

# PSYCHOLOGY AND LAWYERING: COALESCING THE FIELD

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*There is some tendency, with the case method, for the study of law to be something like the study of chess or the analysis of a bridge hand. When analyzing the law in intricate detail, it may be hard to keep in mind the vital fact that the problems really relate to people . . . .*<sup>1</sup>

Although, historically, some may have thought of lawyers as walking talking brains,<sup>2</sup> more recently we have seen increasing recognition that law is a people profession. After all, lawyers spend a substantial portion of their time interviewing and counseling clients; negotiating and mediating; conducting discovery, factual research, and due diligence; and advocating orally and in writing. While these tasks do require good legal analytical skills they also require other traits relating to lawyers' ability to work with people.<sup>3</sup> And, it is important to recognize that lawyers' own mental states can impact how well or poorly they do their jobs.<sup>4</sup>

Within the last ten years some legal academics and also practitioners in a variety of legal fields began to appreciate that psychology—the science of how people think, feel, and behave,<sup>5</sup> can be very helpful to attorneys' practice of law.<sup>6</sup> Expanding far beyond the long-time recognition that psychology can help

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<sup>1</sup> Erwin N. Griswold, *Law Schools and Human Relations*, 1955 Wash. U. L.Q. 217, 220.

<sup>2</sup> This view of lawyering hearkens back to the days of Christopher Columbus Langdell. See, e.g., John Lande and Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 253–56 (2010).

<sup>3</sup> For one excellent list of the skills required by attorneys see MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (2008), available at <https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

<sup>4</sup> See, e.g., REBECCA NERISON, LAWYERS, ANGER, AND ANXIETY: DEALING WITH THE STRESSES OF THE LEGAL PROFESSION (2010).

<sup>5</sup> Kevin W. Boyack et al., *Mapping the Backbone of Science*, 64 SCIENTOMETRICS 351 (2005); John Cacioppo, *Psychology Is a Hub Science*, APS OBSERVER, Sept. 2007, at 5.

<sup>6</sup> This new field is distinct from the valuable work that applies psychology to substantive law fields. See, e.g., EVE BRANK, PSYCHOLOGICAL FOUNDATIONS OF FAMILY LAW (forthcoming); JENNIFER K. ROBBENOLT & VALERIE P. HANS, THE PSYCHOLOGY OF TORT LAW (2016); MICHAEL J. SAKS & BARBARA A. SPELLMAN, THE PSYCHOLOGICAL FOUNDATIONS OF

attorneys pick juries or be persuasive in the courtroom,<sup>7</sup> such commentators began to discuss how psychology might inform legal writing,<sup>8</sup> legal ethics,<sup>9</sup> conceptions of justice,<sup>10</sup> and attorney wellness and success.<sup>11</sup> My co-author Jennifer Robbennolt and I brought together some aspects of this field in our book *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making*.<sup>12</sup>

Yet, while a number of commentators were applying psychology to lawyering, they were not necessarily drawing from the same aspects of psychology as one another, nor connecting to each other through their writing or in person. Some commentators focused particularly on cognitive and social psychology,<sup>13</sup> some on insights drawn from clinical psychology,<sup>14</sup> some on the benefits of mindfulness meditation,<sup>15</sup> some on attorneys' struggles with alcohol and substance abuse,<sup>16</sup> and some on neuroscience.<sup>17</sup> Even my lengthy book, with Jennifer Robbennolt, addressed only certain aspects of psychology and lawyering, focusing quite little for example on insights drawn from clinical psychology, abnormal psychology, or neuroscience.<sup>18</sup>

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EVIDENCE LAW (2016); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012).

<sup>7</sup> This was the traditional realm of psychology and lawyering. *See, e.g.*, DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE (2012); RICHARD C. WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY (2002).

<sup>8</sup> *See, e.g.*, Kathryn M. Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411.

<sup>9</sup> *See, e.g.*, Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007).

<sup>10</sup> *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 193 (2008)

<sup>11</sup> *See, e.g.*, NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW (2010).

