

# Psychology and Effective Lawyering: Insights for Legal Educators

Jean R. Sternlight and Jennifer K. Robbennolt

Lawyers spend substantial amounts of time and energy working with people. These people include clients, adversaries, judges, witnesses, government bureaucrats, business partners, or colleagues.<sup>1</sup> Thus, it is no surprise that effective lawyers are not only skilled intellects, but also excel at questioning and interviewing, communicating and persuading, planning and managing, resolving conflict, entrepreneurship, working with others, and making ethical decisions.<sup>2</sup> And it is not surprising that legal employers and clients desire lawyers who can communicate well, are able to collaborate effectively, are motivated and hard-working, can work independently but know when to ask for guidance, and are able to effectively plan projects.<sup>3</sup> Recent law graduates

**Jean R. Sternlight** is Saltman Professor of Law and Director Saltman Center for Conflict Resolution, U. Nevada, Las Vegas. We received very helpful feedback on an earlier draft from Linda Edwards, Lynne Henderson, Randy Kiser, Kate Kruse, Bob Lawless, Ann McGinley, Thom Main, and Jeff Stempel. We are also grateful for the research assistance provided by UNLV law librarian Jennifer Gross, and by UNLV law students Andrew Dunning and Sarah Mead.

**Jennifer K. Robbennolt** is Professor of Law and Psychology, University of Illinois College of Law.

1. For one study of how lawyers spend their time, see David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91-102 (1983) (detailing that litigators spend most of their time on client conferences, discovery, factual investigation, settlement discussions and pleadings); see also Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROB. 5, 8 (1995) (urging that counseling “lies at the heart of the professional relationship between lawyer and client”).
2. MARJORIE M. SCHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING 24-27 (2008); see also Erwin N. Griswold, *Law Schools and Human Relations*, 73 CHI. B. REC. 199, 201 (1956); DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW* (2014).
3. Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client’s Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 101 (2001); Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311 (1981); Susan C. Wawrosc, *What Do Legal Employers Want to See in New Graduates?: Using Focus Groups to Find Out*, 39 OHIO N.U. L. REV. 505 (2013). It is telling that the most common disciplinary complaints made against attorneys involve neglect and lack of communication. See Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253, 259-60 (2012).

recognize that they would benefit from more and better education in the interpersonal and decision-making skills needed for effective lawyering.<sup>4</sup>

Psychology—the science of how people think, feel and behave<sup>5</sup>—has a great deal to teach about a range of core competencies related to working with people and making good decisions. For example, psychologists have conducted extensive research into perception, memory, communication, individual and group decision-making, conflict, goal setting and planning, self-assessment, motivation, “grit,” and many other matters that are central to effective lawyering. This research has much to contribute to an understanding of the work of lawyers and can be effectively incorporated into how we teach law students to practice law.<sup>6</sup>

Despite the importance of the interpersonal aspects of lawyering and the utility of psychology for mastering this aspect of the profession, law school curricula include relatively little psychology. Legal academia has slowly started to take account of the fact that new lawyers need to be skilled in dealing with people in addition to being skilled legal analysts.<sup>7</sup> There is now more clinical education than there was in the past, and greater emphasis on

4. HON. RANDALL T. SHEPARD ET AL., REPORT AND RECOMMENDATIONS AMERICAN BAR ASSOCIATION TASK FORCE ON THE FUTURE OF LEGAL EDUCATION 26 (January 2014) [hereinafter ABA TASK FORCE REPORT], available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf).
5. Psychology has recently been identified as a “hub science.” Kevin W. Boyack et al., *Mapping the Backbone of Science*, 64 SCIENTOMETRICS 351, 368 (2005).
6. See generally JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION-MAKING (2012). Understanding psychology is very important to informing the tasks lawyers have historically done, but also to tasks central to a broadened view of lawyering that includes problem solving, decision-making, group dynamics, and dispute systems design. See Carrie Menkel Meadow, *Crisis in Legal Education or the Other Things Law Students Should be Learning and Doing*, 45 McGEORGE L. REV. 133, 155 (2013).
7. For a century, evaluators have urged law schools to focus more on a variety of skills in addition to legal analysis. See, e.g., ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 284-87 (1921); JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS (1914); *Training for the Public Professions of the Law*, 1971 Ass’n A. L. Schs. Ann. Meeting Section II, reprinted in HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION app. at 111-12, 130-31 (1972); *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. Sec. Legal Educ. & Admissions to the Bar, discussed in ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 240 (1983); *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. Sec. Legal Educ. & Admissions to the Bar (the MacCrate Report); WILLIAM M. SULLIVAN, ET AL, SUMMARY OF THE FINDINGS AND RECOMMENDATIONS, IN EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7 (2006) [hereinafter CARNEGIE REPORT], available at [http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers\\_summary.pdf](http://www.carnegiefoundation.org/files/elibrary/EducatingLawyers_summary.pdf).

legal writing and other skills.<sup>8</sup> Yet, even recent calls for adding more practical skills training to law schools do not particularly emphasize that lawyers need good interpersonal and decision-making skills, nor does legal education fully recognize the substantial contributions that knowledge of psychology can make to the practice of law.<sup>9</sup> By contrast, U.S. medical schools have historically placed more focus than law schools on clinical education, and recently have begun to emphasize the importance of some aspects of psychology.<sup>10</sup>

Given the typical focus of the law school curriculum, many lawyers must learn the people side of law practice on the job. For some aspects of practice, on-the-job learning is surely inevitable. But, learning from experience has its limits. As George Bernard Shaw purportedly noted: “[W]hat we learn from experience is that [we] never learn from experience.”<sup>11</sup> While Shaw’s assertion may be too extreme, psychologists *have* found a human tendency to overestimate our ability to learn from experience.<sup>12</sup> Thus, it is important to provide students with grounding in the science of human behavior—a grounding that will prepare them for the interpersonal aspects of practice and will inform and shape what they learn from their experiences. As Robert Pirsig put it in *Zen and the Art of Motorcycle Maintenance*, “The real purpose of [the] scientific method is to make sure Nature hasn’t misled you into thinking you know something that you don’t actually know.”<sup>13</sup> Harnessing the science of psychology can attune

