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Left Brain, Right Brain, and Reading Precedent

Lawyers have a precarious relationship with science. After math, it is the school subject most likely to send them running for the hills—as anyone who has litigated a Daubert motion knows well. But if there is one subject that lawyers love more than they hate science, it's themselves—or put nicely, "professional development." And while lawyering is more art than science, science—specifically neuroscience—has something to say about professional development. Its insights into the brain can help lawyers apply precedents more persuasively and, in doing so, gain an edge on the competition.

The Hemispheric Brain

Neuroscience's most relevant insight for lawyers is the hemispheric theory of the brain. This theory posits that human cognition evolved to embody a tension between (i) focused attention and (ii) broad awareness.

The left hemisphere specializes in the former: details, categories, rules; it's an "either-or" way of thinking.

The right hemisphere specializes in the latter: patterns, relationships, movement; it's a "both-and" way of thinking.

Together, these modes of attention allowed our ancestors to hunt for a meal without unwittingly becoming one. See generally McGilchrist, Iain, "The Master and His Emissary: The Divided Brain and the Making of the Western World" (2d ed. Yale Univ. Press 2019).

For lawyers, the implications of the hemispheric brain are intuitive. The left brain identifies relevant facts and authorities; it is malpractice insurance. The right brain perceives how those facts and authorities fit within a broader constellation of persuasive precedents, policies, and procedures; it is job security.

Together, these methods of analysis make an argument both correct and convincing.

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Distinguishing Bad Law

Understanding this fact about our brains can give a lawyer a competitive edge when it comes to reading the law. Specifically, this framework can help a lawyer confront the seemingly-bad-and-binding precedent (the "SBBP"): the case or line of caselaw that appears "on all fours," where each leg says, "You lose."

Sometimes a lawyer must concede when confronted with the SBBP. After all, Rule 11 is flexible but not feckless.

But more often, lawyers will seek to "distinguish" an SBBP. The art of distinguishing a precedent consists of acknowledging the precedent's relevance while identifying a feature that removes its precedential force. While every law school in the country teaches this concept, the hemispheric theory of the brain explains how to distinguish precedents effectively.

The Scatter Plot Method

From the perspective of the hemispheric brain, the key to distinguishing an SBBP is to treat the precedent as merely one data point on a broader legal scatter plot of authorities. Cf. Josh Blackman, Judge Oldham Wants To Restore A Judiciary Without Horizontal Stare Decisis, The Volokh Conspiracy (Oct. 22, 2025); see also The 2025 Joseph Story Distinguished Lecture, YouTube (Oct. 22, 2025).

This means that for the left brain, the SBBP remains binding authority, but for the right brain, the SBBP is only one factor among others for resolving your client's case—including other precedents, rules, policies, and trends.

If a lawyer wants to leverage both hemispheres of the brain, legal reasoning is less about "following" one specific SBBP and more about "finding" the SBBP's underlying legal theory. The lawyer's task is to research widely enough to identify the conceptual "line of best fit" running through the scatter plot of relevant authorities. That line of best fit—not the SBBP—is the real "law" of your case.

The art of distinguishing, therefore, is not identifying superficial differences between your client's case and the SBBP but showing

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how your case lies closer to the line of best fit than the SBBP does.

The virtue of this approach is that it avoids fixating on the SBBP. When it comes to the brain, fixation is dangerous. From the perspective of our brains, the law governing our client's case is no different than the ancient savannah out of which our brains evolved: imperceptibly vast, with both food (favorable precedent) and predators (bad precedent). If a hunter-gatherer (or lawyer) fixates on one at the expense of the other, the result is the same: death.

You found spring water in the savannah? You can bet a crocodile found it, too. Just the same: you found a line of categorical, black-letter law in your favor? You can bet equity has an exception.

You see a sleeping lion ahead? Well, he might be sleeping because he's already eaten something else. Just the same: you found an unfavorable, published case? Well, the parties may have never briefed the antecedent question that decides your case.

