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Deciding

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By Curtis E.A. Karnow¹

I'm the decider.

-President George W. Bush²

Presidents and judges are paid to make decisions. But our training includes little on that process.³ To be sure, we are taught substantive law and the basic ethical duties designed to keep us free of bias. But some of the most serious impediments to clear, rational thinking stem from the structure of the brain, and operate despite the best intentions. Indeed, the very strengths we prize in judges and others—decisiveness, conviction, expertise, judgment borne of long experience—are generated by the same mechanisms that manifest bias, lead us to prejudge, answer the wrong questions, and make it difficult to focus on key evidence.

Let's take a few examples of roughly the same behavior. In the first, an experienced art dealer looks at a purported Picasso and instantly knows it's a fake. At 1,650 feet altitude, Captain Sully Sullenberger's jet loses power in both engines as a result of a bird strike, and he makes the almost instantaneous decision to land in the Hudson river rather than try for nearby airports (which as it turns out he would not have reached). Everyone lives.⁴ A judge hears an objection and instantly rules—hearsay (*of course* it's coming in for the truth!). Driving on a road, we sense an oncoming car and instinctively turn the wheel to avoid a collision.

A slight shift now. This is less pleasant. An African-American man in a hoodie suddenly stops and takes something out of his pocket—a *gun*; obviously.⁵ A lawyer is unkempt; he has dark rings under his eyes, his shirt is not tucked in, and he can't find his papers. His hands shake. The man must be an idiot. A motion *in limine*, the same damn thing we have seen a million times—exclude all witnesses from the courtroom—*of course* it's granted, why was this even filed and why read the opposition. (Because in this case the witnesses are experts and there might be some benefit to letting each listen to the other.) Walking in the countryside, we duck in panic sensing a great dark looming shadow—only to see it was a hawk, now in the distant sky.

All these moments—good, bad and the ugly—have something in common. In each case the unconscious mind (I use the term for convenience, see n.6 below) has made a decision long before the conscious mind

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² <http://www.cnn.com/2006/POLITICS/04/18/rumsfeld/> (April 18, 2006).

³ C. Tavis, et al., MISTAKES WERE MADE (BUT NOT BY ME) at 152 (2007) (“the professional training of most ... judges ... includes almost no information about their own cognitive biases”)

⁴ <http://abcnews.go.com/Travel/story?id=7793478>

⁵ This is the “shooter bias” where one may assume members of stereotypically ‘dangerous’ groups are more likely to have weapons than some other innocent object. <https://www.psychologytoday.com/blog/ulterior-motives/201210/shooter-bias-and-stereotypes>. Interestingly, the bias may not be simply attributable to racial differences, but to *any* distinctions based on “unfamiliar, arbitrarily formed groups using a minimal group paradigm.” Saul L. Miller, et al., “The Basis of Shooter Biases Beyond Cultural Stereotypes,” <http://psp.sagepub.com/content/38/10/1358.abstract>.

has had time to reflect. As with riding a bicycle, playing the bagpipes, or landing a plane, the instantaneous reaction is often the product of long training and it is exactly right.

But it is not always right.

Daniel Kahneman distinguishes ‘System One’ and ‘System Two,’ vaguely corresponding respectively to the unconscious and conscious minds, vaguely correlated respectively with activity in the amygdala in the central brain, and prefrontal cortex (just behind the forehead).⁶ Whatever the nomenclature, repeated experiments confirm their frequent relationship: System One (the unconscious) decides first, and the System Two (the conscious, rational mind) comes in long after, not deciding for itself, but creating the scaffolding, the justification and explanation for the initial unconscious decision. System One generates default, unconscious reactions which kick in very, very quickly. System One always reaches a result, regardless of whether there is “enough” or conflicting information. It is built to resolve ambiguity, and so it frequently jumps to conclusions. System Two, or the reasoning mind, is far slower, plods stepwise through inferences and interim conclusions, and gets exhausted, often stopping its work as soon as it can claim some success in problem solving (even when it’s the wrong problem). System One is involved in driving long stretches of the freeway (the conscious mind is otherwise engaged), looking for your spouse in a crowd, and deciding $2+2=4$ (i.e., you know it when you see it).⁷ Laborious (and lazy) System Two becomes involved when we try to park in a narrow space, complete our tax forms, analyze a complex statute, or examine (face by face) a picture to find “where’s Waldo?,” or (for most of us) calculate 17×123 .

The interplay between these two systems manifests in a series of so-called classic cognitive fallacies. In each case, the unconscious (or System One) makes an implicit decision, and in effect enlists System Two to clothe it with credibility. System Two adopts the foregone conclusion; it *rationalizes* it. In these situations, reason is not the means of reaching a result; it is the means of beautifying it. It’s the lipstick on the pig.

There are many of these fallacies; I have chosen a few that pertain most closely to the work of judges.

