwhelm in importance the type of individual differences in personal traits or dispositions that people normally think of as being determinative of social behavior."<sup>59</sup> As a result, "subtle features of . . . [the] situation . . . prompt[] ordinary members of our society to behave . . . extraordinarily."<sup>60</sup>

The importance of context is clear. Asch's studies showed that a single variable, such as reducing the number of people in the group or introducing a dissenting group member, could dramatically reduce conformity levels.<sup>61</sup> Milgram also found that the existence of a dissenter

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52. *Id.* at 34-36.

53. *Id.* at 59-60, 62.

54. *Id.* at 119, 121-22.

55. *Id.* at 118-21.

56. *Id.* at 5, 170 (socioeconomic groups), 62-63 (gender), 170-71 (international replications).

57. SHELLEY E. TAYLOR ET AL., SOCIAL PSYCHOLOGY 228 (11th ed. 2003). There are also other reasons to expect that a similar experiment could not be fully replicated today, including the increasing sophistication of subjects and the expense of such work. See David J. Luban, *Milgram Revisited*, 9 RESEARCHING L. (Am. B. Found., Chi., Ill.), Spring 1998, at 1, 6. Nevertheless, a partial replication was recently conducted and produced results very similar to Milgram's. Jerry Burger, *Replicating Milgram*, APS OBSERVER, Dec. 2007, available at <http://www.psychologicalscience.org/observer/getArticle.cfm?id=2264>.

58. ROSS & NISBETT, *supra* note 3, at 58.

59. *Id.* at xiv.

60. *Id.* at 56.

61. See *supra* notes 10-30 and accompanying text.



could reduce obedience and that other factors, such as placing the experimenter outside of the room or moving the “learner” into the same room as the subject, produced a similar effect.<sup>62</sup> Social psychologists, in short, have found that conformity and obedience are heavily context-dependent and that social forces play a much greater role—and dispositional traits a much weaker role—in determining human behavior than most people assume.

### III. SITUATIONAL CONFORMITY AND OBEDIENCE: IMPLICATIONS FOR LAWYER BEHAVIOR

Conformity and obedience are different in subtle but important ways. According to Milgram, “[o]bedience to authority occurs within a hierarchical structure in which the actor feels that the person above has the right to prescribe behavior. Conformity regulates the behavior among those of equal status . . . .”<sup>63</sup> So, for example, the discovery hypothetical primarily implicates issues of obedience, because a superior is issuing an order to a subordinate. The hypothetical would implicate conformity if the young lawyer saw her colleagues at the firm concealing “smoking guns” and consequently followed their lead without being instructed to do so. Despite the differences in the two concepts, both of them can exist in many law practice settings.

#### A. *Situational Factors that Produce Conformity in Law Practice*

Recall that numerous factors contribute to conformity, including the size of the group, the level of unanimity, the ambiguity of the issues involved, group cohesiveness, the strength of an individual’s commitment to the group, the person’s status in the group, and basic individual tendencies, such as the desire to be right and to be liked.<sup>64</sup>

Many of these factors frequently exist in law practice.<sup>65</sup> For instance, lawyers often have to tackle problems that contain many ambiguities of law and fact. Even questions that, at first, seem to have well-settled answers are often susceptible to an analysis that can make the answers seem unclear. Indeed, law students are trained to perform

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62. MILGRAM, *supra* note 32, at 34-36, 59-60, 62.

63. *Id.* at 114.

64. *See supra* notes 22-30 and accompanying text.

65. Obviously, law practice occurs in a wide range of environments, and each setting produces its own constraints and social forces that profoundly influence attorney behavior. *See generally* Andrew M. Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 829 (2001). Thus, the analysis offered here is not universally applicable.

this particular art of legal jiu jitsu.<sup>66</sup>

Given the uncertainty of many legal answers and lawyers' expertise in identifying (or manufacturing) those uncertainties, lawyers are especially susceptible to the forces of conformity. For example, the subordinate in the initial discovery hypothetical may review the discovery rules and find language that could theoretically (though implausibly) support the partner's position, particularly if she perceives that other lawyers at the firm are engaging in similar behavior.<sup>67</sup> Thus, despite her initial belief about the document's discoverability, she might begin to believe that her original view was either a product of inexperience or a failure to appreciate fully all of the nuances about how discovery works in practice.<sup>68</sup> She might consequently come to think that her initial view was wrong, even though it was quite clearly right. And if the document's discoverability fell into an area that was even slightly grey instead of black and white, the tendency to conform would be even greater.<sup>69</sup>

The hierarchical structure of lawyering also makes conformity more likely. Studies suggest that strong conformity forces exist even in "arbitrarily constructed groups . . . that hold no long-term power to reward conformity or punish dissent."<sup>70</sup> Lawyers, however, work in groups that are *not* arbitrarily constructed and actually *do* hold long-term power to reward conformity or punish dissent. Attorneys typically work in settings where other group members, such as senior partners or corporate executives (e.g., in-house counsel jobs), control the professional fates of subordinates, a condition that increases the likelihood of conformity.<sup>71</sup> So, for example, the young lawyer in the initial hypothetical would feel a powerful, though perhaps unconscious, urge to conform, especially given that she had trouble finding a job and

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66. See, e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 595-96 (1982).

67. Again, obedience and conformity are related, but distinct, forces. Technically, conformity is an effect that occurs in groups, whereas the original hypothetical primarily concerns obedience. See *supra* note 63 and accompanying text.