<sup>12</sup> JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING (2013) (drawing on psychology to help lawyers with interviewing, counseling, negotiation, mediation, discovery, writing, ethics, productivity and success); *see also* Jean R. Sternlight & Jennifer K. Robbennolt, *Psychology and Effective Lawyering: Insights for Legal Educators*, 64 J. LEGAL EDUC. 365 (2015).

<sup>13</sup> ROBBENNOLT & STERNLIGHT, *supra* note 12.

<sup>14</sup> *See, e.g.*, SUSAN SWAIM DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (2004)

<sup>15</sup> *See, e.g.*, Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

<sup>16</sup> *See, e.g.*, G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCHIATRY 233 (1990).

<sup>17</sup> *See, e.g.*, DAVID BALL AND DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION (2009); Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791 (2013).

<sup>18</sup> ROBBENNOLT & STERNLIGHT, *supra* note 12.

A number of us thought it would be highly informative as well as fun to try to bring together as many of us as possible who had been separately toiling in the fields of psychology and lawyering. Thus, UNLV's Boyd School of Law and its Saltman Center for Conflict Resolution decided to host a conference entitled *Psychology and Lawyering: Coalescing the Field*. Two other schools with strong programs in the area, the University of Illinois and U.C. Davis School of Law, generously made financial contributions in support of the conference.<sup>19</sup> When we came up with the idea for the conference we were not sure how many scholars would be willing and able to attend, particularly at their own expense. We were shocked and thrilled by the outpouring of interest by professors and practitioners, from a variety of fields, from around the world.

The conference, which took place in February 2014, was indeed a fun and highly productive event. We learned a great deal from one another and vowed to gather again to further our connections. The conference helped spark a blog on behavioral legal ethics,<sup>20</sup> and much talk about potential future conferences.

Today we are very pleased to present the written version of the conference, which we hope will further advance and connect this field.<sup>21</sup> Like the conference, this symposium covers a broad array of topics. We have tried to group all the articles into five broad thematic groups: interviewing and counseling; legal advocacy; behavioral legal ethics; attorney and student personal wellbeing; and fairness and justice.

#### PSYCHOLOGICAL INSIGHTS FOR INTERVIEWING AND COUNSELING

The conference began most auspiciously with Randy Kiser's discussion of *The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior*.<sup>22</sup> A brilliant scholar and legal consultant, Kiser has written several books presenting original research on lawyers' judgment and decision making skills, or lack thereof.<sup>23</sup> In this article he emphasizes that "[t]he law and emotions have an uneasy if not antagonistic relationship," explaining that while law is in some sense supposed to rise above emotion, the successful practice of law nonetheless "requires a high level of emotional intelligence."<sup>24</sup> Drawing on a set of attorney interviews Kiser finds that lawyers of-

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<sup>19</sup> The conference was also supported by Thomson Reuters and LexisNexis.

<sup>20</sup> Inspired by the UNLV conference, Professors Tigran Eldred, Jim Milles, and Molly Wilson started a blog, Behavioral Legal Ethics, which considers links between behavioral science, law, and ethical decision making. BEHAVIORAL LEGAL ETHICS, <https://behaviorallegalethics.wordpress.com/> (last visited Apr. 17, 2015).

<sup>21</sup> While some presenters chose not to include articles in this symposium issue of the law journal, we were fortunate that many did.

<sup>22</sup> Randall Kiser, *The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior*, 15 NEV. L.J. 442 (2015).

<sup>23</sup> E.g. RANDALL KISER, BEYOND RIGHT AND WRONG: THE POWER OF EFFECTIVE DECISION MAKING FOR ATTORNEYS AND CLIENTS (2010); RANDALL KISER, HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY (2011).

