

Introduction

How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice, no one knows; but all fair persons not conventionalized by provincial legal habits of mind ought, I should think, unite to effect some such advance.

—*Judge Learned Hand*¹

Most lawyers would benefit greatly from knowing more about psychology, that is, the science of how people think, feel, and behave.² After all, the typical lawyer spends much of his time interacting with people: clients, other lawyers, staff, witnesses, mediators, arbitrators, insurers, experts, judges, and jurors.

Lawyers who can harness the insights of psychology will be more effective interviewers and counselors, engage in more successful negotiations, conduct more efficient and useful discovery, more effectively persuade judges and others through their written words, better identify and avoid ethical problems, and even be more productive and happier.

Lawyers, however, typically thrive or falter in navigating the psychological aspects of their work using either skills they possessed before law school or skills they acquire on the job. Law school courses do not usually focus on the part of the job that involves understanding human psychology. And while many lawyers pick up some psychology through on-the-job experience and intuitively understand its value, one thing that psychology teaches us is that we tend to overestimate our ability to learn from experience.⁴ Thus, even the best lawyers

“ [W]hat we learn from experience is that men never learn from experience. —*George Bernard Shaw*³ ”

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We all believe that we are capable of seeing what's in front of us, of accurately remembering important events from our past, of understanding the limits of our knowledge, of properly determining cause and effect. But these intuitive beliefs are often mistaken ones that mask critically important limitations on our cognitive abilities.

—*Christopher Chabris & Daniel Simons*⁶

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tend to have little systematic grounding in much of the psychological research that could be useful to their work.

Instead of relying on a nuanced understanding of scientific psychology, lawyers, like most people, typically rely on intuition and lay theories of psychology. While some of these lay theories work reasonably well much of the time, we will see that they can also lead lawyers astray.⁵ Just as our visual capacities often serve us quite well but fail us when we fall prey to optical illusions, so, too, may our psychological intuitions let us down. Indeed, much of what we will discuss in this book will not be obvious—even to an experienced legal practitioner. And some of the ideas we present will even be counterintuitive.

Given the central importance of human psychology to the practice of law, we believe that all lawyers can benefit from a more complete scientific understanding of human thinking and interaction and from detailed

discussion of how to apply those insights in practice. We focus in particular on empirical research, drawn primarily from social and cognitive psychology, that has explored how people think, feel, and behave.

◆ ◆ ◆ ◆ ◆ Psychological Science Versus Trial and Error

How do lawyers come to believe that certain techniques are successful and others are not? How does the acquisition of practice knowledge among lawyers compare with the acquisition of knowledge in comparable fields? How do lawyers come to know—or to think they know—what works and what does not in the practice of law? The two basic sources are advice from others and personal experience based on (forgive the expression) trial and error. If we ask how those from whom the advice is received know, we realize that the first of those categories is nothing more than the second one in disguise. Trial and error is not without value. But it progresses at a glacial pace and sometimes can be deceptive.⁷

In contrast to intuition and trial and error, psychological science capitalizes on the systematic study of human behavior, that is, using empirical methods to test hypotheses about the effects of particular practices and to compare one strategy or technique to another.

The first part of the book offers a crash course in those aspects of psychology that we think will be the most useful to practicing attorneys. Thus, we begin in chapter 1 by examining how attention and construal influence our perceptions of the world. Chapter 2 considers the science of memory. Chapter 3 examines a number of ways in which emotions influence thinking and behavior. Chapters 4 and 5 explore the psychology of judgment and decision making, examining the ways in which cognitive heuristics, or rules of thumb, influence judgment and the ways in which people grapple with and make decisions. Chapter 6 studies the psychology of how people persuade and influence each other. Chapter 7 reviews the complexities of verbal and nonverbal communication—including lying—and offers a range of strategies for facilitating good communication. Finally, in chapter 8, we consider research on the psychology of justice.

Throughout this discussion we recognize that each of us exists within one or more cultural environments that provide us with a set of lenses through which we see the world. These lenses do not dictate or inevitably determine our behavior: there is much overlap in perspective across cultures, much variation within cultures, and many differences in the extent to which individuals identify with a particular culture. But culture does shape our perceptions and intuitive responses, our values and beliefs, our assumptions, our memories, and our typical behaviors and practices.⁹ Accordingly, throughout the book we describe the ways in which culture moderates the psychological phenomena we describe, noting the extent to which the ways of thinking we describe are or are not common to people from different cultural backgrounds.