68. One recent study suggests that the social forces that produce conformity actually affect one's subjective perception of a situation and do not simply push someone to conform for the sake of fitting in with the group. Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 BIOLOGICAL PSYCHIATRY 245, 251 (2005). For a useful summary of the experiment, see ZIMBARDO, *supra* note 21, at 264-65. The study implies that the associate may truly believe that the partner is right and will not consciously recognize that she is engaging in an act of conformity.

69. See, e.g., Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054 (Wash. 1993).

70. ROSS & NISBETT, *supra* note 3, at 33.

71. See Perlman, *supra* note 65, at 834-39; see also Kim, *supra* note 6, at 1005-06, 1008 (describing the particularly strong social forces that act on in-house counsel).

faced significant financial burdens.

Social status also affects conformity. There is evidence that people with more social prestige feel more comfortable deviating from the prevailing opinion.<sup>72</sup> By contrast, a person with a lower status, such as the junior law firm associate in the hypothetical, will be more likely to conform to protect her more vulnerable position.

Unanimity also encourages conformity, and unanimity is common among lawyers who are working together on the same legal matter. Studies have shown that zealous advocacy tends to make lawyers believe that the objectively “correct” answer to a legal problem is the one that just so happens to benefit the client.<sup>73</sup> This tendency causes teams of lawyers to agree on many issues, making it even more difficult for dissenting voices to be heard. So in the discovery example, the absence of a dissenting voice would make the subordinate more likely to assume that her initial position was incorrect or, at the very least, not worth pursuing.

The point here is not that lawyers will always conform to the views of superiors or colleagues. Plenty of lawyers express their own beliefs, even under very difficult circumstances.<sup>74</sup> The claim is that powerful social forces exist in many law practice settings that make conformity more likely than most people would expect.

#### *B. Situational Factors that Produce Obedience in Law Practice*

Law practice also tends to produce excessive obedience. To understand why this happens, consider just a few of the key variables that affected obedience in Milgram’s experiments: (1) the existence of a plausible legitimate reason for the wrongful conduct (in Milgram’s experiment, it was to study the learning process); (2) the use of positive language to describe the negative behavior (e.g., the shocks help the

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72. See, e.g., Cass R. Sunstein, *Conformity and Dissent* 12 (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 34, 2002), available at <http://www.law.uchicago.edu/academics/publiclaw/resources/34.crs.conformity.pdf>; see also Sherif, *supra* note 28, at 42.

73. See, e.g., Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers’ Responsibility for Clients’ Fraud*, 46 VAND. L. REV. 75, 95-111 (1993).

74. See, e.g., *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1192-93 (2d Cir. 1974) (describing a junior associate who resigned from his job and reported his firm’s misconduct to the Securities and Exchange Commission); Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32, 32 (describing Alberto Mora’s defiance of his superiors in an attempt to stop the torture of detainees at the Guantanamo Bay prison); Douglas McCollam, *The Trials of Jesselyn Radack*, AM. LAW., July 1, 2003, at 19-21 (describing Jesselyn Radack’s defiance of superiors in the Justice Department regarding the Department’s tactics in questioning John Walker Lindh, the so-called American Taliban).

person to learn); (3) the presentation of rules that, on their face, seem benign (e.g., hit the lever when the learner gives a wrong answer); (4) the creation of some kind of verbal or contractual obligation to help (e.g., the experimenter asked participants to agree to follow certain procedures before starting the experiment); (5) the assignment of specific roles (e.g., teacher/learner); (6) the physical separation of the person carrying out the orders and the victim (e.g., the learner being in an adjoining room); (7) the close proximity of the person issuing the orders and the person following them (e.g., the experimenter being in the same room as the subject); (8) the blurring of responsibility or the assignment of responsibility to someone else (e.g., when a subject asked the experimenter who was responsible for the fate of the bound man, the experimenter told the subject that the experimenter, not the subject, was responsible); (9) the incremental nature of the experiment (e.g., starting with only fifteen volts and increasing the shocks by small increments); (10) the social prestige of the setting (e.g., Milgram's initial experiment occurred in a laboratory at Yale University);<sup>75</sup> and (11) the elimination of dissent (e.g., Milgram found that, when the experiment was done in groups, the presence of a dissenter dramatically reduced obedience).<sup>76</sup>

Many of these factors exist in law practice. First, lawyers can usually frame unethical or illegal requests in ways that fit the first and second factors. For example, the partner who requested the withholding of the smoking gun document could articulate a legitimate reason for the request, such as "it's not within the scope of discovery" or "it's arguably privileged," even though neither statement is objectively accurate. The partner could also explain that withholding the document will produce the salutary effect of promoting zealous advocacy and advancing the client's cause. In these ways, the authority figure—in this case, a partner—could give the subordinate a seemingly plausible explanation for refusing to disclose the document and argue that it promotes a positive outcome (factors one and two respectively).

The partner could also frame the instruction as part of litigation's

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75. Obedience levels dropped when Milgram moved the experiment to a rundown office building unaffiliated with Yale. MILGRAM, *supra* note 32, at 66-70 (noting a reduction in obedience from sixty-five percent to forty-eight percent when the study was moved from Yale to a rundown office building that had no apparent ties to the University). Although Milgram's particular results were not statistically significant, subsequent studies reveal that the status of the authority figure is a factor that influences obedience. ZIMBARDO, *supra* note 21, at 275-76.

