



# Through the Eyes of Another: Leveraging Psychological Insights in the Legal System

BY CHRISTOPHER T. STEIN, ESQ.

*“The only true voyage of discovery ... would be not to visit strange lands but to possess other eyes, to behold the universe through the eyes of another, of a hundred others, to behold the hundred universes that each of them beholds.”<sup>1</sup>*

**Practicing law is a never-ending voyage of discovery.** Through our cases and clients, we dive deeply into the universes constructed through the eyes of those involved in the legal system. The system tends to ignore the human elements of these constructions and is worse off for it. Good lawyers, however, must be (or must know) good psychologists.<sup>2</sup> Psychology – the science of the mind – can help us visit these strange lands and bring back the insights to better understand our cases and better serve our clients.

When lay people think of psychology and law, they may conjure up images from Hollywood—“Silence of the Lambs” or “One Flew Over the Cuckoo’s Nest.” Lawyers recognize these as caricatures, yet the level of sophistication we have

on the psychological sciences – even as they influence our profession – is not much better. We can be both unaware of the extent to which psychology informs our practice and unprepared to effectively employ this resource. Research in psychology has exploded far beyond its origins in mental illness, with robust literature into all areas of perception, persuasion, bias, behavior, and risk assessment. Good lawyers must allow this science to inform our work.

## **The Client’s Universe: Forensic Assessment**

In many ways, forensic assessment (or psychological evaluation) is the original and most enduring interjection of mental health into the legal system. It provides unique

CONTINUED ON PAGE 16

# Through the Eyes of Another:

## Leveraging Psychological Insights in the Legal System

insight into a subject's mind, helping us understand the rich social and psychological context that shaped past behaviors and may predict future actions. In a criminal context, attorneys see assessments of mental state at the time of offense (criminal insanity),<sup>3</sup> competency to stand trial, sexual and violent offender risk assessment, suggestibility for coerced confessions, mitigation for sentencing, and more. In a civil context, assessments of malingering (feigning or exaggeration of symptoms) and forensic child custody evaluations are common.

A licensed clinical psychologist or psychiatrist uses forensic assessment instruments to answer specific psycholegal questions about the subject of interest and behavior or state at issue. Due to a disease or defect of the mind, was the defendant in a delusional state at the time of the alleged offense? Is the patient exaggerating the presence of psychological injury? What dynamic risk factors does the offender possess, and how can they be mitigated to reduce risk of re-offense? Testing will generally include a psychosocial history and mental status examination, a multi-dimensional personality test, and then instruments specific to the subject and the nature of the question being explored.

Apart from court-ordered assessments for specific reasons, lawyers may find significant benefits from commissioning a confidential evaluation to understand a client's universe. Attorneys have found forensic assessments to be a fount of information, even when the evaluations themselves are never introduced into evidence. One may finally see events through the client's eyes, which allows new strategy to be developed and evidence recruited. Information about a defendant's undisclosed mental challenges may explain certain behaviors, undermine the *mens rea*, or serve as powerful mitigating evidence in sentencing. From a client-centered approach, the assessment may provide insight the client was lacking and help him or her address mental health concerns that go beyond immediate

involvement in the legal system. In a variety of contexts, forensic assessment can let lawyers behold the client's universe and thereby better serve the case and the client.

### The Witness's Universe: Perception and Memory

Not all lawyers will have the opportunity to employ forensic assessment, but most will encounter issues relating to perception and memory. Less a mental health issue involving clinicians, perception and memory are generally the purview of research psychology. Studies have revealed many widespread beliefs about perception and memory are woefully inaccurate, and relying on our common beliefs, biases, and assumptions can mislead. Therefore, it is important for lawyers to understand and be able to apply the science.

Professor Daniel Reisberg, in his essential work, *The Science of Perception and Memory: A Pragmatic Guide for the Justice System*, explores a number of these mistaken beliefs, which are ripe for testimony from an in-court expert and for inclusion in strategy development.<sup>4</sup> Contrary to popular belief that perception and memory functions like a video recording, people selectively perceive only part of that presented, and the mind surreptitiously supplements with inferences based on what we know and expect. Though people think their perception of the world is detailed and complete (and jurors tend to believe them when they confidently testify to this), this is a "grand illusion" the mind creates in the face of physical limitations, limited processing powers, and attentional overload. Since memory begins with what is perceived, it is troubled from the start. Memory is a reconstruction, drawn from interconnected sources in the mind, contaminated in myriad ways by outside information and shaped by self-image, beliefs, and frames about how things "should have" happened.