Of course, we cannot hope to cover all aspects of psychology or even all the nuances of the areas that we do review. Rather than attempt comprehensive coverage of the vast field of psychology, we instead concentrate on those aspects of the research that we think will be the most helpful to the everyday practice of law. In addition, we focus less on the psychology of special populations (such as children or people with mental illnesses) in favor of a closer examination of the findings from psychological research about how ordinary adults think, decide, and behave.¹⁰

The second part of the book applies the insights of the research to tasks that lawyers face on a regular basis. Specifically, we look at how psychology can help lawyers do a better job of interviewing (chapter 9) and counseling their clients (chapter 10). Next, we examine how knowledge of psychology can help lawyers be more effective as negotiators and in mediation (chapter 11); conduct better written and oral discovery and due diligence (chapter 12); and write more effective letters, briefs, and transactional documents (chapter 13). In chapter 14, we examine the insights of psychological research for understanding and preventing ethical lapses. Finally, in chapter 15, we consider the implications of psychology for lawyers' productivity and

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The real purpose of [the] scientific method is to make sure Nature hasn't misled you into thinking you know something that you actually don't.

—Robert Pirsig⁸

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personal well-being. In making these applications, we recognize that psychology is not the only consideration in every dilemma and that different aspects of psychology will occasionally lead in multiple directions. Nonetheless, we believe that practitioners can draw a great deal of practical guidance from psychology as they carry out the full range of lawyering tasks.

We focus here on the myriad tasks on which lawyers spend most of their time: interviewing and counseling, negotiating, conducting discovery, and writing. The possibility of trial or other adjudicative action lies in the background of much of this work. In that sense, much of what we discuss here is directly relevant to trial practice. Nonetheless, we do not explicitly cover the vast quantities of psychological research on trials and jury decision making both because so few cases actually go to trial and because many books and articles already examine the psychology of how juries make decisions and use psychology to guide lawyers on how to conduct themselves at trial.¹¹

A Note on Audience

The primary goal of this book is to expose lawyers and law students to how some of the key insights offered by the field of psychology can improve the practice of law. We expect lawyers will see many ways to apply psychology to help them understand others with whom they work.

We also hope that attorneys and students who read this book will gain insights about themselves. Interestingly, gaining insights about oneself may prove more challenging than gaining insights about others. Introspection can only take us so far in understanding ourselves, our perceptions and judgments, our motives, and our behavior and can lead to predictable misapprehensions. Indeed, the *introspection illusion* refers to a tendency to place undue confidence in the value of introspection for gaining insight into ourselves. In addition, psychological research has found that it is typically easier to recognize some of the psychological phenomena described here in others than in ourselves—evidence of a *bias blind spot*.¹² We tend to think that we are more logical and objective (see chapter 1), less self-interested (see chapter 1), less influenced by intuition (see chapters 4 and 5), less persuadable (see chapter 6), better able to read other's emotions and to communicate (or mask) our own emotions (see chapter 3), and more ethical (see chapter 14) than are others. Thus, we encourage readers to give particular attention to the ways in which the phenomena we explore describe their own psychology.

We also hope that the work reviewed here will be of interest to psychological researchers. Indeed, we hope to inspire psychological researchers to more carefully study the myriad interactions and decisions that take place in the course of legal representation. We have grounded our discussion in a relatively robust set of empirical findings. Where there are studies expressly examining the relevant phenomena in



What Makes a Good Lawyer?

Law professor Marjorie Schultz and psychologist Sheldon Zedek conducted extensive empirical research designed to identify the skills possessed by effective lawyers. It is striking to note the extent to which psychological research can inform each of the skills identified.

Intellect and Cognition

Analysis and Reasoning • Creativity/Innovation • Problem Solving • Practical Judgment

Research and Information Gathering

Researching the Law • Fact Finding • Questioning and Interviewing

Communications

Influencing and Advocating • Writing • Speaking • Listening

Planning and Organizing

Strategic Planning • Organizing and Managing Own Work • Organizing and Managing Others (Staff/Colleagues)

Conflict Resolution

Negotiation Skills • Ability to See the World Through the Eyes of Others

Client and Business Relations: Entrepreneurship

Networking and Business Development • Providing Advice and Counsel and Building Relationships with Clients

Working with Others

Developing Relationships Within the Legal Profession • Evaluation, Development, and Mentoring

Character

Passion and Engagement • Diligence • Integrity/Honesty • Stress Management • Community Involvement and Service • Self-Development¹³

legal settings, we have drawn on such studies directly. In other instances, we describe research that has been conducted in other settings and how it might apply to the practice of law. We hope that our discussion will stimulate researchers in psychology and law to examine these areas in greater depth, exploring the nuances and boundaries of how these phenomena operate in the rich setting of legal practice.



It has been said that “neither LAW NOR HUMAN NATURE is an exact science,”¹⁴ and surely many lawyers would agree. Nonetheless, the science of psychology has much to contribute to the art of legal practice and to the craft of working with clients, opposing counsel, staff, witnesses, mediators, judges, and others. While we cannot provide an exact recipe for success, we hope that by highlighting the importance

of psychological science and some of the critical insights offered by that field, we provide some useful tools for improving the ways in which lawyers are able to successfully represent their clients.

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