76. Social psychologists have offered many explanations for Milgram's results, but the explanations described here are some of the most common. See ZIMBARDO, *supra* note 21, at 273-75. For a slightly different list, see Philip G. Zimbardo, *A Situationist Perspective on the Psychology of Evil: Understanding How Good People Are Transformed into Perpetrators*, in THE SOCIAL PSYCHOLOGY OF GOOD AND EVIL 21, 27-28 (Arthur G. Miller ed., 2004).

unwritten “rules of the game” (factor three).<sup>77</sup> In this way, the demand appears entirely benign. Moreover, the consequences may also appear inconsequential. Unlike Milgram’s experiments, where obedience resulted in painful electric shocks to a man with a heart condition, compliance in many (but not all)<sup>78</sup> lawyering contexts produces far less dire consequences. For instance, in the discovery example, the lawyer is “merely” withholding a document as part of the discovery “game” that all lawyers play,<sup>79</sup> not causing somebody physical pain or risking someone’s life. The seemingly benign nature of the request can enhance the subordinate’s willingness to obey.

This factor is likely to have more weight if the subordinate has little litigation experience and does not have the necessary expertise to question the partner’s authority. In contrast, if the subordinate has handled numerous document productions and has a strong experiential basis to know that the partner’s request is impermissible, the subordinate is less likely to give the partner’s demand a benign gloss. Of course, even when it is absolutely clear that the partner’s behavior is unethical or illegal, the subordinate may still comply if some of the other factors favoring obedience are present.<sup>80</sup>

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77. See, e.g., *Wash. State Physicians Ins. Exch. & Assoc. v. Fisons Corp.*, 858 P.2d 1054, 1074-85 (Wash. 1993) (remanding the case for the imposition of sanctions on attorneys who had abused the judicial process by failing to disclose a smoking gun document in discovery); see also Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 718-19, 724 (2005) (concluding from her study of large law firm litigators that they frequently “view zealous advocacy as an affirmative moral obligation” and view the ideal of litigation as “a game well-played”).

78. See, e.g., *Balla v. Gambro*, 584 N.E.2d 104, 107 (Ill. 1991) (describing the firing of an in-house counsel after he warned the company’s president that one of the company’s products could cause “death or serious bodily harm to patients”).

79. Discovery is a “game” in both an academic and layman’s sense. From an academic perspective, discovery has an interesting game theory dimension. For a very nice discussion of game theory’s implications for discovery in the context of a subordinate lawyer, see David McGowan, *Politics, Office Politics, and Legal Ethics: A Case Study in the Strategy of Judgment*, 20 GEO. J. LEGAL ETHICS 1057, 1071-75 (2007). But discovery is also a game in the more ordinary sense of the word. Namely, lawyers frequently think of the process not so much as a method for discovering the truth, but as a game that needs to be won. See generally Robert L. Nelson, Essay, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 794-95 (1998).

80. For a recent real world illustration of this effect, see *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B, 2008 WL 66932, at \*13 n.10 (S.D. Cal. Jan. 7, 2008); see also REGAN, *supra* note 6, at 4-6, 294, 323-24 (emphasizing the role that social context played in a lawyer’s failure to disclose pertinent information); Lawrence J. Fox, *I’m Just an Associate . . . At a New York Firm*, 69 FORDHAM L. REV. 939 (2000) (offering a realistic account of a subordinate who is asked to bury discovery documents); Luban, *supra* note 6, at 95-96 (describing a subordinate’s complicity with a partner’s obvious perjury to a federal judge).

Factors four (an agreement to help the authority figure) and five (the presence of assigned roles) also frequently exist in law practice. The lawyer-client relationship itself is essentially an agreement to help clients achieve their goals (factor four). When combined with the common perception that a lawyer's morality is distinct from individual morality (i.e., role differentiation),<sup>81</sup> lawyers are more apt to view arguably legal conduct as part of their job as an advocate (factor five). Thus, subordinates, such as the associate in the discovery example, will view the authority's instructions as part of the agreement to help the client, with the mindset of role-differentiation only adding to the belief that any moral consequences are not the subordinate's primary concern.<sup>82</sup>

The effect that role has on judgment is nicely illustrated by a study involving 139 auditors at major accounting firms. The auditors were given hypothetical accounting scenarios and asked to assess the accounting in each situation.<sup>83</sup> Roughly half of the accountants were asked to assume that they were retained by the firm that they were auditing, while the rest were supposed to assume that they had been hired by an outside investor who was considering making an investment in the company.<sup>84</sup> On average, the auditors were significantly more likely to find that the company's financial reports complied with generally accepted accounting standards when they played the role of the company's accountant than when they played the role of the investor's accountant.<sup>85</sup> Their assigned roles, in other words, heavily influenced their perspectives.

Another factor that contributes to obedience is that attorney misbehavior will typically affect victims who are more remote in time and place than the victims in Milgram's experiments (factor six). For

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81. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 104-47 (1988) (describing and criticizing this view); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 3-4 (1975) (same).

82. *See generally* ZIMBARDO, *supra* note 21 (describing his well-known Stanford Prison Experiments, in which he demonstrated the substantial impact that social role has on behavior); *see also* Kim, *supra* note 6, at 1012 (making a similar point); David Luban, *Integrity: Its Causes and Cures*, 72 *FORDHAM L. REV.* 279, 292-93 (2003) (reviewing the social psychology literature, including Professor Zimbardo's work, that highlights the extent to which role influences behavior).

83. *Id.* at 1009-10 (citing Don A. Moore et al., *Conflict of Interest and the Unconscious Intrusion of Bias* (Harv. Bus. Sch. Negotiations, Orgs. & Mkts. Unit, Working Paper No. 02-40, 2002)).

84. *Id.* at 1009.