<sup>24</sup> Kiser, *supra* note 22, at 442.

ten realize the importance of people skills.<sup>25</sup> Yet, he also reports that law schools are far behind medical schools in trying to teach such skills to their students.<sup>26</sup>

Building on Kiser's themes, William S. Blatt's *Teaching Emotional Intelligence to Law Students: Three Keys to Mastery*<sup>27</sup> urges that the standard law school curriculum "develops the logical and linguistic abilities needed for passing the bar and performing an entry-level job, but neglects the managerial and relationship skills essential to advancing in the profession."<sup>28</sup> Yet, urges Blatt, such skills as stress reduction, self-awareness, emotional management, and performance optimization can indeed be taught, as he has done for six years in a course entitled "Emotional Intelligence: Life Skills for Lawyers."<sup>29</sup>

Susan Brooks addresses related questions when she faces head-on the question of whether we can "actually teach empathy and other relational skills" and if so, "what does it look like to teach them in law school?"<sup>30</sup> Her article, *Using a Communication Perspective to Teach Relational Lawyering*,<sup>31</sup> spells out how law professors can draw on five key principles of communication<sup>32</sup> and then translates these principles into eight practices law professors can share with their students.<sup>33</sup> Brooks emphasizes that students should be taught a non-instrumental approach to lawyering—where lawyers strive for meaningful and "generative" dialogue with their clients,<sup>34</sup> rather than merely attempt to solve the client's problems or persuade the client to follow the lawyer's advice.<sup>35</sup>

Next, Debra Lyn Bassett turns to the content of attorney interactions with their clients. In *Silencing Our Elders*, she urges that while words are critically important to interviewing, counseling, and other lawyering activities, it is also essential to understand the role of silence in communication.<sup>36</sup> Drawing extensively on communication literature Bassett points out that it is crucial for lawyers to understand that, rather than just being an absence of sound, and therefore communication, silence often has meaning and power.<sup>37</sup> In Parts I and II of her article Bassett also connects what she calls "silence bias" to age bias, noting that lawyers' instincts to avoid silence and fill in speech voids, when combined

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<sup>25</sup> *Id.* at 447–54.

<sup>26</sup> *Id.* at 454–62.

<sup>27</sup> William S. Blatt, *Teaching Emotional Intelligence to Law Students: Three Keys to Mastery*, 15 NEV. L.J. 464 (2015).

<sup>28</sup> *Id.* at 464 (footnote omitted).

<sup>29</sup> *Id.* at 465.

<sup>30</sup> Susan Brooks, *Using a Communication Perspective to Teach Relational Lawyering*, 15 NEV. L.J. 477, 479 (2015).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 485–98.

<sup>33</sup> *Id.* at 498–507.

<sup>34</sup> *Id.* at 485.

<sup>35</sup> *Id.* at 481.

<sup>36</sup> Debra Lyn Bassett, *Silencing Our Elders*, 15 NEV. L.J. 519 (2015).

<sup>37</sup> *Id.* at 522.

with age bias, “can lead to consequences ranging from inaccurate assumptions to unwarranted conclusions of diminished capacity.”<sup>38</sup>

Also focusing on the content of interviews, Andrea A. Curcio examines how biases and stereotypes may impact lawyers’ interviews of their clients, as well as other activities.<sup>39</sup> She draws on two surveys of law students suggesting that law students believe “legal ‘objectivity’ and legal training in rational and analytical thinking makes lawyers less susceptible than others, and especially less susceptible than clients, to having, or acting upon, stereotypes or biases.”<sup>40</sup> However, argues Curcio, when interacting with clients, lawyers and law students are by no means immune to stereotypes and biases.<sup>41</sup> She urges that legal educators use social cognition theory as “the cornerstone of a program of legal education that recognizes the need to infuse the curriculum with an awareness of the role culture plays in the lawyering process.”<sup>42</sup>

The last piece dealing with interviewing and counseling is Sarah F. Shelton’s article, *Evaluating the Evaluation: Reliance upon Mental Health Assessments in Cases of Alleged Child Sexual Abuse*.<sup>43</sup> Focusing on the very special and difficult situation in which children make allegations of sexual abuse, Shelton points out how knowledge of the psychology of memory, communication, childhood development, and emotion can help both forensic psychologists and attorneys better ensure the accuracy of children’s testimony and also provide a less stressful environment for child witnesses.<sup>44</sup>

#### PSYCHOLOGICAL INSIGHTS RELATING TO LEGAL ADVOCACY

Shifting gears just a bit, the next set of articles focuses on how psychology is relevant to trial practice and written advocacy. Larry Cunningham’s article, *Using Principles from Cognitive Behavioral Therapy to Reduce Nervousness in Oral Argument or Moot Court*,<sup>45</sup> shows how both individual attorneys and legal educators can employ therapeutic tools to help attorneys better overcome fear, anxiety, and even panic relating to courtroom performances. Cunningham states that while legal educators should not provide “unlicensed therapy,” it is nonetheless appropriate to “provide students with suggestions for reducing their nervousness,” just as we “teach students how to respond to judges’ ques-

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<sup>38</sup> *Id.* at 532.