8. See CARNEGIE REPORT, *supra* note 7, at 7. See also AM BAR ASS’N, A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010 (Catherine L. Carpenter ed., 2012); Barbara Glesner Fines, *Out of the Shadows: What Legal Research Instruction Reveals About Incorporating Skills Throughout the Curriculum*, 2013 J. DISP. RESOL. 159, 174 (2013).
9. *E.g.*, CARNEGIE REPORT, *supra* note 7; ABA TASK FORCE REPORT, *supra* note 4.
10. See Randall Kiser, *The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior*, forthcoming 15 NEV. L.J. (2015) (on file with authors) (arguing that “the medical profession is years ahead of the legal profession in recognizing the importance of emotional intelligence and incorporating psychology into its student admissions process and professional curriculum.”); see also Anemona Hartocollis, *In Medical School Shift, Meeting Patients on Day 1*, N. Y. TIMES, Sept. 3, 2010, at A15 (discussing curricular revisions at Harvard and N.Y.U.); William T. Branch et al., *A Good Clinician and a Caring Person: Longitudinal Faculty Development and the Enhancement of the Human Dimensions of Care*, 84 ACAD. MED. 117-25 (2009) (presenting data about how to train teachers to better model the required competencies of professionalism, compassionate care, and humanistic values). But even medical schools may have a long way to go in effectively cultivating people skills. *Cf.* Pauline W. Chen, *The Hidden Curriculum of Medical School*, N. Y. TIMES, Jan. 30, 2009 (discussing many doctors’ perception that bedside manner cannot be taught); Edward C. Halperin, *Abraham Flexner and the Evolution of the Modern Medical School*, 45 MED. EDUC. 10, 11 (2011) (discussing lack of integration between the science and clinical years of medical education).
11. DAVID DUNNING, SELF-INSIGHT: ROADBLOCKS AND DETOURS ON THE PATH TO KNOWING THYSELF 64 (2005). See also THOMAS GILOVICH, HOW WE KNOW WHAT ISN’T SO (1993) (detailing many ways in which it is difficult to accurately discern patterns (or lack of patterns) in the information we encounter).
12. See, *e.g.*, ROBYN DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 100-20 (1988); ROBBENNOLT & STERNLIGHT, *supra* note 6, at 1-2.
13. ROBERT PIRSIG, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE 94 (1974).

lawyers to insights that are difficult to discover organically and help lawyers avoid drawing mistaken insights from their experiences in practice.

### I. Why Teach Psychology to Law Students?

Psychology has much to contribute to a wide-range of lawyering tasks—particularly aspects of practice that have grown in importance in an era in which trials are rare.<sup>14</sup> As we have urged in our recent book, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision-making*,<sup>15</sup> lawyers who are knowledgeable about cognitive and social psychology can be more effective at such tasks as interviewing clients and witnesses, counseling clients, negotiating and mediating, conducting discovery and due diligence, writing, behaving ethically, being productive and successful, and being happy. Psychologically savvy attorneys can perform their jobs more effectively because they better understand how people—themselves and those with whom they work—think, feel, and make decisions. Below we highlight some of the most important insights attorneys can draw from this body of psychology.

*Perception and construal.* Many people believe that human perception operates much like a video-recorder or computer, such that the environment is accurately and completely observed and recorded.<sup>16</sup> And it is true that our perceptual capacities are quite impressive, allowing us to quickly absorb a great deal of information. But that sensory experience tends to be so rich that we mistakenly believe that we take in all or at least most of what we encounter.<sup>17</sup> Instead, our capacity to perceive everything is limited in ways that can cause us to miss many important details, even for important events such as assaults in progress.<sup>18</sup> And while we also do amazingly well at assembling the information that we do take in, our interpretations are inevitably influenced by stereotypes, schemas, preexisting attitudes, and our own perspective, expectations,

14. See generally Marc Galanter *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459 (2004).
15. ROBBENOLT & STERNLIGHT, *supra* note 6. See also Jennifer Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013); Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008).
16. See Daniel J. Simons & Christopher F. Chabris, *What People Believe about How Memory Works: A Representative Survey of the U.S. Population*, 6 PLOS ONE 1 (2011). While we often think of video recordings as infallible, even videotape can be inaccurate or misleading. See NEIL FEIGENSON, *LAW ON DISPLAY: THE DIGITAL TRANSFORMATION OF LEGAL PERSUASION AND JUDGMENT* (2009).
17. CHRISTOPHER CHABRIS & DAN SIMONS, *THE INVISIBLE GORILLA: AND OTHER WAYS OUR INTUITIONS DECEIVE US* 7 (2010).
18. Christopher F. Chabris et al., *You Do Not Talk About Fight Club if You Do Not Notice Fight Club: Inattentional Blindness for a Simulated Real-World Assault*, 21 PERCEPTION 150 (2011).

and preferences.<sup>19</sup> But, it is difficult to appreciate the extent to which one's perceptions and construal are so influenced.<sup>20</sup>

The nuances of perception and construal have important implications for how clients, witnesses, and attorneys understand and report their experiences. Thus, it is critical for attorneys to recognize that a client or witness's prior conceptions may have led them to misconstrue a situation, that a witness who claims not to have seen something that seems like it would have been obvious may be telling the truth, or that the attorney's own psychology may have led the attorney to make assumptions about clients or to miss or discount key documents produced in discovery.

*Memory.* As with perception, people tend to believe that memory works like a video recorder that faithfully records events for later accurate replay.<sup>21</sup> We do remember lots of information. But we also forget much, we are suggestible, and our memories can be colored by our experiences, our moods, hindsight, and the desire to view ourselves in favorable terms.<sup>22</sup> Attorneys who are not knowledgeable about the workings of memory run the risk of expecting too much of the memories of clients, witnesses, and themselves and risk tainting memories with inartful questions. But attorneys who understand the nuances of memory are better equipped to develop strategies for eliciting more—and more accurate—information from clients and witnesses.<sup>23</sup>

*Emotion.* Although law students sometimes believe (or are taught) that they should strip emotion from their assessment of legal problems,<sup>24</sup> it is impossible, and often even counterproductive, to try and ignore emotion.<sup>25</sup> Instead, recognizing and understanding how emotions work can help attorneys predict, manage, and even use their own, their clients', their adversaries', or others'

19. See, e.g., Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357 (Daniel T. Gilbert et al. eds., 4th ed. 1998); RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980).

20. See, e.g., Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636 (Thomas Gilovich et al. eds., 2002).

21. Simons & Chabris, *supra* note 16.

22. See, e.g., DANIEL L. SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS (2001).

23. ROBBENOLT & STERNLIGHT, *supra* note 6, at 39-42.

24. The attempt to strip emotion out of the practice of law might be attributed at least in part to the legacy of Christopher Columbus Langdell, who stated: “[L]aw is a science . . . all the available materials of that science are contained in printed books. . . .” JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 185 (1950) (quoting C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871)).

25. See Kiser, *supra* note 10 (discussing the balance successful attorneys must achieve to ensure that emotions do not “poison the objective analysis of facts and the uniform application of rules” while also using emotions to effectively communicate, counsel, negotiate, and advocate on behalf of one's clients).

emotions.<sup>26</sup> For example, understanding and paying attention to emotions can provide a source of information about a client's or a negotiation counterpart's priorities, displaying emotions can be useful in signaling one's own priorities or limits, and matching tasks to mood can improve performance.<sup>27</sup>

*Judgment and Decision-making.* When making judgments and decisions we use numerous shortcuts, or heuristics. The use of shortcuts is often an efficient route to reasonably accurate judgments, but can also produce systematic errors in judgment.<sup>28</sup> Attorneys can make better predictions and more effectively advise clients if they know, for example, how positive illusions,<sup>29</sup> anchoring,<sup>30</sup> the representativeness heuristic,<sup>31</sup> hindsight bias,<sup>32</sup> the framing of options,<sup>33</sup> irrelevant information,<sup>34</sup> and the structure of decision-making processes<sup>35</sup>