85. *Id.* at 1009-10; *see also* ROSS & NISBETT, *supra* note 3, at 72-75 (describing partisans' inability to view a given situation objectively); Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 *AM. ECON. REV.* 1337, 1339-42 (1995) (finding that lawyers' assessment of the value of a case varies dramatically depending on which side they are assigned to represent); Langevoort, *supra* note 73, at 95-111.

example, the failure to produce a smoking gun document will affect an adverse party, but in a much more indirect way than the application of an electric shock. Similarly, assisting a company's financial fraud (e.g., the Enron scandal) will primarily harm shareholders and lower level employees, people with whom lawyers have little contact.<sup>86</sup> Because a lawyer will perceive these harms to be less immediate and proximate than someone suffering painful electric shocks in an adjoining room, this factor favors obedience in the lawyering context even more strongly than what Milgram found in many of his experiments.

Not only will the victims of legal misconduct be relatively remote, but the person issuing the orders will be nearby. Milgram found that obedience increased when the authority figure and the subordinate were in the same room and decreased when the experimenter issued orders using a tape recorder or from another location.<sup>87</sup> For lawyers, the authority figure who issues the instruction will typically be a colleague or a client with whom the subordinate has a great deal of contact and who may exercise considerable power regarding the subordinate's future at the firm, thus further adding to the likelihood of obedience (factor seven).<sup>88</sup>

Subordinates may also discount their responsibility for their conduct (factor eight) by shifting moral responsibility to the person issuing the orders. Indeed, when Milgram's subjects asked who was responsible for what happened in the laboratory, the experimenter said that he (the experimenter) was ultimately responsible for any harm to the learner.<sup>89</sup> This shifting of responsibility is especially likely in the legal ethics context, where Model Rule 5.2(b) states that "[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."<sup>90</sup> Given the ambiguity of so many legal and ethical duties, subordinates will frequently find that a supervisory lawyer's instructions reflect a "reasonable resolution of an arguable question of professional duty."<sup>91</sup> Thus, subordinate lawyers are likely to believe that responsibility for their actions ultimately lies with superiors.

Another significant factor that contributed to obedience in Milgram's subjects was the incremental nature of the experiment (factor

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86. Kim, *supra* note 6, at 1033 (making this point in the context of securities fraud).

87. MILGRAM, *supra* note 32, at 59-62.

88. Kim, *supra* note 6, at 1003-04, 1011 (making a similar observation).

89. MILGRAM, *supra* note 32, at 7-8.

90. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2007).

91. See Luban, *supra* note 57, at 5 (making a similar point).

nine).<sup>92</sup> Each new shock was only modestly larger than the last, making it difficult for subjects to distinguish morally what they were about to do from what they had already done.<sup>93</sup> This phenomenon of justifying past actions in a way that makes conduct of a similar type in the future seem ethical is known as cognitive dissonance.<sup>94</sup> In Milgram's experiment, it meant that obedience was more likely at higher voltages because subjects had already complied with shocks at lower voltages.<sup>95</sup>

In one of the few articles to describe in detail the implications of Milgram's work for legal ethics, Professor David Luban contends that the incremental nature of the experiment offers the best explanation for the obedience that Milgram observed.<sup>96</sup> Luban explains that "[b]y luring us into higher and higher level shocks, one micro-step at a time, the Milgram experiments gradually and subtly disarm our ability to distinguish right from wrong."<sup>97</sup>

Professor Luban is clearly right that obedience in Milgram's experiments occurred, in part, because the experimenter made seemingly benign initial requests followed by gradually larger requests for punishment.<sup>98</sup> Nevertheless, the incremental nature of the experiment probably did not play the decisive role that Luban suggests. Although each step up on the shock generator was only fifteen volts, subjects did not experience each step in precisely the same way. In fact, some of the shocks were meaningfully different from the shocks that had come before. For example, the learner eventually requested to be let go at 150 volts, making any additional shocks quite different in effect. Indeed, when subjects resisted Milgram's commands, more did so at this point in the experiment than at any other time.<sup>99</sup> Moreover, the learner's complaints about heart pain and his subsequent ominous silence made additional shocks clearly distinguishable from the shocks that the subjects had already administered. Thus, cognitive dissonance and the incremental nature of the experiment were important, but clearly not the only—or even the primary—factors.

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92. MILGRAM, *supra* note 32, at 20-21.

93. *Id.* at 149; *see also* Luban, *supra* note 57, at 8.

94. Luban, *supra* note 57, at 8.

95. MILGRAM, *supra* note 32, at 149.

96. Luban, *supra* note 6, at 103.

97. *Id.* Professor Luban also pointed out how this force can affect law practice, such as in the discovery context. He explained that an initial attempt to avoid producing a document can lead to more and increasingly problematic attempts to resist the production of relevant information, leading ultimately to the type of situation described in the initial hypothetical. *Id.* at 106.

98. MILGRAM, *supra* note 32, at 20-21.

99. *Id.* at 35-37 (noting that in this version of the experiment, five of the fifteen people who disobeyed the experimenter did so at 150 volts, the point at which the "learner" demanded to be let go); *see also* DORIS, *supra* note 7, at 50 (making a similar observation).