<sup>39</sup> Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537 (2015).

<sup>40</sup> *Id.* at 540. This article builds on an earlier work, Andrea A. Curcio, Teresa E. Ward & Nisha Dogra, *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177 (2014).

<sup>41</sup> Curcio, *supra* note 39, at 550–54.

<sup>42</sup> *Id.* at 541.

<sup>43</sup> Sarah F. Shelton, *Evaluating the Evaluation: Reliance upon Mental Health Assessments in Cases of Alleged Child Sexual Abuse*, 15 NEV. L.J. 566 (2015).

<sup>44</sup> *Id.*

<sup>45</sup> Larry Cunningham, *Using Principles from Cognitive Behavioral Therapy to Reduce Nervousness in Oral Argument or Moot Court*, 15 NEV. L.J. 586 (2015).

tions.”<sup>46</sup> Such tools may both increase lawyers’ effectiveness and also make lawyers happier.<sup>47</sup>

Moving to the content of what lawyers say in the courtroom, Kenneth D. Chestek’s *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*,<sup>48</sup> explains why focusing on fear and other negatives can work well in the courtroom, just as it apparently does in political ads. Chestek quotes one neuropsychologist, Rick Hanson, who states “[y]our brain is like Velcro for negative experiences and Teflon for positive ones.”<sup>49</sup> While recognizing the need for additional empirical research in the area,<sup>50</sup> Chestek at least tentatively suggests that even educated judges, who may seek to battle the negativity effect, are likely nonetheless impacted by the phenomenon.<sup>51</sup> Thus, perhaps law professors and lawyers do lawyers a disservice when they counsel them to always stay positive and take the high ground in their arguments?<sup>52</sup>

Of course, our focus on negativity is not the only aspect of psychology that may help attorneys enhance their persuasive talents. Sydney A. Beckman urges that attorneys can use some of magicians’ psychological tools to “manipulate” witnesses at trial.<sup>53</sup> He explains that “[m]isdirection, misinformation, selective attention, ambiguity, verbal manipulation, body language interpretation, and physical manipulation”<sup>54</sup> are skills useful to “some of the greatest trial lawyers in their constant quest to win.”<sup>55</sup> Yet jurors and judges, unlike the magician’s audience, may not realize they have been fooled.<sup>56</sup> Rather than endorse these techniques, Beckman also provides some possible countermeasures that can be employed to try to battle such deception.<sup>57</sup>

#### BEHAVIORAL LEGAL ETHICS

Three of the articles contained in this symposium issue relate to the topic of behavioral legal ethics, which draws on psychology for insights into peoples’

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<sup>46</sup> *Id.* at 588.

<sup>47</sup> *Id.*

<sup>48</sup> Kenneth D. Chestek, *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*, 15 NEV. L.J. 605 (2015). Chestek does not, of course, purport to be the first to address the negativity phenomenon and its applicability to attorneys. *See, e.g., id.* at 607 n.8 (citing BALL & KEENAN, *supra* note 17) (examining how plaintiff’s attorneys can appeal to jurors’ embedded “reptile”).

<sup>49</sup> *Id.* at 606 (quoting RICK HANSON WITH RICHARD MENDIUS, BUDDHA’S BRAIN: THE PRACTICAL NEUROSCIENCE OF HAPPINESS, LOVE & WISDOM 41 (2009)).

<sup>50</sup> *Id.* at 619.

<sup>51</sup> *Id.* at 617–19.

<sup>52</sup> *See generally id.*

<sup>53</sup> Sydney A. Beckman, *Hiding the Elephant: How the Psychological Techniques of Magicians Can Be Used to Manipulate Witnesses at Trial*, 15 NEV. L.J. 632 (2015).

<sup>54</sup> *Id.* at 633.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 633–35.

