

Intuition, the Subconscious Mind, and the Appellate Brief

Blink

Malcolm Gladwell (Little, Brown 2005), 288 pages

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Fifteen years and four bestsellers ago, Malcolm Gladwell wrote *Blink: The Power of Thinking Without Thinking*.¹

Gladwell is a science and business writer at *The New Yorker*. *Blink* was his second book, and it was a massive success. It sold over two million copies, and it was soon followed by several other Gladwell bestsellers. If you're reading this journal and have made it this far in this review, the odds are good that you have one (if not several) of his books on your bookshelf at home.

Gladwell's books follow something of a pattern. Each one focuses on a particular idea or question, and Gladwell then acts as a guide through scientific studies and historical examples that illustrate its contours. In *The Tipping Point*, for example, Gladwell described ways in which achieving a critical mass can influence a social or business trend.² In *Outliers*, Gladwell considered the question of how much of a person's high-end success can be attributed to external conditions or timing.³ In *David & Goliath*, Gladwell argued that being an underdog can sometimes create hidden advantages.⁴

Blink is about the role that the subconscious mind and intuition play in decisionmaking. Though not written for lawyers, its insights have a

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¹ MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2005).

² MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000).

³ MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* (2008).

⁴ MALCOLM GLADWELL, *DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS* (2013).

lot of potential application to the work of lawyering in general—and, in particular, to brief writing.

I. *Blink* and the Role of Intuition in Decisionmaking

One of Gladwell’s principal insights is that the subconscious mind forms opinions about persons or things really quickly. Gladwell memorably refers to this as the “thin-slicing” phenomenon, which he describes as “the ability of our unconscious to find patterns in situations and behavior based on very narrow slices of experience.”⁵ Gladwell claims that humans instinctively do this, that we commonly “read[] deeply into the narrowest slivers of experience.”⁶

In one notable example, Gladwell describes a study in which college students were shown three ten-second, soundless videotapes of a professor’s lecture. When they were asked to fill out evaluations of that professor, their evaluations proved to be consistent with evaluations that had been filled out by other students who had been shown clips of “just *two* seconds of videotape.”⁷ Perhaps surprisingly, those evaluations were also consistent with evaluations that had been filled out by students who had taken the professor’s class for a full semester.⁸

Through this and other examples, Gladwell argues that people instinctively make quick assessments of persons or things. He then argues that although these initial, instinctive assessments are not necessarily fixed or unchangeable, they often end up heavily influencing a person’s long-term thinking.

Shifting gears, Gladwell also discusses some of the factors that can influence these intuitive reactions. For example, Gladwell discusses at some length the psychological phenomenon known as “priming.” Priming “refers to a process in which a person’s response to later information is influenced by exposure to prior information.”⁹ Gladwell offers several illustrations of this. For example, he points to studies showing that when companies make improvements to a food product’s packaging, consumers often believe that the product tastes better, even if no changes were made to the food itself.¹⁰ In such instances, the more attractive packaging has

⁵ GLADWELL, *supra* note 1, at 23.

⁶ *Id.* at 44.

⁷ *Id.* at 13.

⁸ As someone who spends a fair amount of time in the classroom, I’ll freely admit that this study absolutely terrifies me.

⁹ Kathryn Stanchi, *The Power of Priming in Legal Advocacy: Using the Science of First Impressions to Persuade the Reader*, 89 OR. L. REV. 305, 306 (2010).

¹⁰ GLADWELL, *supra* note 1, at 160–62.

psychologically primed the consumer to believe that the food is better, and this impacts how the consumer perceives its physical taste.¹¹

In another study described by Gladwell, two groups of students were asked to answer a series of trivia questions. Beforehand, one group was asked to spend five minutes thinking about what it would be like to be a professor, while the other group was asked to think about soccer hooligans. Those in the professor group scored much higher in the ensuing trivia test than those in the hooligan group¹²—a result that has been replicated in other similar studies.¹³ In such instances, priming acts to put a person into a particular frame of mind, and that frame of mind affects the person’s performance.

To be clear, Gladwell does not claim that priming (or other related subconscious phenomena) are the only things that affect opinion or performance. In the food-packaging context, for example, Gladwell readily acknowledges that the “taste of the product itself” still “matters a great deal.”¹⁴ But Gladwell’s point is simply that subconscious factors do matter, even influencing seemingly physical reactions such as taste or performance.¹⁵

In a related manner, Gladwell also describes the phenomenon commonly referred to as confirmation bias. Confirmation bias is the “tendency to search for, interpret, favor, and recall information in a way that confirms or strengthens one’s prior personal beliefs or hypotheses.”¹⁶ Or, as memorably put by the great twentieth century philosophers Simon & Garfunkel, it’s the process by which “a man hears what he wants to hear and disregards the rest.”¹⁷

Gladwell believes that confirmation bias is another way in which the subconscious mind influences a person’s conscious decisionmaking. Because of its effects, Gladwell argues that it matters a great deal what a person wants the eventual outcome of a particular decision to be,¹⁸

¹¹ *Id.*

¹² *Id.* at 56.