In fact, Professor Luban offers an example that illustrates the limited explanatory force of increments. In the famous *Berkey-Kodak* case, an associate failed to report the blatant lying of a respected senior colleague.<sup>100</sup> Luban contends that the associate's obedience reflected the kind of incremental "corruption-of-judgment" that produced obedience in Milgram's experiments.<sup>101</sup> Namely, the associate's loyalty to his lying superior was the "end of a slippery slope, beginning with lawful adversarial deception and culminating with lies, perjury, and wrongful obedience."<sup>102</sup>

The problem is that, even if a contentious discovery process had preceded the lying, there is quite a leap from engaging in contentious discovery to helping a partner lie to a federal judge. The *Berkey-Kodak* case, according to Professor Luban's own account, involves a large jump on the legal ethics equivalent of the shock generator from a small shock to a potentially lethal one. Such a jump is not consistent with Luban's contention that subordinates follow orders as a result of a gradual corruption of judgment. Of course, increments play a role in excessive obedience, but such obedience can readily occur in cases like *Berkey-Kodak* without increments, assuming other forces are present.<sup>103</sup>

Social prestige (factor ten) is another of those forces.<sup>104</sup> Many law firms, especially larger firms, are held in high esteem among lawyers. These firms are thus likely to produce the same social forces that Yale University produced in Milgram's subjects.<sup>105</sup> Moreover, smaller firms

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100. Luban, *supra* note 57, at 4.

101. *Id.* at 9.

102. *Id.*

103. Professor Luban also argues that "[t]he Achilles' heel of situationism is explaining why anyone deviates from the majority behavior." Luban, *supra* note 6, at 101; Luban, *supra* note 82, at 295-96 (making a similar point). In fact, this Achilles' heel can only be found on a straw man version of situationism. Situationists do not claim that context fully explains all human behavior or that everyone will act the same way in the same situation. DORIS, *supra* note 7, at 25 (asserting that neither he nor any situationist he knows of maintains that "correlations between measurable dimensions of situations and single behaviors typically approach 1.0"); *id.* at 46 (acknowledging that dispositional differences provide a partial explanation for why some people did not comply with the experimenter's commands in Milgram's experiments). Rather, situationists make more modest claims, such as that dispositional traits are far less important than most people realize and that context is a much more significant determinant of human behavior than people typically believe. *Id.* at 24-25.

104. MILGRAM, *supra* note 32, at 66-70 (noting a reduction in obedience from sixty-five percent to forty-eight percent when the study was moved from Yale to a rundown office building that had no apparent ties to the University). *But see supra* note 75.

105. MILGRAM, *supra* note 32, at 66-70.

can also produce the same effect, especially if the superior is an experienced and respected partner.<sup>106</sup>

Finally, the partner in the example is the only person to offer an opinion, so the subordinate has not heard any dissent regarding the partner's interpretation. The absence of dissent (factor eleven) is yet another force that favors obedience.<sup>107</sup>

In addition to the factors that contributed to obedience in Milgram's experiment, there is one factor that favors obedience in the lawyer situation that did not exist for Milgram: professional and financial self-interest.<sup>108</sup> In Milgram's experiments, subjects were told that they could keep the modest amount of money that they had been given, even if they refused to continue with the experiment.<sup>109</sup> Moreover, their professional fortunes were in no way affected by whether they complied. In contrast, a subordinate lawyer has a lot to lose by refusing to obey: a job. The subordinate's concern for her job, particularly a junior lawyer who may have had few other professional opportunities, is likely to be substantial. Thus, this factor also weighs heavily in favor of compliance and suggests that lawyers might be even more likely to comply than the subjects of Milgram's experiments.

There is, however, one factor that weighs against the hypothetical lawyer's compliance: obedience could lead to monetary sanctions or disbarment. If the lawyer believes that she faces a real chance of discipline, she arguably would be more likely to resist the partner's demands. The powerful concern for professional survival might trump the other social forces that favor obedience and conformity and make compliance *less* likely than in Milgram's experiments, where subjects had no equivalent incentive to dissent.

There are three problems with this view. First, it assumes that the subordinate will recognize that the partner's demands implicate her ethical duties. The reality is that, given the forces at work, she may

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106. Luban himself offers a nice description of this phenomenon in the context of the *Berkey-Kodak* case, see Luban, *supra* note 6, at 95-96, though he does not ultimately identify it as a force that could impact the associate's behavior independently of his corruption of judgment theory.

107. See, e.g., Kim, *supra* note 6, at 1021 (making this point in the in-house counsel context); see also ROSS & NISBETT, *supra* note 3, at 41 (explaining why people who witness, or find themselves in, a potentially dangerous situation will fail to act if other people also fail to do so). There are, of course, many other forces that contribute to obedience that were not part of Milgram's experiment. For example, a superior can increase obedience by demeaning the intended victim. MILGRAM, *supra* note 32, at 9. Thus, the common tendency among lawyers to demonize an opponent or the opponent's lawyers makes it more likely that a subordinate will carry out an unethical command that adversely affects that opponent.

108. Kim, *supra* note 6, at 1027 (describing this self-serving bias).

109. See MILGRAM, *supra* note 32, at 14-15 (showing the newspaper announcement that was used to recruit subjects).

easily begin to question her initial opinion and view the partner's opinion as, at the very least, justifiable.<sup>110</sup> This tendency to interpret the situation so that it does not implicate one's ethical or moral responsibility is sometimes called ethical fading.<sup>111</sup> Specifically, the actor reinterprets the situation in such a way that the ethical nature of the situation fades from view. If the subordinate does not even identify the ethics issue, the concern for professional survival cannot override the social forces favoring conformity and obedience.

Second, even if the subordinate recognizes the ethical dilemma, she is not likely to be terribly concerned about discipline. Rule 5.2 only imposes discipline if the superior's instructions were clearly unethical. So unless the instruction is blatantly impermissible, the subordinate is not likely to fear any disciplinary consequences.