It's impractical to describe this "zooming-in-and-zooming-out" practice in every circumstance, but an example helps to explain.

Example: Personal Jurisdiction

In this example, your client received a complaint filed in a federal court within the Sixth Circuit, which you believe lacks personal jurisdiction. In the Sixth Circuit, personal jurisdiction is governed by a burden-shifting framework: plaintiff makes a prima facie showing; defendant must respond with evidence; and if defendant does so, plaintiff must come forward with evidence of its own. Courts may decide jurisdiction on the papers or after a hearing, but even when ruling on the papers, "the plaintiff may not rest on his pleadings to answer the movant's affidavits, but must set forth, 'by affidavit or otherwise[,] … specific facts showing that the court has jurisdiction.'" Serras v. First Tennessee Bank Nat. Ass'n, 875 F.2d 1212, 1214 (6th Cir. 1989).

Aware of this framework, you intend to move to dismiss the complaint and attach an affidavit defeating personal jurisdiction.

But then you find the SBBP: Malone v. Stanley Black & Decker, which holds, "The plaintiff must first make a prima facie case, which can be

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done merely through the complaint … [Defendant's] affidavit, however, [i]s irrelevant." 965 F.3d 499, 504–06 (6th Cir. 2020).

Now your framework has seemingly collapsed, and your affidavit is worthless.

And, indeed, some district courts had the same reaction in the aftermath of Malone. E.g., Willock v. Hilton Domestic Operating, 474 F. Supp. 3d 938, 945 (M.D. Tenn. 2020) ("[Malone] explained that, once a plaintiff makes a prima facie showing of personal jurisdiction—which he can do solely through allegations in the complaint, construed in the light most favorable to him—the defendant cannot contest jurisdiction on the basis of … an affidavit.").

But this is where the right brain intervenes. Your reading of Malone doesn't pass the "smell test"—a signal from your right hemisphere telling your left hemisphere that there's something more to explore. You therefore start asking questions: "Does a court really ignore sworn statements?" "What about undisputed facts, those too?" "Should plaintiffs always go straight to discovery?"

Researching broadly and following these questions to their answers, you soon discover the "line of best fit" running through the personal-jurisdiction scatter plot: the Sixth Circuit's burden-shifting framework is intended to enforce a plaintiff's burden of establishing jurisdiction but also to "prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts." CompuServe v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (emphasis added).

Thus, affidavits still matter—but not when they merely deny allegations. Compare Malone, 965 F.3d at 505 ("The [district] court seems to have [granted the motion] because an affidavit from one of Rexon's sales managers disclaimed some of the complaint's allegations." (emphasis added)), with H&H Wholesale Services v. Kamstra Int'l, B.V., No. 21-1533, 2021 WL 5505495, at *4 (6th Cir. Nov. 24, 2021) ("The district court accurately noted that H&H's allegations could not overcome the specific facts presented by B&S['s] affidavit[.]" (never discussing Malone)).

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Because your client's affidavit adds undisputed and dispositive facts, Malone is no longer controlling. Your case is closer to the line of best fit, and now you can distinguish Malone effectively.

The Takeaway

The hemispheric theory fittingly yields two practical lessons for lawyers seeking to apply precedent.

First, ask whether a precedent actually constitutes an SBBP. The left brain often fixates and invents rigid rules that do not exist.

Second, if the precedent truly is an SBBP, step back, identify the broader "line of best fit," and try to position your client's case closer to it. When escaping bad precedent, invoke the decision maker's right brain: the context and facts showing why the rule made sense there but not here. When relying on good precedent, invoke the left brain: rules, principles, and consistency.

At the end of the day, lawyers may never study neuroscience, but they can remain mindful that their brains shape how they read cases. With that awareness, they can avoid fixation, recognize weak arguments, and construct stronger ones.

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