Psychologists can assist lawyers in improving legal outcomes by applying this critical lens in evidence review,

investigative planning, questioning development, and strategy design. Even more, given factfinders can be so ill informed, testimony about the science can be essential. An expert qualified by special knowledge, skill, experience, training, or education may testify about relevant scientific information that would assist the trier of fact in understanding the evidence or determining a fact in issue.<sup>5</sup> Whether in court or out, the science of memory and perception is crucial to integrate into the lawyer's toolkit.

### The Judge's and Juries' Universe: Judgement and Decision-Making

Some lawyers work with forensic assessment, most deal with issues of perception and memory, and all live on judgment and decision-making. Whether trying a case before a judge or jury, seeking resolution from an arbitrator, resolving something at the firm, or advising a client, the science of judgment and decision-making is at the heart of legal practice. The research in this area has been surprising, provocative, and transformative, with consequences for approaches to individual cases as well as the legal system.

Our communities entrust judges and juries to fairly apply facts to law and render just judgments on important issues. The American legal system is premised on the assumption they can and do deliver accurate, reliable, and equitable results. Yet the evidence is piling up that, as much as they may try, the complexity and uncertainty of the task leads to systematic errors and biases in judgment. Nobel Prize winner Daniel Kahneman popularized the research on cognitive biases and heuristics (mental shortcuts), introducing the public to anchoring, availability, the narrative fallacy, and representativeness—all of which are imminently relevant in a legal environment.<sup>6</sup> Judges and juries are susceptible to any number of these cognitive illusions, biases, and errors in judgment.<sup>7</sup>

Psychologists can help lawyers identify the predictable bias in a given situation and purposefully implement measures to combat it. For example, in a study the author performed with a university psychologist, the research discovered a method of tactical debiasing lawyers could employ to reduce the significant power of the anchoring effect in criminal sentencing.<sup>8</sup> Beyond that, psychologists might be useful in educating the judge or jury about the flaws in their thought process on a relevant issue and how that could degrade their ability to reach an accurate decision if they do not correct for them. Finally, research on judgment and decision-making can be useful in all aspects of case design, presentation, and persuasion.

This is but a brief introduction to inspire a voyage of discovery into the insights psychology offers into the legal practice. There are fascinating universes waiting to be explored by lawyers seeking better outcomes for their clients and cases through the science of the mind.

#### ENDNOTES:

1. Marcel Proust, *In Search of Lost Time*, Vol. V: *The Captive* (1923).
2. This line is inspired by the excellent article of a similar name by Boyd School of Law professor 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).
3. Nevada has an interesting history with the insanity defense, which the state legislature abolished, but the Nevada Supreme Court reinstated in *Finger v. State*, 117 Nev. 548 (2001).
4. Daniel Reisberg, "The Science of Perception and Memory: A Pragmatic Guide for the Justice System" (2014) (information referenced in this section is derived from research covered in this book).
5. NRS 50.275; *Hallmark v. Eldridge*, 124 Nev. 492 (2008); *Perez v. State*, 129 Nev. 850 (2013).
6. Daniel Kahneman, "Thinking, Fast and Slow" (2011).
7. Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001).
8. Christopher T. Stein & Michelle Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect Through Tactical Debiasing*, 52 U.S.F. L. REV. 393 (2017).

#### CHRISTOPHER T.

**STEIN** is a U.S. Air Force lieutenant colonel and judge advocate. A graduate of UNLV's William S. Boyd School of Law and member of the State Bar of Nevada, he has spent the last 13 years on active-duty service around the world in a wide range of legal positions, from criminal prosecutor and defense counsel, to deployed contracts and airspace advisor, to general counsel and diplomat. In 2019, he published "Forensic Psychology in Military Courts" in collaboration with the American Psychological Association. The views expressed are his own and do not necessarily represent the views of the U.S. Air Force or Department of Defense.



# SKIP THE LINE. DON'T WAIT. WE CAN HELP.

ARM offers mediation, arbitration, special masters, discovery referees, private trials, focus groups and so much more....

Everything you need without the wait.



WWW.ARMADR.COM. | 855.777.4ARM