26. See, e.g., DAVID R. CARUSO & PETER SALOVEY, *THE EMOTIONALLY INTELLIGENT MANAGER* (2004).
27. See Robbenolt & Sternlight, *supra* note 6, at 61-66.
28. See generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).
29. Positive illusions can cause attorneys to be overly optimistic about their clients' likelihood of success. See, e.g., Jane Goodman-Delahunty et al., *Insightful or Wishful: Lawyers' Ability to Predict Case Outcomes*, 16 PSYCHOL. PUB. POL'Y & L. 133 (2010).
30. Anchoring is the tendency to be unduly affected in a decision by irrelevant numbers. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 3, 14 (Daniel Kahneman et al. eds., 1982). Irrelevant anchors have been shown to affect judges, see Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 813-14 (2001).
31. The representativeness heuristic is a tendency for people "to base their likelihood estimates and causal attributions on the degree to which an event or object is representative of (or resembles) a particular category." ROBBENOLT & STERNLIGHT, *supra* note 6, at 73. See, e.g., Thomas Gilovich & Kenneth Savitsky, *Like Goes with Like: The Role of Representativeness in Erroneous and Pseudo-Scientific Beliefs*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 617 (Thomas Gilovich et al. eds., 2002).
32. Hindsight bias is akin to what most of us call "Monday morning quarterbacking." It is "the tendency to unconsciously overestimate the likelihood that we would have assigned to an outcome once that outcome has actually occurred." ROBBENOLT & STERNLIGHT, *supra* note 6, at 75-76. See also Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes are Known*, 107 PSYCHOL. BULL. 311 (1990).
33. The framing literature reveals that "people's evaluations of options are influenced not only by the substance of those options but also by the way those options are presented." ROBBENOLT & STERNLIGHT, *supra* note 6, at 88. See also Daniel Kahneman & Amos Tversky, *Choices, Values, & Frames*, 39 AM. PSYCHOL. 341, 343-44 (1984).
34. See, e.g., Anthony Bastardi & Eldar Shafir, *On the Pursuit and Misuse of Useless Information*, 75 J. PERSONALITY & SOC. PSYCHOL. 19, 28 (1998).
35. For example, decisions are impacted by the other options that are presented, by prior decisions, and by who proposes a particular option. See, e.g., Christopher J. Anderson, *The Psychology of Doing Nothing: Forms of Decision Avoidance Result From Reason and Emotion*, 129 PSYCHOL. REV. 139, 146 (2003); Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003); Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, 27 ADV. EXPERIMENTAL SOC. PSYCHOL. 255 (1995). Decisions are impacted by whether options

influence judgments and decisions made by attorneys, clients, neutrals and others.

*Persuasion and Communication.* Whether working with clients, colleagues, adversaries, arbitrators, judges, or government officials, attorneys need to be adept at communicating with and convincing others.<sup>36</sup> Understanding why and how to demonstrate expertise and trustworthiness,<sup>37</sup> use concrete examples,<sup>38</sup> and present two-sided messages can increase persuasiveness,<sup>39</sup> as can understanding principles of reciprocity,<sup>40</sup> scarcity,<sup>41</sup> consistency and commitment,<sup>42</sup> liking,<sup>43</sup> and social norms.<sup>44</sup> With respect to communication, knowledge of psychology can help attorneys be better listeners,<sup>45</sup> more effectively build rapport,<sup>46</sup> manage communication difficulties,<sup>47</sup> more successfully elicit disclosure from clients and witnesses,<sup>48</sup> more effectively deal

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are to be selected or rejected, deadlines, and whether they can be justified. *See, e.g.*, Dan Ariely & Klaus Westenbroch, *Procrastination, Deadlines, and Performance: Self-Control by Precommitment*, 13 *PSYCHOL. SCI.* 219 (2002); Robyn LeBoeuf & Eldar Shafir, *Decision-making in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING* (Keith J. Holyoak & Robert G. Morrison eds., 2005).

36. *See* ROBBENOLT & STERNLIGHT, *supra* note 6, at 115-69.
37. *See id.* at 118-20.
38. *See, e.g.*, Mark Sadoski et al., *Engaging Texts: Effects of Concreteness on Comprehensibility, Interest, and Recall in Four Text Types*, 92 *J. EDUC. PSYCHOL.* 85, 86 (2000).
39. Two-sided arguments are those that acknowledge and then refute an opposing position. *See, e.g.*, Ayn E. Crowley & Wayne D. Hoyer, *An Integrative Framework for Understanding Two-Sided Persuasion*, 20 *J. CONSUMER RES.* 561, 561-62 (1994).
40. *See, e.g.*, ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 19 (5th ed. 2009).
41. *See, e.g., id.* at 199-200.
42. *See, e.g., id.* at 52.
43. *See id.* at 142-44.
44. *See, e.g., id.*; Bibb Latané & John M. Darley, *Group Inhibition of Bystander Intervention in Emergencies*, 10 *J. PERSONALITY & SOC. PSYCHOL.* 215, 216 (1968).
45. *See, e.g.*, Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 *LAW & PSYCHOL. REV.* 97 (2002).
46. *See, e.g.*, Janice Nadler, *Rapport in Negotiation and Conflict Resolution*, 87 *MARQ. L. REV.* 875 (2004); Linda Tickle-Degnen & Robert Rosenthal, *The Nature of Rapport and Its Nonverbal Correlates*, 1 *PSYCHOL. INQUIRY* 285, 286 (1990).
47. *See, e.g.*, Boaz Keysar et al., *Taking Perspective in Conversation: The Role of Mutual Knowledge in Comprehension*, 11 *PSYCHOL. SCI.* 32 (2000); Raymond S. Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One's Own Knowledge to Others*, 125 *PSYCHOL. BULL.* 737 (1999).
48. *See* ROBBENOLT & STERNLIGHT, *supra* note 6, at 165-66.

with the possibility that others may lie,<sup>49</sup> and provide more influential advice.<sup>50</sup> These abilities can serve attorneys well in virtually all aspects of their work. And, importantly, lawyers who communicate with their clients more effectively are less apt to be charged with ethical infractions.<sup>51</sup>

*Justice.* The psychology of justice teaches that clients and opponents care about far more than the monetary bottom line or staying out of jail.<sup>52</sup> Clients or opponents may measure monetary outcomes in light of their assessments of equality, equity, or need.<sup>53</sup> They may be satisfied with a particular substantive result, or not, depending on whether they think others similarly situated have done much better or much worse.<sup>54</sup> They care tremendously about *procedural* justice—desiring voice, dignity, respect, and the opportunity to tell their story to someone they perceive as neutral.<sup>55</sup> And, they may focus on retribution<sup>56</sup> or restoring damaged relationships or property.<sup>57</sup> Understanding how people value and respond to different aspects of justice can help attorneys tap into client concerns in interviews, better respond to those concerns as counselors, frame attractive proposals in negotiation, and more persuasively craft arguments as advocates.