<sup>57</sup> *Id.* at 667–70.

ethical behavior. First, Catherine Gage O'Grady's article focuses on the question of how behavioral legal ethics and the psychology of judgment, problem solving, and decision making applies to newer as opposed to more senior attorneys.<sup>58</sup> She asserts that while all attorneys are affected by psychological pressures that may cause them to act unethically,<sup>59</sup> newer attorneys are particularly vulnerable to certain pressures, for example due to their lack of job security and lack of familiarity with legal practice.<sup>60</sup> Yet, such newer attorneys are also especially well positioned to notice ethical implications that may be missed by their senior colleagues.<sup>61</sup> Given this psychology, O'Grady suggests law firms and law schools take steps not only to protect newer attorneys but also to encourage newer attorneys to report perceived ethical problems to their supervisors.<sup>62</sup>

Randy D. Gordon and Nancy B. Rapoport, drawing on their combined backgrounds in law teaching, legal practice, the humanities, and social science,<sup>63</sup> explore how the classical concept of "virtue" may relate to legal billing, and whether it is "possible for lawyers to develop some billing habits that will make it easier for them to bill more ethically."<sup>64</sup> First considering how a "virtuous" lawyer would bill his or her time,<sup>65</sup> the authors then go on to consider how law firms might use incentives, improved monitoring, and alternative billing practices<sup>66</sup> to instill more ethical billing habits in their attorneys. Their goal is not necessarily to make all lawyers ethical billers, but rather to use a set of pragmatic reforms to encourage them to *act* as ethical billers.<sup>67</sup>

In the contribution entitled *Mindful Ethics and the Cultivation of Concentration* Scott L. Rogers and Jan L. Jacobowitz argue that mindfulness meditation, a secular practice increasingly used by lawyers and others to reduce stress, improve concentration, and fight anxiety and depression,<sup>68</sup> can also help attorneys behave more ethically.<sup>69</sup> They further argue that "mindfulness and ethics

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<sup>58</sup> Catherine Gage O'Grady, *Behavioral Legal Ethics, Decision Making, and the New Attorney's Unique Professional Perspective* 15 NEV. L.J. 671 (2015).

<sup>59</sup> *Id.* at 672.

<sup>60</sup> *Id.* at 688–89.

<sup>61</sup> *Id.* at 689–97. For example, the new attorneys may approach issues in a more fresh way, untarnished by the schemas of business as usual, and may not be as impacted by the feeling of power or pull of client relationships that can support unethical decisions.

<sup>62</sup> *Id.* at 696–97.

<sup>63</sup> Randy D. Gordon & Nancy B. Rapoport, *Virtuous Billing*, 15 NEV. L.J. 698 (2015).

<sup>64</sup> *Id.* at 700.

<sup>65</sup> *Id.* at 717–23.

<sup>66</sup> For example, the authors identify hourly billing as a source of much unethical billing. *Id.* at 712–16.

<sup>67</sup> *Id.* at 729 & n.161.

<sup>68</sup> Scott L. Rogers & Jan L. Jacobowitz, *Mindful Ethics and the Cultivation of Concentration*, 15 NEV. L.J. 730, 730 (2015); see also Riskin, *supra* note 15.

<sup>69</sup> Rogers & Jacobowitz, *supra* note 68. Here, they cite their own prior work, SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS & PROFESSIONAL RESPONSIBILITY: A GUIDE BOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* (2012).

enjoy a symbiotic connection, such that an attorney's deliberate attentiveness to the rules of professional conduct as a personal ethic can help cultivate a mindfulness practice.<sup>70</sup> Mindfulness and ethics are well paired, argue the authors, because mindfulness, "a practice of developing greater awareness of our interpersonal interactions and of the events taking place in our lives, along with our reactions to those events . . . lends itself to a conversation on ethical and professional conduct."<sup>71</sup>