¹³ *Id.* at 52–56.

¹⁴ *Id.* at 165.

¹⁵ *Id.*

¹⁶ *Confirmation bias*, WIKIPEDIA (last modified Apr. 13, 2020, 11:00 PM), https://en.wikipedia.org/wiki/Confirmation_bias; see also Christine M. Venter, *The Case Against Oral Argument: The Effects of Confirmation Bias on the Outcome of Selected Cases in the Seventh Circuit Court of Appeals*, 14 LEGAL COMM. & RHETORIC: JALWD 45, 49 n.23 (2017) (“Confirmation bias is a widely observed phenomenon whereby people seek out and interpret information that is consistent with their expectations.”) (citation omitted).

¹⁷ SIMON & GARFUNKEL, *The Boxer* (Columbia Records 1969).

¹⁸ GLADWELL, *supra* note 1, at 14.

because the person's preferences will then shade how he or she responds to arguments or evidence about that subject.

Gladwell notably acknowledges that there is a potential dark side to this. For example, he devotes an entire chapter to what he refers to as the "Warren Harding Error"—which he describes as the tendency to choose a solution (or, in his illustrative example, a presidential candidate) based on what we think the solution should be, thereby causing us to disregard objective indications that this preferred solution is actually not the best one.¹⁹

In this sense, *Blink's* overall view seems to be more descriptive than prescriptive. Gladwell's point isn't that the subconscious mind plays an inherently good or bad role in decisionmaking. Rather, his point is simply that it is indeed playing a role, and that because of this, decisionmakers and decision-influencers alike should try to understand and account for its effects: "Taking our powers of rapid cognition seriously means we have to acknowledge the subtle influences that can alter or undermine or bias the products of our unconscious."²⁰

II. *Blink's* Potential Applications to Brief Writing

Again, although *Blink* was not written for lawyers, many of its concepts have clear application to brief writing. Three in particular stand out.

First, consider the potential impact of priming as it relates to the opening pages of a legal motion or brief.²¹ Again, Gladwell believes that priming a person to look favorably on something can subconsciously impact how the person evaluates the thing itself. In this sense, he contends that a person's initial interactions with an item or idea can matter a great deal.

Think about how often you've read a motion that began with something like this: "Comes now Plaintiff, by and through counsel of record, Lawyer Q, Esquire, and hereby prays for relief on the grounds set forth below." Think about how often that kind of formalistic opening was followed by several pages of dry factual or procedural details. In such motions, it's not unusual for the Argument section to be the first place where the party actually advances a coherent and persuasive statement of their position on the underlying legal issue.

Or consider the appellate version of this. If a brief follows the standard format, it begins with a jurisdictional statement (hardly scintillating

¹⁹ *Id.* at 72–98.

²⁰ *Id.* at 252.

²¹ For discussion of the concept applied to oral argument, see Venter, *supra* note 16.

stuff), followed by an issue statement, and then followed by a statement of facts and procedural history. In many such briefs, the Summary of the Argument is the first time that the reader is given a fully-formed version of the party's legal argument, which can be ten or fifteen pages into the brief.

If Gladwell is right, then these are wasted opportunities.²² If the judge is subconsciously making snap judgments about the party's position all along the way, and yet the first pages don't provide any context or persuasive thrust, then the judge's snap judgments won't be particularly helpful to that party. But by contrast, if the initial pages of the brief or motion try to actively persuade the judge to rule in the party's favor on the main legal issue, then priming theory would suggest that this will positively influence how the judge responds to everything else that comes in the remainder of the brief—including the technical, factual, or procedural sections that must be set forth in its beginning stages.

This is perhaps why many attorneys have begun including standalone Introduction sections at the beginning of complex motions or appellate briefs. Viewed through the prism of *Blink*, these sections have value precisely because they appeal to the judge's intuition, thereby favorably shading the judge's perceptions of the party's position from the outset.

Second, Gladwell's arguments about priming and confirmation bias should also influence the kinds of arguments that attorneys include in motions or briefs.

Lawyers sometimes fall into the trap of thinking that judges are automatons, with judicial decisions being driven strictly by mechanical principles. But human decisionmaking does not often work that way. Aristotle, for example, believed that humans are influenced by a combination of *logos* (i.e., logic), *ethos* (i.e., the reputation or trustworthiness of the speaker), and *pathos* (i.e., emotion).²³

Our legal system is governed by texts, so the logical interpretation of those texts must predominate in a motion or brief. But it would be folly to suggest that at least some judges aren't persuadable, at least on some level, by their sense of what the correct outcome should be. As recognized by one prominent commentator, many "trial judges and appellate judges" are indeed "pragmatists' who care about the effects their decisions may have" and "are curious about [the] social reality" affected by their decisions.²⁴

22 Others in the legal writing discipline have observed similarly. See, e.g., Stanchi, *supra* note 9, at 307 ("[The article] shows advocates how priming can help them make better strategic decisions in their briefs and gives specific examples of different ways to use priming in persuasive writing:").