*Behavioral Ethics.* Attorneys' ability to act ethically can be enhanced by understanding that we are each far more vulnerable to ethical missteps than we may realize.<sup>58</sup> Ethical rules are breached not only by "bad apples," but also by ordinary people who have ethical blind spots, allow ethical lines to blur, and take small steps down slippery slopes.<sup>59</sup> Various aspects of legal practice—

49. See, e.g., Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214 (2006); Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCHOL. BULL. 74 (2003).
50. See ROBBENOLT & STERNLIGHT, *supra* note 6, at 166-68.
51. See Brown & Wolf, *supra* note 3.
52. ROBBENOLT & STERNLIGHT, *supra* note 6, at 171-84.
53. See, e.g., Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will be Used as the Basis of Distributive Justice?*, 31 J. SOC. ISSUES 137 (1975).
54. See, e.g., Max H. Bazerman et al., *Perceptions of Fairness in Interpersonal and Individual Choice Situations*, 4 CURRENT DIRECTIONS PSYCHOL. SCI. 39 (1995).
55. E. ALAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988). See also Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637 (2014).
56. See, e.g., Mario Gollwitzer & Markus Denzler, *What Makes Revenge Sweet: Seeing the Offender Suffer or Delivering a Message?*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 840 (2009).
57. See, e.g., Tyler G. Okimoto et al., *Beyond Retribution: Conceptualizing Restorative Justice and Exploring Its Determinants*, 22 SOC. JUST. RES. 156 (2009); Michael Wenzel et al., *Retributive and Restorative Justice*, 32 LAW & HUM. BEHAV. 375 (2008).
58. See Robbenolt & Sternlight, *Behavioral Legal Ethics*, *supra* note 15. See generally MAX H. BAZERMAN & ANN E. TENBRUNSEL, *BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT* (2011).
59. See, e.g., Dolly Chugh et al., *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of*



including the vagaries of the ethical rules and standards, lawyers' role as agents for their clients, the adversarial system, the pressures of law practice, the group psychology of communities of practice, and variations in lawyers' power and status—can interact with this psychology to complicate the ethical landscape for lawyers.<sup>60</sup> Vowing to be ethical is not sufficient protection against ethical lapses, and indeed those who pride themselves on their ethics can sometimes be particularly vulnerable.<sup>61</sup> But both firms and individuals can use knowledge of behavioral ethics to take concrete steps to prevent ethical infractions.<sup>62</sup>

*Productivity, Success, and Satisfaction.* The psychology literature teaches about how best to avoid procrastination,<sup>63</sup> the limitations of multitasking,<sup>64</sup> the importance of “grit” and perseverance,<sup>65</sup> the value of seeking (and being) a mentor,<sup>66</sup> how best to collaborate,<sup>67</sup> how to deal with pressure,<sup>68</sup> and how to learn from mistakes.<sup>69</sup> Psychological studies also provide many insights

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*Interest, in CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY* 74, 74-95 (Don A. Moore et al. eds., 2005); Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 *SOC. JUST. RES.* 223 (2004).

60. Robbennolt & Sternlight, *Behavioral Legal Ethics*, *supra* note 15, at 1124-56.
61. See, e.g., Jennifer Jordan et al., *Striving for the Moral Self: The Effects of Recalling Past Moral Actions on Future Moral Behavior*, 37 *PERSONALITY & SOC. PSYCHOL. BULL.* 701, 702 (2011); Sonya Sachdeva et al., *Sinning Saints and Saintly Sinners: The Paradox of Moral Self-Regulation*, 20 *PSYCHOL. SCI.* 523, 524 (2009).
62. These steps include being aware of our vulnerabilities, making ethics more salient, developing a more critical stance, planning ahead, and putting in place organizational structures to help attorneys avoid ethical missteps. Robbennolt & Sternlight, *Behavioral Legal Ethics*, *supra* note 15, at 1156-81.
63. See, e.g., Piers Steel, *The Nature of Procrastination: A Meta-Analytic and Theoretical Review of Quintessential Self-Regulatory Failure*, 133 *PSYCHOL. BULL.* 65, 82 (2007).
64. See, e.g., Catherine M. Arrington & Gordon D. Logan, *The Cost of a Voluntary Task Switch*, 15 *PSYCHOL. SCI.* 610 (2004); Sophie Leroy, *Why Is It So Hard To Do My Work? The Challenge of Attention Residue When Switching Between Work Tasks*, 109 *ORG. BEHAV. & HUM. DECISION PROCESSES* 168 (2009).
65. Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 *J. PERSONALITY & SOC. PSYCHOL.* 1087, 1088 (2007).
66. See, e.g., Fiona M. Kay & Jean E. Wallace, *Mentors as Social Capital: Gender, Mentors, and Career Rewards in Law Practice*, 79 *SOC. INQUIRY* 418 (2009).
67. See, e.g., Steve W. J. Kozlowski & Daniel R. Ilgen, *Enhancing the Effectiveness of Work Groups and Teams*, 7 *PSYCHOL. SCI. IN THE PUB. INTEREST* 77 (2006); Charles R. Evans & Kenneth L. Dion, *Group Cohesion and Performance: A Meta-Analysis*, 22 *SMALL GROUP RES.* 175 (1991).
68. See, e.g., SIAN BEILLOCK, CHOKO: WHAT THE SECRETS OF THE BRAIN REVEAL ABOUT GETTING IT RIGHT WHEN YOU HAVE TO 6 (2010).
69. See generally CAROL DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2006); ROBBENNOLT & STERNLIGHT, *supra* note 6, at 425-28 (emphasizing the importance of a growth mindset).

regarding how to choose a job that will help one be happy and how to craft a given job to lead to greater satisfaction and fulfillment.<sup>70</sup>

Although some of the psychological findings in each of these areas may be intuitive to those who have good instincts and good people skills, others are counterintuitive. For example, we have seen that many people have unrealistic expectations of perception and memory.<sup>71</sup> In addition, many incorrectly assume that those who express the greatest confidence in their memories are more accurate,<sup>72</sup> that “venting” one’s anger is an effective means of discharging that emotion,<sup>73</sup> that lack of eye contact is a good predictor of lying,<sup>74</sup> that gathering more information always leads to better decisions,<sup>75</sup> that knowing oneself is the best way to predict one’s own future emotions,<sup>76</sup> and that money will make them happy.<sup>77</sup> But research has established that each of these notions is erroneous. Confidence is only weakly related to accuracy.<sup>78</sup> Venting can heighten and prolong feelings of anger.<sup>79</sup> Lack of eye contact is not correlated with lying.<sup>80</sup> People have a tendency to seek out even irrelevant information, and that information can distort decisions.<sup>81</sup> Research shows we can often

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70. See, e.g., Justin M. Berg et al., *Perceiving and Responding to Challenges in Job Crafting at Different Ranks: When Proactivity Requires Adaptivity*, 31 J. ORG. BEHAV. 158 (2010); see also NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* (2010).

71. See *supra* text accompanying notes 16-23.

72. See generally Elizabeth R. Tenney et al., *The Benefits of Knowing What You Know (and What You Don’t): How Calibration Affects Credibility*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1368 (2008) (exploring the limits of the influence of confidence).

73. See, e.g., Brad J. Bushman, *Does Venting Anger Feed or Extinguish the Flame? Catharsis, Rumination, Distraction, Anger, and Aggressive Responding*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 724 (2002).

74. See, e.g., Leif A. Strömwall et al., *Practitioners’ Beliefs about Deception*, in *THE DETECTION OF DECEPTION IN FORENSIC CONTEXTS* 229 (Pär Anders Granhag & Leif A. Strömwall eds., 2004); DePaulo et al., *supra* note 49.