#### PSYCHOLOGICAL WELLBEING OF ATTORNEYS AND LAW STUDENTS

Another exciting group of essays discusses how attorneys and law students can draw on psychology to enhance their personal success and wellbeing. Marybeth Herald's contribution, *Getting Students Psyched: Using Psychology to Encourage Classroom Participation*,<sup>72</sup> is a must-read for professors, and perhaps especially law professors who teach first-year courses. Herald suggests multiple approaches professors can use to help students overcome their fears and anxieties over class participation, linking these approaches to psychological research. In particular, she examines how students are affected by their own body language,<sup>73</sup> the importance of recognizing that mistakes will be made but can be learned from,<sup>74</sup> the fact that our mistakes are not as obvious as we may feel,<sup>75</sup> the value of reframing nervousness as excitement,<sup>76</sup> and the need to be wary of the bystander effect which might lead some students to sit back and let others carry the conversation.<sup>77</sup>

Next, Lauren A. Newell examines insights psychology provides regarding how our ever-present digital devices are impacting the attention of both law students and lawyers.<sup>78</sup> Newell cites numerous studies showing there is reason to be concerned that information and communication technologies (the term used to describe smartphones, tablets, e-mail, the internet, and all our many technological vices) are "significantly eroding our ability to pay focused attention, even when we want and try to do so."<sup>79</sup> She points out that this impact is likely a special concern for today's young people, as they are more immersed in digital technology than older folks, and for lawyers, as their job requires strong

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<sup>70</sup> Rogers & Jacobowitz, *supra* note 68, at 731.

<sup>71</sup> *Id.* at 734.

<sup>72</sup> Marybeth Herald, *Getting Students Psyched: Using Psychology to Encourage Classroom Participation*, 15 NEV. L.J. 744 (2015).

<sup>73</sup> *Id.* at 745–46.

<sup>74</sup> *Id.* at 746–47.

<sup>75</sup> *Id.* at 748–51.

<sup>76</sup> *Id.* at 751–52.

<sup>77</sup> *Id.* at 752–53.

<sup>78</sup> Lauren A. Newell, *Redefining Attention (and Revamping the Legal Profession?) for the Digital Generation* 15 NEV. L.J. 754 (2015).

<sup>79</sup> *Id.* at 756.



powers of attention.<sup>80</sup> Thankfully, Newell not only presents this rather bleak analysis but also some potential solutions such as the desirability and feasibility of shutting off the technology, taking technology breaks, and learning to practice mindfulness or concentration meditation as a means of enhancing attention powers.<sup>81</sup>

Debra S. Austin's article, *Drink Like a Lawyer: The Neuroscience of Substance Abuse and Its Impact on Cognitive Wellness*,<sup>82</sup> also contains information that is critically important for law students, lawyers, and law professors. While Austin is certainly not the first to note that lawyers suffer inordinately from anxiety, stress, depression, and substance abuse,<sup>83</sup> her article uniquely delves into the neuroscience underlying these phenomena.<sup>84</sup> Rather than simply make us more depressed, by learning about lawyers' and law students' unfortunate plight, Austin then draws on the neuroscience to make helpful recommendations on how law students, lawyers, law schools, and law firms can optimize the brain health and overall wellness of law students and attorneys. She explains in detail why exercise, particularly aerobic exercise, is key to the cognitive and emotional wellbeing of us all.<sup>85</sup>

#### IMPLICATIONS OF PSYCHOLOGY FOR FAIRNESS AND JUSTICE

Last but certainly not least, several of the contributions focus on how psychological insights can help lawyers better achieve fairness and justice. In *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, Victor D. Quintanilla considers the inevitable tradeoff between procedural fairness and cost.<sup>86</sup> While, as Quintanilla notes, Rule 1 of the Federal Rules of Civil Procedure requires processes that are just, speedy, and inexpensive,<sup>87</sup> inevitably these goals are in tension. Here, Quintanilla connects bodies of work on both procedural justice<sup>88</sup> and taboo tradeoffs,<sup>89</sup> also reporting on his original empirical work regarding the public's willingness to trade fairness for time or money. In brief, Quintanilla finds, through experimental vignettes, that people express a willingness to pay hun-

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<sup>80</sup> *Id.* at 774–75.

<sup>81</sup> *Id.* at 795–806.

<sup>82</sup> Debra S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Abuse and Its Impact on Cognitive Wellness*, 15 NEV. L.J. 826 (2015).

<sup>83</sup> For another excellent discussion of these phenomena, see, e.g., Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002).