23 JAY HEINRICH, THANK YOU FOR ARGUING: WHAT ARISTOTLE, LINCOLN, AND HOMER SIMPSON CAN TEACH US ABOUT THE ART OF PERSUASION 39–40 (2007).

24 ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 28 (2d ed. 2014) (citation omitted).

Many of us have had experiences that confirmed this. I once had a judge tell me in an off-the-record conversation that while he tried really hard to make his decisions based solely on the text that was in front of him, “it sure makes it easier for me to do that when I think that I’m doing the right thing.”

Given these understood realities, Ross Guberman devoted an entire chapter of his seminal book on brief writing to illustrating how attorneys can “[g]ive the court a reason to want to find for” their client.²⁵ Guberman advised attorneys that, in addition to making the necessary textual arguments, it’s a good idea to also provide judges with “a pragmatic reason to want to rule for them—or at least to feel bad about ruling for their opponent.”²⁶

The degree to which such an argument will matter may, of course, vary depending on the judge or the case. But even still, an attorney would be wise to account for it when drafting a brief. In Gladwellian terms, such pragmatic or policy-based arguments can be effective precisely because they appeal to the judge’s subconscious mind or intuition, thereby potentially influencing how the judge assesses even the textual arguments themselves.

Third, Gladwell’s discussion about priming and packaging also helps explain why some of the seemingly trivial things that go into a brief (e.g., Bluebooking, micro-level word choices, or formatting) are worth the time we spend on them. Many of us have dealt with pushback on these fronts—perhaps from busy law students who are in the late stages of a brief, or perhaps from hourly-billed clients who are scrutinizing the fine print of their bill. Gladwell’s description of how the subconscious mind works can help explain why these things are worth the investment.

If it is indeed true that a food product’s packaging can influence how that food tastes to the consumer, then the same is likely true for a motion or brief. If a brief is proofed correctly and looks polished in terms of its formatting, then these packaging details will send subconscious cues of competence to the judge who reads it, thereby positively influencing how the judge perceives the underlying arguments. Conversely, if a brief has noticeable technical errors or formatting glitches, it will likely send the opposite kind of signals, thereby negatively influencing the judge’s perception of the brief.

Many have recognized this. In his book on formatting technique for legal documents, Matthew Butterick argued that it is “plainly absurd” to believe that a judge would never “care[] how a text looks.”²⁷ While

²⁵ *Id.* at 27.

²⁶ *Id.* at 38.

²⁷ MATTHEW BUTTERICK, *TYPOGRAPHY FOR LAWYERS* 28 (2d ed. 2015).

acknowledging that a document's formatting should not be dispositive on its own, Butterick nevertheless contends that formatting issues will impact a judge's assessment of a document's credibility.²⁸ Butterick analogizes this to how an attorney's appearance in court might impact a judge. If an attorney appears in court wearing jeans and sneakers, this would send signals about the attorney's professionalism or even competence, and no one would dispute that this might influence how the judge would think about the attorney and even the attorney's arguments.²⁹

In his book on appellate advocacy, Judge Ruggero Aldisert of the Third Circuit likewise stated that to "gain the judge's attention," an attorney "must immediately establish credibility as a brief writer."³⁰ In this sense, he suggested that "judges become disturbed when citations are incorrect or page references inaccurate."³¹

In her law review article, Judge Patricia Wald of the D.C. Circuit similarly counseled attorneys to "proofread with a passion."³² Judge Wald continued:

You cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the judge go back to square one in evaluating the counsel. It says—worst of all—the author never bothered to read the whole thing through, but she expects us to.³³

Were he addressing lawyers, Gladwell would likely agree.

III. Conclusion

Blink is not without its flaws. Gladwell's detractors have sometimes accused him of overgeneralizing complicated subjects or of insufficiently accounting for contrary evidence. A limited book review of this sort is not the place to resolve such disputes.

But the basic principles described above do have intuitive resonance. First impressions and instinctive reactions matter, perhaps disproportionately so; decisions are often influenced by preconceived notions or

28 *Id.*

29 *Id.* at 24.

30 RUGGERO J. ALDISERT, *WINNING ON APPEAL* 24 (2d ed. 2003).

31 *Id.* at 94.

32 Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 22 (1999).

33 *Id.*

preferred outcomes; and a more polished-looking product will be more appealing to a consumer than one that is not.

Ours is a profession that is centered on influencing the decisions made by others. If even these basic insights are correct, then lawyers would be wise to both acknowledge them and then actively use them in their work. If nothing else, *Blink* is a thought-provoking look at a subject that is of central relevance to our work. It's a worthwhile read.