75. Bastardi & Shafir, *supra* note 34.

76. See, e.g., Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADV. EXPERIMENTAL SOC. PSYCHOL. 345 (2003).

77. See, e.g., Becky Beaupre Gillespie & Hollee Schwartz Temple, *Hunting Happy: In Grim Times, a Search for Joy Gains Ground*, ABA J., Feb. 2011, at 41 (quoting Nancy Levit: “It is the most pernicious myth about lawyers: If you earn a high income, you will be happy.”).

78. See, e.g., Steven Penrod & Brian Cutler, *Witness Confidence & Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL., PUB. POL’Y, & L. 817 (1995); Siegfried Ludwig Sporer et al., *Choosing, Confidence, and Accuracy: A Meta-Analysis of the Confidence-Accuracy Relation in Eyewitness Identification Studies*, 118 PSYCHOL. BULL. 315, 315 (1995).

79. See, e.g., Bushman *supra* note 73; Keith G. Allred et al., *The Influence of Anger and Compassion on Negotiation Performance*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 175 (1997).

80. See, e.g., DePaulo et al., *supra* note 49.

81. See, e.g., Bastardi & Shafir, *supra* note 34, at 28; Donald A. Redelmeier et al., *The Beguiling Pursuit of More Information*, 21 MED. DECISION-MAKING 374 (2001).

be more accurate using *others'* reported feelings and reactions, rather than introspection, to predict how we will feel in future circumstances.<sup>82</sup> And the relationship between money and happiness is weaker and more complicated than is commonly thought.<sup>83</sup> Thus, even the most experienced practitioner has a lot to gain by learning more about the nuances of psychology.

## II. How to Teach Psychology to Law Students

While it might be desirable for all future lawyers to engage in a substantial course of psychological study, we know that this is unrealistic. Lawyers would benefit from greater familiarity with a variety of interdisciplinary topics, but time in law school is limited.<sup>84</sup> Nor are we suggesting that lawyers need to be trained as psychological researchers or prepared to offer therapy to their clients or others. Lawyers perform—and should perform—a different role. Rather than learning psychology as future researchers or therapists, law students need to learn aspects of psychology that will help them function more effectively as attorneys.

### A. A Stand-Alone Course in Lawyering and Psychology

Exposing students to the science of psychology through a course that is explicitly focused on psychology and lawyering is a powerful way to give students the opportunity to think about how psychology can help them be better lawyers. We have each taught such courses to upper level law students, and Professor Sternlight will soon teach the course as a first-year elective. These semester-long three credit courses have included aspects of both a seminar and a skills course. Students were assigned our book, *Psychology for Lawyers*, and the courses followed the organization of that book.<sup>85</sup> Accordingly, students first studied a range of findings from psychology that are relevant to lawyering, next applied that psychology to specific lawyering tasks, and finally presented papers applying psychological concepts to lawyering. Some

82. See, e.g., Daniel T. Gilbert et al, *The Surprising Power of Neighborly Advice*, 32 SCIENCE 1617 (2009).
83. See, e.g., Elizabeth W. Dunn, et al., *If Money Doesn't Make You Happy Then You Probably Aren't Spending It Right*, 21 J. CONSUMER PSYCHOL. 115 (2011); Jordi Quoidbach et al., *Money Giveth, Money Taketh Away: The Dual Effect of Wealth on Happiness*, 21 PSYCHOL. SCI. 759 (2010). It can also be difficult for attorneys to believe that fair procedures can matter just as much or more than the magnitude of monetary or other substantive outcomes. See, e.g., Tom R. Tyler, *Procedural Justice*, in JURY PSYCHOLOGY: SOCIAL ASPECTS OF TRIAL PROCESSES 25, 29 (Joel D. Lieberman & Daniel A. Krauss eds., 2009).
84. While we urge the importance of teaching psychology to law students, other tools are very important as well. For example, lawyers who understand empirical methodologies will be more persuasive advocates, better able to communicate with experts, and better policy analysts. Empirical training can also help lawyers to assess the quality of psychological studies as well as research from other fields. See generally ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW (2010).
85. ROBBENOLT & STERNLIGHT, *supra* note 6.

students wrote research papers,<sup>86</sup> others wrote “practical application” papers requiring them to interview practicing attorneys and determine whether or how psychological principles might be useful to particular aspects of their practice,<sup>87</sup> and still others wrote grant proposals that required them to think about new or additional research that would be beneficial to attorneys in practice.<sup>88</sup> In both courses, students were evaluated based on their paper and presentation and their overall participation in the class. Professor Sternlight also evaluated students’ preparation of a journal analyzing the readings and reflecting on class discussion. Professor Robbennolt gave periodic in-class quizzes.

Given our emphasis on drawing from the lessons of psychology, it is perhaps not surprising that we also draw on the lessons of psychology in thinking about how best to teach this material. Educational psychology reveals that most

86. Students who wrote research papers were expected to become familiar with an aspect of the psychology literature and apply it to a particular lawyering issue. Topics students have addressed include how to effectively interview child witnesses or victims, how to use emotion to gain a strategic edge in negotiations, how to use psychology to become a better rainmaker, how attorneys can use psychology to be more effective practitioners in tribal courts, how courtroom interpreters influence decision-making, how prosecutors can use psychology to evaluate the reliability of witness statements, the implications of consumer psychology for trademark lawyers, the implications of group psychology for employment discrimination claims, how to recognize and handle grief in lawyering contexts, how the psychology of decision-making might be used to address problem drinking among law students and lawyers, how psychology sheds light on differences between adversarial and inquisitorial systems, how law schools can draw on psychology to graduate attorneys who are more satisfied in practice, and how mediators can work with and use disputants’ emotions.
87. Professor Sternlight has used this “practical application paper” as an alternative to the research paper. She required students to interview at least two attorneys or legal professionals and to assess whether and how a particular subset of the material covered in the course might be helpful to attorneys in practice. These papers also gave the students a chance to gauge attorneys’ reactions to the psychology material. Students addressed such topics as how public defenders might use psychology to develop better rapport with their juvenile clients, how prosecutors might learn psychological lessons that would help them behave more ethically, and how government attorneys could draw on insights regarding judgment shortcuts when dealing with pro se individuals.
88. Professor Robbennolt has allowed students to write grant proposals as an alternative to the research paper. Students were required to review existing psychological research, situate that research in the context of legal practice, design one or more studies to explore a specific research question or questions, and make a persuasive argument that such research would benefit practitioners. This approach gave students the opportunity to consider the limits of existing research and new areas of application. For example, one student proposed a set of studies to explore how jurors evaluate hearsay evidence and how the findings of such studies would be useful for lawyers in setting trial strategies and in thinking about how to structure the rules of evidence.

people do not learn best by reading a text or listening to a lecture, even if the text or lecture is brilliant. Instead, it is important to use multiple modalities or channels to help maximize student understanding. Here the lesson is not (as is often asserted) that people have different learning styles (for example, visual, auditory, or kinesthetic), but rather that we all benefit from having material presented in a variety of ways.<sup>89</sup> We are fortunate that a great deal of terrific material relating to lawyering and psychology is available on-line in videos and other formats that our students find particularly appealing.<sup>90</sup>