<sup>84</sup> Austin, *supra* note 82.

<sup>85</sup> *Id.* at 871–80.

<sup>86</sup> Victor D. Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 NEV. L.J. 882 (2015).

<sup>87</sup> FED. R. CIV. P. 1.

<sup>88</sup> Quintanilla, *supra* note 86, at 889–92.

<sup>89</sup> *Id.* at 892–96.

dreds or thousands of dollars to obtain a fairer process.<sup>90</sup> He also finds that where people were given a fair process as a default they were unwilling to sell it for an unfair process unless given, on average, half a million dollars.<sup>91</sup> Quintanilla draws on his findings to critique the Supreme Court's current approach to procedural due process, which emphasizes decisional accuracy and the weighing of costs and benefits.<sup>92</sup>

Nicole E. Negowetti uses social science research to examine the lack fairness and justice within the legal profession itself.<sup>93</sup> Noting that the racial and gender diversity within the legal profession is quite poor, and has worsened rather than improved in recent years,<sup>94</sup> Negowetti suggests that this bleak situation can be attributed in substantial part to implicit or unconscious bias. After summarizing research on implicit bias, Negowetti suggests that such bias affects both the hiring and evaluation of attorneys. Negowetti then explains why the lack of diversity in the legal profession is problematic,<sup>95</sup> and suggests steps law firms can take with regard to hiring and evaluation practices to fight against implicit biases and help diversify the profession.<sup>96</sup>

Finally, Jonathan M. Hyman shows how better understanding of moral psychology can help attorneys and mediators do their jobs more effectively.<sup>97</sup> Specifically, he explores whether the branch of moral psychology known as Moral Foundations Theory ("MFT")<sup>98</sup> can provide substantial insights into "how fairness works on the ground, day to day, in mediation and negotiation."<sup>99</sup> In the first parts of the article Hyman shows how applying MFT can help explain results in various mediations and negotiations. While recognizing critiques that have been made of MFT,<sup>100</sup> Hyman nonetheless cautiously concludes that focusing on moral judgments "provides ways to engage the moral dimensions of difference and conflict without stifling the opportunities for both

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<sup>90</sup> *Id.* at 907–08 (finding people are willing to pay more in a child custody dispute than in an employment or apartment dispute).

<sup>91</sup> *Id.* at 908–09.

<sup>92</sup> *Id.* at 915–23.

<sup>93</sup> Nicole E. Negowetti, *Implicit Bias and the Legal Profession's "Diversity Crisis": A Call for Self-Reflection*, 15 NEV. L.J. 930 (2015).

<sup>94</sup> *Id.* at 934–35.

<sup>95</sup> *Id.* at 949–52.

<sup>96</sup> *Id.* at 956–58.

<sup>97</sup> Jonathan M. Hyman, *Beyond Fairness: The Place of Moral Foundations Theory in Mediation and Negotiation*, 15 NEV. L.J. 959 (2015).

<sup>98</sup> See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012) (expounding six moral modules comprising Moral Foundations Theory, specifically fairness/cheating, care/harm, loyalty/betrayal, authority/subversion, sanctity/degradation, and liberty/oppression).

<sup>99</sup> Hyman, *supra* note 97, at 961–62.

<sup>100</sup> Hyman admits, for example, that both the number and nature of the various moral modules remain open to debate. *Id.* at 977–81.

creative problem solving and greater understanding that good negotiation and mediation can provide.”<sup>101</sup>

#### CONCLUSION

As many have noted, the conference was just the beginning, albeit a very nice beginning, of an attempt to coalesce the field of psychology and lawyering. This written version of the conference now expands upon many of the insights expressed at the conference and will, we hope, allow more academics and practitioners from across disciplines and across the world to join and further the conversation.

By continuing to bridge divides between academics and practitioners, between disciplines and sub-disciplines, and across geographic lines, we will further the enterprise of applying psychology to lawyering tasks and lawyers’ and law students’ personal wellbeing. The excitement in the air in Las Vegas in February 2014 was palpable. Let’s dedicate ourselves to furthering this venture—in the interest of helping attorneys and their clients and also having fun learning from one another!

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<sup>101</sup> *Id.* at 991.