Third, even if the instruction *is* blatantly unethical or illegal, a lawyer may still not fear discipline, at least in the discovery context. Bar discipline for this sort of misconduct occurs rarely, and sanctions are usually far below what would be necessary to discourage this sort of behavior.<sup>112</sup>

The case of *Washington State Physician Insurance Exchange & Associates v. Fisons Corp.* is illustrative.<sup>113</sup> The original plaintiff in that case was a child who had suffered seizures and permanent brain damage after taking medicine that Fisons manufactured.<sup>114</sup> The plaintiff's discovery requests called for all documents related to a particular ingredient in the medicine and any information that Fisons had about that ingredient's dangerousness in children.<sup>115</sup> Despite these requests, the defense lawyers relied on a contorted and frivolous rationale for not turning over documents that proved that Fisons knew about the

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110. Luban, *supra* note 6, at 95-96 (describing this phenomenon in the context of the *Berkey-Kodak* case).

111. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 224-25 (2004); *see also* Kim, *supra* note 6, at 1026-29 (citing additional studies that have reached a similar conclusion); Luban, *supra* note 82, at 280 (observing that "hundreds of experiments reveal that when our conduct clashes with our prior beliefs . . . our beliefs swing into conformity with our conduct, without our ever noticing").

112. *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 572-73 (2000) (noting the general reluctance of courts to refer discovery violations to disciplinary authorities); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 90 (1995) (citing COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 36 (1991)). It is too early to tell whether the recent sanctions for discovery abuses in the recent high profile case of *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B, 2008 WL 66932, at \*13 n.10 (S.D. Cal. Jan. 7, 2008), will have any impact on lawyers' behavior.

113. 858 P.2d 1054 (Wash. 1993).

114. *Id.* at 1058.

115. *Id.* at 1080-83.

ingredient's toxicity in children.<sup>116</sup>

After an anonymous copy of the smoking gun emerged, the trial court considered and rejected any sanctions against the company or its lawyers.<sup>117</sup> The trial court relied heavily on the notion that "the conduct of the drug company and its counsel was consistent with the customary and accepted litigation practices of the bar of [the county] and of [Washington] state."<sup>118</sup> The Washington Supreme Court reversed that determination,<sup>119</sup> but the ultimate sanction for the lawyers was an out-of-court settlement of a mere \$325,000,<sup>120</sup> a small fraction of the fees that the firm had generated from the case. Put simply, the defense lawyers received a slap on the wrist for a rather blatant discovery violation that was similar to the one in the initial hypothetical.

Finally, the risks of sanctions and discipline are no higher (and may be lower) than the risks associated with making the report. Many lawyers in this circumstance would be concerned not only about losing their current jobs, but about whether a report of this sort might make it difficult to get jobs in the future once they were labeled as whistleblowers.

To summarize, the hypothetical associate faces considerable pressures to conform and obey and few risks from compliance and obedience. Even if the misconduct is uncovered, a risk that may be rather small, she is unlikely to face any punishment that will adversely affect her career. The ultimate and disturbing result is that she is prone to obey the partner who has issued the unethical and illegal command.

#### IV. IMPLICATIONS FOR THE LAW OF LAWYERING

The challenge for legal ethicists is to counter the social forces that contribute to excessive conformity and obedience. In one of the few efforts to address that challenge, Professor Luban has suggested that, by educating lawyers about their own tendencies to obey authorities, they might be better able to resist an order to commit illegal or unethical conduct.<sup>121</sup> Unfortunately, there is little evidence that this so-called

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116. *Id.* at 1079-84.

117. *Id.* at 1074-75.

118. *Id.* at 1078.

119. *Id.* at 1085.

120. Stuart Taylor, Jr., *Sleazy in Seattle*, AM. LAW., Apr. 1994, at 5, 5.

121. Luban, *supra* note 6, at 116 ("Perhaps the best protection [for lawyers against the forces described in Milgram's experiments] is understanding the . . . insidious way [those forces] work on us."); *see also* Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 47 (1992) (suggesting that exposure to Milgram's work might help law students avoid unethical behavior).

“enlightenment effect” holds much promise, at least in this particular context.<sup>122</sup>

There are some steps, however, that might make a difference in some cases. Rather than offering an exhaustive list of potential remedies, the following proposals are illustrations of how social psychology could play a more active role in debates about professional regulation.<sup>123</sup>

#### A. Providing Whistleblower Protections for Attorneys

Currently, some states do not offer whistleblower protections for lawyers.<sup>124</sup> In those jurisdictions, lawyers who are fired after disclosing illegal conduct have no legal recourse against their employers. This lack of whistleblower protection is unwise, given that it reinforces the already strong social forces that weigh against defiance in such circumstances.<sup>125</sup>

The problem is amply illustrated by the well-known Illinois case, *Balla v. Gambro, Inc.*,<sup>126</sup> in which Gambro’s general counsel, Mr. Balla, learned that his company was selling dialyzers for dialysis machines that were not within federal specifications and that could cause potentially serious medical complications.<sup>127</sup> After Balla unsuccessfully urged Gambro not to put the dialyzers on the market, Gambro fired Balla.<sup>128</sup> Balla subsequently revealed the defects to the Federal Food and Drug Administration and sued for retaliatory discharge under the state’s whistleblower statute.<sup>129</sup>

The Illinois Supreme Court rejected Balla’s claim, explaining that whistleblower statutes exist to protect employees who might otherwise

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122. Thomas Blass, *The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority*, in *OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM* 35, 50-53 (Thomas Blass ed., 2000) (drawing on several studies and concluding that “[b]eing enlightened about the unexpected power of authority may help a person stay away from an authority-dominated situation, but once he or she is *already* in such a situation, knowledge of the drastic degree of obedience authorities are capable of eliciting does not necessarily help free the individual from the grip of the forces operating in that concrete situation”). Despite this lack of evidence, I share Professor Luban’s intuition that enlightening lawyers about this tendency is worthwhile. I show my students a video of the Milgram experiments on the last day of class in the hope that it might make some difference at some point in their professional lives.