Research from a variety of fields shows that students particularly benefit from “active” learning that engages them in the provision of information;<sup>91</sup> approaches such as small group activities that can help activate prior knowledge;<sup>92</sup> teaching methods that situate lessons in contexts similar to those the students are likely to encounter, so that applications will be more apparent;<sup>93</sup> techniques that stimulate students’ inherent interests in learning and becoming better attorneys rather than trying to motivate them through grades;<sup>94</sup> collaborative activities that boost student self-efficacy and retention;<sup>95</sup> and meta-cognitive or self-explanatory work that requires students to think,

89. See, e.g., Harold Pashler et al., *Learning Styles: Concepts and Evidence*, 9 PSYCHOL. SCI. PUB. INT. 105 (2008) (debunking common assertion that certain persons learn best from one approach, whereas others learn best from another); RICHARD E. MAYER, *APPLYING THE SCIENCE OF LEARNING* (2010). See generally Hillary Burgess, *Deepening the Discourse Using the Legal Mind’s Eye: Lessons from Neuroscience and Psychology that Optimize Law School Learning*, 29 QUINNIPIAC L. REV. 1 (2011).
90. For example, National Geographic has produced a series of excellent videos on topics including memory and perception in a series called Brain Games. <http://braingames.nationalgeographic.com/episode/o>. Using YouTube, one can find many other gems such as talks given by Nobel Laureate Daniel Kahneman. *Ethics Unwrapped* at the University of Texas McCombs School of Business offers a series of videos focused on the psychology of ethics. <http://ethicsunwrapped.utexas.edu/videos>.
91. E.g., Michael Prince, *Does Active Learning Work? A Review of the Research*, 93 J. ENGR. EDUC. 223 (2004).
92. E.g., Claire Onyon, *Problem-Based Learning: A Review of the Education and Psychology Literature*, 9 THE CLINICAL TEACHER 22, 23 (2012); Henk G. Schmidt et al., *Explanatory Models in the Processing of Science Text: The Role of Prior Knowledge Activation Through Small Group Discussion*, 81 J. EDUC. PSYCH. 610, 610-19 (1989).
93. E.g., JEAN LAVE & ETIENNE WENGER, *SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION* (1991); Onyon, *supra* note 92, at 23.
94. E.g., John Biggs, *TEACHING FOR QUALITY LEARNING AT UNIVERSITY* (2d ed. 2003); Onyon, *supra* note 92, at 24; Geoffrey R. Norman & Henk G. Schmidt, *The Psychological Basis of Problem-based Learning: A Review of the Evidence*, 67 ACAD. MED. 557 (1992).
95. E.g., Zhining Qin, et al., *Cooperative versus Competitive Efforts and Problem Solving*, 65 REV. EDUC. RES. 129 (1995).

write, and talk about the concepts they are learning and the processes of learning themselves.<sup>96</sup>

Law school professors have devised a number of ways to involve students in more active and cooperative activities that encourage students to explain and reiterate the lessons they have learned.<sup>97</sup> Popular approaches include simulations or role plays,<sup>98</sup> small group exercises,<sup>99</sup> student presentations,<sup>100</sup> and journals.<sup>101</sup> In our courses on psychology and lawyering, we have drawn on many of these techniques, involving students actively in learning about psychology and allowing them to experience psychological phenomena for themselves in order to gain a better understanding of how psychology impacts lawyering. It is particularly important to help students learn about psychology first hand given what is known as the *bias blind spot*—the difficulty that people have in recognizing the influences on their own perceptions, judgments, and decisions.<sup>102</sup>

In her first class, Professor Robbenolt asks students to respond to a series of hypothetical situations—each exploring a psychological phenomenon. For example, students are asked questions that are likely to demonstrate the effects of availability, anchoring, representativeness, self-serving bias, the options

96. See generally HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 12 (exp. ed. 2000) (emphasizing the value of metacognitive approaches that focus on sensemaking, self-assessment and reflection in helping students transfer learning to new settings and events); see also Jennifer McCabe, *Metacognitive Awareness of Learning Strategies in Undergraduates*, 39 MEMORY & COGNITION 462 (2011); Paul R. Pintrich, *The Role of Metacognitive Knowledge in Learning, Teaching, and Assessing*, 41 THEORY INTO PRACTICE, 219-25 (2002); see also *Characteristics of Adult Learners*, ROCHESTER INST. OF TECH., <http://www.rit.edu/academicaffairs/tls/characteristics-adult-learners> (discussing special characteristics of adult learners).
97. See generally MICHAEL HUNTER SCHWARTZ ET AL., WHAT THE BEST LAW TEACHERS DO 177-259 (2013). We note that while a number of law professors have adopted and written about various creative teaching approaches, empirical examination of the success of such approaches has been uneven.
98. See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 179-88 (2007); Jay M. Feinman, *Simulations, An Introduction*, 45 J. LEGAL EDUC. 469, 469-71 (1995); Gerald R. Williams, *Using Simulation Exercises for Negotiation and Other Dispute Resolution Courses*, 34 J. LEGAL EDUC. 307, 307 (1984). For a discussion of how to design simulations that engage students more fully see Jean Poitras, Arnaud Stimec & Kevin Hill, *On Teaching: Fostering Student Engagement in Negotiation Role Plays*, 29 NEGOT. J. 439 (2013).
99. See TEACHING THE LAW SCHOOL CURRICULUM (Steven Friedland & Gerald F. Hess eds., 2004) (discussing the use of group exercises as well as other approaches).
100. See *id.*
101. See, e.g., Giada Di Stefano et al., *Learning by Thinking: How Reflection Aids Performance*, Working Paper 14-103, March 25, 2014, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2414478](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414478). See also Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33 (2006) (proposing a range of activities).
102. See, e.g., DUNNING, *supra* note 11; Emily Pronin, *The Introspection Illusion*, 41 ADV. EXPERIMENTAL SOC. PSYCHOL. 1 (2009).

under consideration, cognitive reflection, and hindsight bias. The class revisits the questions, together with their responses, as they study the relevant topics throughout the semester. Students quickly learn that they, and not just others, are affected by the psychological phenomena under discussion—often in ways that are surprising to them. They are also able to use their experience as participants to better understand the strengths and limitations of experimental simulations. Similarly, Professor Sternlight has used an in-class encounter with her secretary in her first class to help students see that their perception and memories are not as good as they might think. In the staged encounter, the secretary—wearing some distinctive clothing—entered the class to deliver an unusual object to Sternlight. At the end of the class the students were asked to fill out a survey describing the incident and the clothing. Their answers demonstrated the difficulties inherent in perception and memory, the common variability in witness accounts, and the influence of stereotypes.<sup>103</sup> Later in the semester, when discussing the psychology of decision-making, both instructors actively involve students in exploring the psychology of their own decision-making by inviting the students to consider the decision-making process they used to decide whether to go to law school and which law school to attend. Because these decisions are ones that the students have in common, the decisions are still salient to the students, and students' decision-making processes vary, discussions of their decisions are fruitful and interesting.

Both courses use role plays and actively involve students in commenting on videos of attorneys engaged in lawyering activities. Thus, students might conduct role plays on subjects including interviewing, counseling, negotiation, or discovery and then analyze those activities using the psychology they have learned. Similarly, students watch attorneys conduct interviews<sup>104</sup> or depositions<sup>105</sup> and then discuss how knowledge of psychology might help attorneys improve their effectiveness in these tasks. Our courses also emphasize the importance of self-directed learning, cooperative activities, and self-reflection. Students write individual papers, engage in numerous small

103. For example, one student described the secretary, who is Latina, as wearing a sombrero, when in actuality she wore a backwards baseball cap.

104. One good source of interview and counseling videos is the series produced in connection with the American Bar Association Client Counseling Competition. *Competition DVDs*, AMERICAN BAR ASS'N, [http://www.americanbar.org/groups/law\\_students/events\\_competitions/practical\\_skills\\_competitions/dvds.html](http://www.americanbar.org/groups/law_students/events_competitions/practical_skills_competitions/dvds.html) (last visited Mar. 30, 2014). While the interviews are conducted by students rather than attorneys, they are nonetheless quite helpful because the videos show three teams of students interviewing and counseling the same client and often achieving quite different results as a result of their different approaches.

105. Some favorite deposition clips include an infamous meltdown by renowned Texas attorney Joe Jamail, see "Old Lawyer Fight," <http://www.youtube.com/watch?v=td-KKmcYtrM> (Apr. 27, 2006), and excerpts of depositions taken of casino mogul Sheldon Adelson. See, e.g., *Sheldon Adelson 2006 Lawsuit Deposition*, LAS VEGAS SUN, <http://www.lasvegassun.com/videos/2011/sep/22/5722>.

group discussions,<sup>106</sup> participate in group presentations,<sup>107</sup> and write journals reflecting on their experiences and the reading. Some students have similarly made their own videos or written their own role plays.

We believe that our courses in lawyering and psychology have been successful, and are confident that our students have learned a great deal.<sup>108</sup> At the same time, we are still learning how best to present this material. It is challenging to teach the relevant psychology and even more challenging to teach students how to apply it to lawyering contexts.

### *B. Integrating Psychology and Lawyering into Existing Courses*

In addition to teaching courses focused specifically on lawyering and psychology, it is also possible and desirable for law schools and law professors to infuse psychology into courses devoted primarily to other topics.<sup>109</sup> As with other cross-cutting topics such as ethics and dispute resolution, there is value to promoting concentrated and sustained attention to the particular topic, but also value to incorporating it into the fabric of legal instruction.<sup>110</sup>

Clinics offer a wonderful opportunity for teaching students how psychology can help them be more effective attorneys. Because clinics provide students with direct exposure to real clients (and frequently to opposing clients, attorneys and neutrals as well) clinics can enable students to see how the psychology they have learned in seminar classes plays out in practice.<sup>111</sup> Thus,

106. For example, Sternlight has had small groups discuss the effectiveness of a particular attorney presentation, (e.g., attorney Ken Feinberg explaining the Gulf oil spill claims process to members of the public), or how best to use psychology in drafting a complaint or interrogatories.
107. Sternlight has had students create new role plays, craft videos, and locate new materials to present to their classmates.
108. We recognize that this confidence may result, in part, from our own positive illusions. See *supra* note 29 and accompanying text.
109. To assist in this endeavor we have convinced our book's publisher, the American Bar Association, to make available any two chapters of our book, free of charge, for law school professors to distribute to students in their classes. There are, of course, many other books and articles that can also be helpful.
110. Others have discussed how particular topics might be taught pervasively throughout the law school curriculum. See, e.g., Deborah Rhode, *The Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992) (legal ethics); Leonard L. Riskin & James E. Westbrook, *Integrating Dispute Resolution Into Standard First-Year Courses: The Missouri Plan*, 39 J. LEGAL EDUC. 509 (1989); Carol Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997).
111. For insights into the clinical approach to teaching see, e.g., DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* (2002); Elliott S. Milstein, *Clinical Legal Education in the United States: In-House, Externships and Simulations*, 51 J. LEGAL EDUC. 375 (2001).



a clinician in an “innocence” clinic might use a portion of the seminar time to explore the psychology pertaining to witness identification (perception and memory), or a clinician in a small claims clinic might discuss psychology pertaining to counseling or decision-making. Then, as students discuss their cases during “rounds,”<sup>112</sup> or as the professor provides one-on-one supervision, the professor might highlight additional facets of the psychological research that are raised by the student attorney’s interactions with clients or adversaries. In short, psychology can provide clinical faculty and their students with an ideal framework for discussing legal representation, and clinics equally provide an ideal setting for teaching students the value of psychology. At the same time, given that clinicians have so much to cover with their students, we recognize that they will need to make difficult pedagogical choices, incorporating psychology selectively and, sometimes, implicitly. Depending on the clinic, professors may choose to emphasize psychology relating to interviewing, counseling, negotiation, mediation, written or oral advocacy, or other lawyering tasks.

Professors in specialized “skills” classes can quite easily integrate psychology into their courses, and some already do.<sup>113</sup> Courses that focus on writing should emphasize psychology relevant to communication and persuasion.<sup>114</sup> Many legal writing texts and classes have already begun to do at least some of this.<sup>115</sup> Courses in pretrial litigation might focus on the psychology that is most relevant to interviewing, counseling, discovery, or writing.<sup>116</sup> Those teaching negotiation or mediation can reference the psychology that is most pertinent to those endeavors, including communication, persuasion, judgment and decision-making.<sup>117</sup> Courses in trial or appellate practice can appropriately draw on psychology pertaining to communication and persuasion.<sup>118</sup> And, courses focusing on drafting or transactional work might examine issues such as judgment and decision-making, as well as perceptions of justice

112. Eliot Milstein & Susan Bryant, *Rounds: A Signature Pedagogy for Clinical Teaching*, 14 CLINICAL L. REV. 195 (2007).

113. While labeling certain classes as “skills” or “doctrinal,” for convenience, we nonetheless join with those who reject the attempt to draw sharp lines between “doctrinal” or “substantive” courses and “skills” courses. See Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181 (2014).

114. ROBBENNOLT & STERNLIGHT, *supra* note 6, at 115-69, 353-83.

115. See, e.g., LOUIS J. SIRICO JR. & NANCY L. SCHULTZ, PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION 13 (2d ed. 2011); LINDA H. EDWARDS, LEGAL WRITING AND ANALYSIS 71-77, 147-50, 166-68, 193-94, 197-98, 299-304, 215-22 (3d ed. 2011); Kathryn M. Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381 (2008). See also Lawrence M. Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 J. L. & POL’Y 7 (2013).

116. ROBBENNOLT & STERNLIGHT, *supra* note 6, at 187-251, 307-83.

117. *Id.* at 67-112, 115-69; James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 OHIO ST. J. ON DISP. RESOL. 263 (2013).