123. For an excellent analysis of social psychology’s implications for the regulation of lawyers who represent publicly traded companies, see Kim, *supra* note 6, at 1034-75.

124. See, e.g., *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 107 (Ill. 1991).

125. Kim, *supra* note 6, at 1042-44, 1064-71 (arguing that securities lawyers should receive whistleblower protection under the Sarbanes-Oxley Act for reasons similar to those described here); Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 *BRANDEIS L.J.* 199, 257 (2007) (arguing in favor of whistleblower protection for lawyers).

126. *Balla*, 584 N.E.2d at 104.

127. *Id.* at 106.

128. *Id.*

129. *Id.*

be reluctant to report corporate malfeasance.<sup>130</sup> The court's primary rationale was that, since lawyers in Illinois already had an ethical obligation to report misconduct like the selling of the defective dialyzers, Mr. Balla did not need whistleblower protection.<sup>131</sup>

On its face, the Illinois Supreme Court's logic is sound. If the whistleblower statute is unclear regarding its application to lawyers and if the purpose of the statute would not be furthered by applying it to attorneys, Balla should not receive protection.

The problem is that the court's opinion rested on a flawed assumption about human behavior. Social psychology suggests that lawyers in Balla's situation would find it difficult to disclose information of the sort described in the opinion, especially without whistleblower protection. First, lawyers like Balla are unlikely to put much stock in the ethical obligation that the court referenced. The rule is ambiguous, and the various forces described earlier can lead a lawyer to interpret the rule as not requiring disclosure. Moreover, there are very few instances where lawyers have been disciplined for failing to disclose information under similar circumstances. Thus, any fear of discipline would be overshadowed by what the lawyer had to lose (i.e., a job) by reporting the misconduct and by other situational forces, such as Balla's distance from the prospective victims, his proximity to his bosses, the hierarchical structure of a corporation, and the presumptive absence of dissent.

Balla's refusal to comply given these variables was notable (and one of the reasons the case is so widely reported), but there is no reason to think that his response was typical. Given similar circumstances, lawyers will face considerable pressure to conceal a client's harmful conduct and to develop legal justifications for that concealment. The reality, in other words, is that lawyers—like most people—face significant social pressures that make it difficult to resist a client's insistence on harmful and potentially illicit courses of conduct, even if a duty to report exists. Justice Freeman, in his dissent, stated this point convincingly:

[T]o say that the categorical nature of ethical obligations is sufficient to ensure that the ethical obligations will be satisfied simply ignores reality. Specifically, it ignores that, as unfortunate for society as it may be, attorneys are no less human than nonattorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed

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130. *Id.* at 108.

131. *Id.* at 108-09.

and support their families.

I would like to believe, as my colleagues apparently conclude, that attorneys will always “do the right thing” because the law says that they must. However, my knowledge of human nature, which is not much greater than the average layman’s, and, sadly, the recent scandals involving the bench and bar of Illinois are more than sufficient to dispel such a belief. Just as the ethical obligations of the lawyers and judges involved in those scandals were inadequate to ensure that they would not break the law, I am afraid that the lawyer’s ethical obligation to “blow the whistle” is likewise an inadequate safeguard for the public policy of protecting lives and property of Illinois citizens.

As reluctant as I am to concede it, the fact is that this court must take whatever steps it can, within the bounds of the law, to give lawyers incentives to abide by their ethical obligations, beyond the satisfaction inherent in their doing so. We cannot continue to delude ourselves and the people of the State of Illinois that attorneys’ ethical duties, alone, are always sufficient to guarantee that lawyers will “do the right thing.” In the context of this case, where doing “the right thing” will often result in termination by an employer bent on doing the “wrong thing,” I believe that the incentive needed is recognition of a cause of action for retaliatory discharge, in the appropriate case.<sup>132</sup>

Justice Freeman got it exactly right. The court should have acknowledged how human beings are likely to behave, discounted the ethical obligation to disclose, and affirmed the value of whistleblower protection. Of course, the existence of whistleblower protection will not ensure that all lawyers reveal information about a client’s illicit actions, but such protection could make a difference in some cases by weakening the significant psychological forces that weigh against such disclosures.

### *B. Enforcing the Duty to Report Misconduct*

Most states impose on attorneys a duty to report another lawyer’s misconduct if the misconduct implicates the lawyer’s trustworthiness, honesty, or fitness to practice law.<sup>133</sup>

The problem with the rule is that most lawyers, especially subordinates, are not eager to report the misconduct of other attorneys. For instance, the associate in the discovery example may find it difficult to report the partner, even if she were convinced that the partner had engaged in an intentional and egregious discovery violation that

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132. *Id.* at 113 (Freeman, J., dissenting).