118. See ROBBENNOLT & STERNLIGHT, *supra* note 6, at 115-69.

and fairness.<sup>119</sup> Students who are learning to help clients draft contracts and other documents need to be aware of how real people make decisions about contractual relationships, and how the language used in contracts may impact how those documents are used by the parties.<sup>120</sup>

Doctrinal courses and seminars can also draw on aspects of psychology pertaining to lawyering. An increasing number of courses are already taught from a problem-solving perspective, in which students work to apply concepts they are learning to hypothetical situations,<sup>121</sup> and it would be fairly easy to add a psychological dimension to courses and texts that already have a problem-based focus. But, even courses that are not focused on problems can use psychology in analyzing how attorneys might apply course concepts. One particularly obvious candidate for infusion is a professional responsibility course, which could draw heavily on the psychology of ethics to help students understand how so many well-intentioned lawyers end up crossing ethical lines.<sup>122</sup>

We believe it is possible and desirable to add psychology to virtually any law school course. A civil procedure course could touch on the psychology relating to perception, justice, discovery, persuasion, or negotiation in order to help students consider how to evaluate claims and defenses, how best to resolve clients' disputes, or how to present arguments most effectively.<sup>123</sup> A course in contracts, property, or torts could have students consider what disputants' concerns might be, whether litigation is the best or only way to meet those concerns, how disputants might communicate their concerns or arguments most effectively, and how well attorneys do at predicting case outcomes.<sup>124</sup>

119. See ROBBENNOLT & STERNLIGHT, *supra* note 6 at 67-112, 171-84; see also Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633 (2010); Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843 (2012); David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395 (2013).

120. See ROBBENNOLT & STERNLIGHT, *Behavioral Legal Ethics*, *supra* note 15, at 379-82.

121. See Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992).

122. See ROBBENNOLT & STERNLIGHT, *supra* note 6; Robbennolt & Sternlight, *supra* note 15. An entire blog is now devoted to the subject of behavioral legal ethics, see *Behavioral Legal Ethics*, <http://behaviorallegalethics.wordpress.com> (last visited June 3, 2014), reflecting the recent surge in interest in this subject.

123. For example, in her civil procedure class, Professor Sternlight teaches about the psychology of procedural justice when she helps students consider how best to interview and counsel their clients and how to guide them regarding procedural options. She also teaches about *confirmation bias* and *biased assimilation* when she teaches about summary judgment, and particularly the case of *Scott v. Harris*, 550 U.S. 372 (2007). See Dan Kahan et al., *Whose Eyes are you Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009).

124. Professor Robbennolt, for example, does an exercise in her torts class in which students are assigned to represent either the plaintiff or defendant in a tort case. Students read a set of case materials, predict the likely damage award, and give their assessment of what a fair

Courses on criminal procedure ought to address psychology pertaining to witness identification,<sup>125</sup> lineups,<sup>126</sup> and false confessions,<sup>127</sup> as well as biased assimilation and other aspects of perception and decision-making.<sup>128</sup> A transactional course such as tax, business associations, or secured transactions should include insights such as how alternative framing will cause participants to see a prospective deal more positively or negatively,<sup>129</sup> how implicit biases or prior schema may affect analyses,<sup>130</sup> and how psychology affects the way that we seek and process additional information.<sup>131</sup> A class focused on constitutional law could consider how advocates might use psychology pertaining to preexisting biases,<sup>132</sup> emotion<sup>133</sup> or communication and persuasion to more

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damage award would look like. Not only do students learn how difficult damage award decisions are for jurors, but the exercise provides an opportunity to introduce the psychology of *self-serving bias* and its relevance for the settlement of tort litigation. This exercise is based on Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913 (1997); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conduct*, 51 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 176 (1992). The exercise also provides an opportunity to discuss strategies for making better predictions. See ROBBENNOLT & STERNLIGHT, *supra* note 6, at 77-83.

125. See generally DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012). A National Geographic video, Brain Games, Season One Episode 3 contains a reenacted crime in which real witnesses make false witness identifications. See National Geographic, *supra* note 90.
126. See generally SIMON, *supra* note 125.
127. For example, professors might have students watch excerpts of the Ken Burns documentary, The Central Park Five, discussing the wrongful conviction of five young men who falsely confessed to committing a rape in Central Park and were jailed for years before being released when another man confessed to having committed the crime on his own. The Central Park Five, <http://www.pbs.org/kenburns/centralparkfive> (last visited June 3, 2014). Similarly, the NPR radio show This American Life, has a podcast discussing how and why a young woman gave a false confession and how and why the police officer believed her, notwithstanding evidence to the contrary. <http://www.thisamericanlife.org/radio-archives/episode/507/confessions>. See also Saul M. Kassin et al., *Police Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010).
128. See, e.g., Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007).
129. ROBBENNOLT & STERNLIGHT, *supra* note 6, at 88-96.
130. *Id.* at 12-14.
131. *Id.* at 308-52.
132. See, e.g., Dan M. Kahan, et al., *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 875 (2012).
133. Christina Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115.

effectively represent their clients.<sup>134</sup> Indeed, we cannot think of a law school class in which psychological insights would not be relevant.

### Conclusion

We believe that law professors should increasingly draw on psychology to enhance their teaching of lawyering. We hope that more law schools will begin to teach courses focused specifically on psychology and lawyering, and we also hope that more professors will begin to incorporate psychology into their discussions of lawyering in a broad range of courses. A law school pedagogy that combines rigorous analytical training and grounding in the psychology of how people perceive the world, interact with each other, and make decisions will produce well-rounded lawyers who can more effectively serve their clients and the interests of justice. In our experience, law students are eager to embrace the relevance of psychology to their future work as attorneys and find psychological training to be a practical complement to their education in substantive law and legal analysis.<sup>135</sup>

134. See generally Neal Davis & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation in THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING* 85, 85-102 (David E. Klein & Gregory Mitchell eds., 2010). See also LAWRENCE S. WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 141 (2006).

135. While we have focused on how psychology relates to lawyering, psychology is, of course, highly relevant to substantive law and legal scholarship as well. See, e.g., EVE BRANK, *PSYCHOLOGICAL FOUNDATIONS OF FAMILY LAW* (forthcoming); JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* (forthcoming); MICHAEL J. SAKS & BARBARA SPELLMAN, *THE PSYCHOLOGICAL ROOTS OF EVIDENCE LAW* (forthcoming); SIMON, IN DOUBT, *supra* note 126; Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMP. LEGAL STUD. 323 (2012); Jeremy A. Blumenthal, "To Be Human": *A Psychological Perspective on Property Law*, 83 TULANE L. REV. 609 (2009); Robert B. Cialdini, *Social Motivations to Comply: Norms, Values, and Principles*, in TAXPAYER COMPLIANCE 200, 200 (Jeffrey A. Roth & John T. Scholz eds., 1989); Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441 (2010); Hoffman & Wilkinson-Ryan, *supra* note 119; Christine Jolls, *Behavioral Economics Analysis of Employment Law*, in THE BEHAV. FOUND. OF PUBLIC POLICY 264 (Eldar Shafir ed., 2013); Dan Kahan, *Cognitive Bias and the Constitution*, 88 CHICAGO-KENT L. REV. 367 (2013); Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261 (2014). By focusing on various aspects of psychology, scholars can broaden and deepen their research pertaining to both lawyering and law, and policy makers can more effectively govern our society. But, this is a topic for another day.