133. MODEL RULES OF PROF’L CONDUCT R. 8.3(a) (2007).

reflected on the partner's trustworthiness or honesty.<sup>134</sup> As Part III explained, the subordinate is likely to feel considerable pressure to obey the authority figure and to be complicit in the authority's misconduct. It would take an unusual subordinate to not only resist that temptation, but to take the next step of reporting the superior to the bar.<sup>135</sup>

Part of the problem is that Rule 8.3, like the disclosure duty in Illinois, is rarely enforced. The vast majority of states do not have a single reported case where a lawyer was disciplined under this rule.<sup>136</sup> As a result, lawyers are willing to run the very negligible risk of discipline in order to avoid having to report another attorney to the bar.

One potential solution is to increase enforcement of the rule so that lawyers perceive a greater threat to their own professional well-being if they fail to report the misconduct of other attorneys under Model Rule 8.3. Indeed, Illinois's experience with this rule suggests that modest increases in enforcement can have a discernable effect on reporting. After the Illinois Supreme Court issued an opinion that disciplined a lawyer under Rule 8.3,<sup>137</sup> Illinois's bar disciplinary authorities observed a substantial increase in Rule 8.3 reports.<sup>138</sup>

The increase in Illinois implies that the fear of discipline can prompt lawyers to report misconduct that they otherwise would have swept under the rug.<sup>139</sup> Thus, increased enforcement of Rule 8.3 can also help to weaken the social forces that would ordinarily encourage lawyers, especially subordinate lawyers, to ignore perceived misconduct.

### C. *Strengthening the Responsibilities of Subordinate Lawyers*

Another Model Rule that impacts the conduct of subordinate lawyers is, unsurprisingly, the rule written specifically for subordinate lawyers—Rule 5.2. That rule states that “[a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in

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134. See, e.g., Luban, *supra* note 6, at 95 (describing an associate's failure to report a partner's obvious perjury in a well-known case).

135. See *Meyerhofer v. Empire Fire & Marine Ins. Co.*, 497 F.2d 1190, 1192-93 (2d Cir. 1974) (describing the actions of a junior associate who resigned from his firm and reported the firm's misconduct to the Securities and Exchange Commission).

136. See Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971, 999 & n.134 (2002) (noting the lack of enforcement of this rule).

137. *In re Himmel*, 533 N.E.2d 790, 794-95 (Ill. 1988).

138. Leonard E. Gross, *Legal Ethics for the Future: Time to Clean Up Our Act?*, 77 ILL. B.J. 196, 198 n.26 (1988).

139. Mary T. Robinson, *A Lawyer's Duty to Report Another Lawyer's Misconduct: The Illinois Experience*, 2007 Symp. Issue PROF. LAW. 47, 49-50 (observing an increase in reporting after *Himmel*); Patricia A. Sallen, *Combating Himmel Angst*, 2007 Symp. Issue PROF. LAW. 47, 49-50 (describing a similar phenomenon in Arizona).



accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."<sup>140</sup> The rule essentially permits a lawyer to carry out a superior's orders as long as those orders constitute a reasonable interpretation of the relevant ethical obligation.

On its face, the rule makes sense. After all, why should a lawyer face discipline for following the arguably ethical and legal orders of a superior?

But as with the *Balla* decision, the rule rests on a questionable assumption about human behavior. By allowing a lawyer to avoid responsibility for "reasonable resolutions of an arguable question of professional duty," the rule opens the door to interpreting a wide range of instructions as "arguably" ethical. For example, the subordinate in the discovery example is likely to understand her ethical obligations through the distorted prism of what the partner wants, leading her to construe the discovery issue as "arguable" and the partner's resolution of it as "reasonable." This tendency, referred to earlier as ethical fading,<sup>141</sup> suggests that the typical subordinate attorney will conclude that Rule 5.2 applies and that she can carry out the partner's commands without fear of professional discipline.<sup>142</sup>

One possible solution is to repeal Rule 5.2(b) to make it clear that subordinates have an independent duty to assess whether a particular course of action is ethical and legal.<sup>143</sup> Of course, the "just following orders" defense could still be raised as a mitigating factor when determining the appropriate punishment.<sup>144</sup> But it should not allow a lawyer to avoid discipline entirely. Indeed, such a defense is generally rejected in most other contexts.<sup>145</sup> Moreover, by putting subordinates on notice that they have an independent duty to question a superior's orders, subordinates would be less likely to assume that a superior's actions are permissible and more likely to offer resistance to unethical or illegal commands.<sup>146</sup>

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140. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2007).

141. See *supra* note 111 and accompanying text.

142. See Luban, *supra* note 57, at 5 (making a similar point).

143. See Carol M. Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887, 931-34 (1997) (making a similar proposal). But see Richmond, *supra* note 125, at 213 (endorsing Rule 5.2(b)).

144. See Rice, *supra* note 143, at 889 n.5, 912-14; see also Richmond, *supra* note 125, at 212.

145. See Rice, *supra* note 143, at 904-14.

146. Of course, this approach cannot counter the ethical fading phenomenon. A lawyer will only consider reporting another lawyer if she recognizes the ethical issue.

## V. CONCLUSION

More than forty years of research into social psychology has revealed that, under certain conditions, we will conform to group opinions and obey authorities who issue illegal instructions. If a majority of people are willing to apply dangerous electric shocks to a bound older man with a heart condition just because someone with a lab coat says so, there is every reason to believe that lawyers will frequently obey their superiors when instructed to perform unethical or illegal tasks.

By drawing on a tiny fraction of social psychology research, this Article suggests some steps that the profession can take to weaken the social forces that produce excessive obedience and conformity. These suggestions, however, have important limitations, such as the problem of ethical fading.<sup>147</sup> Nevertheless, they hint at a much broader project, one that draws on the very rich literature in social psychology to address various causes of attorney misconduct.

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147. *See supra* note 111 and accompanying text.