Confirmation & Expectation bias. We look for, and inevitably find, data that confirm our pre-conceived model of how the world is.⁸ If we are told wine is expensive we tend to think it’s better than cheaper wine (even if actually it’s the same wine). Providing the same ambiguous research to those who endorse and oppose the death penalty results in each group claiming that the data support its position. Bush and Kerry enthusiasts were provided with various news clips that showed each candidate in positive and negative lights: each group said the clips confirmed its candidate choice.

We know about this. We tell our jurors that evidence can be introduced only one piece at a time, that they should wait to hear from the defendant before making up their minds, that openings are not a basis on which to decide. But how about judges? We provide tentative opinions- will we deviate? After spending an hour (or more!) figuring out a felony sentencing, are we really listening at the hearing? Appellate justices are primed with a draft opinion—how much will argument count?⁹ When we flip through motion papers to get a sense of the issue—we may be fixating on a result to the exclusion of opposed materials.

⁶ These and other labels are just shorthand descriptors. As Kahneman says of this nomenclature, “They are expository fictions, and I write the book as a psychodrama between two fictitious characters.”

<http://www.apa.org/monitor/2012/02/conclusions.aspx>

⁷ *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring) (“I know it when I see it”).

⁸ See generally, Kathryn Stanchi, “What Cognitive Dissonance Tells Us About Tone in Persuasion,” 22 J.L. & POL’Y 93, 95 (2013).

⁹ Some fear, not much. E.g., Clark Collings, “Oral Argument Reform in Utah’s Appellate Courts: Seeking to Revitalize Oral Argument Through Procedural Modification,” 2013 UTAH L. REV. ON LAW 174, 179 (2013).

Cognitive Dissonance. As a function of confirmation bias, people tend to ignore or discount evidence that conflicts with their beliefs.¹⁰ The discomfort of entertaining dual views of an issue or series of events is resolved by choosing one over the other, and System One knows which one it likes: that which conforms to the preconceived notion. Our reasoning areas shut down when confronted with dissonant information; it feels better not to entertain a conflict.¹¹ An example is from Leon Festinger's classic *A Theory of Cognitive Dissonance* (1957): "The person who continues to smoke, knowing that it is bad for his health, may also feel (a) he enjoys smoking so much it is worth it; (b) the chances of his health suffering are not as serious as some would make out; (c) he can't always avoid every possible dangerous contingency and still live; and (d) perhaps even if he stopped smoking he would put on weight which is equally bad for his health. So, continuing to smoke is, after all, consistent with his ideas about smoking."

Some have suggested that to enable their views on substantive issues such as qualified immunity for peace officers, judges may be influenced by cognitive dissonance in not finding constitutional violations;¹² and they may be constrained in their interpretations of statutes such as the American Disabilities Act.¹³ And cognitive dissonance may play a role after judges issue preliminary relief (such as a temporary restraining order or preliminary injunction): we may have steered ourselves into granting relief consistent with the old order, regardless of the new evidence adduced.¹⁴

Narrative fallacy. The narrative fallacy is born of our tendency to view facts only as a part of story or explanation, inventing links of causation and logic among facts which, in truth, are not susceptible of it.¹⁵ We do not like the random. Thusly we can recall things, thusly we have the impression of understanding. But these are false impressions. We make up these stories. As Kahneman says, we test these stories not by how accurate they are, based on the reliability of the evidence, but by how *coherent* the stories are.¹⁶ In short (and as every trial lawyer knows) we believe good stories, facts be damned.¹⁷

Conspiracy theorists dine on this. Carol Tavis tells us of those who believe in satanic cults that eat children, despite a lack of evidence of any dead bodies or remains. She notes that the lack is treated as confirmation, because it demonstrates "how clever and evil the cult leaders were: They were eating those babies, bones and all."¹⁸ But it's not just those we deride: The 'cancer cluster' fallacy is a nice example,

¹⁰ See generally, Bertram Gawronski, "Back to the Future of Dissonance Theory: Cognitive Consistency as a Core Motive," 30 SOCIAL COGNITION 652-668 (2012), <https://caa8e1207abdbbfdeadf27c36addf5c0a4a74aa.googleusercontent.com/host/0BzJP1GqBZxxKRXF2ZVJQcE9fTkk/documents/G2012SC.pdf>

¹¹ I mean this literally. Chemical reactions in the brain involving a dopamine reward may be involved when dissonance is resolved. Cf., C. Holroyd, et al., "The neural basis of human error processing: Reinforcement learning, dopamine, and the error-related negativity," PSYCHOLOGICAL REVIEW, 109, 679-709 (2002).

¹² Nancy Leong, "The Saucier Qualified Immunity Experiment: An Empirical Analysis," 36 PEPP. L. REV. 667, 670 (2009). Judges may modify their views on one element in order to avoid an unpleasant ruling on a different element. One type of the avoidance canon, by which courts generate an interpretation of a statute in order to avoid constitutional issues, may be an example. Cf., Lisa A. Kloppenberg, "Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns," 30 U.C. DAVIS L. REV. 1, 23-24 (1996); see generally, Trevor W. Morrison, "Constitutional Avoidance in the Executive Branch," 106 COLUM. L. REV. 1189, 1216 (2006).

¹³ Cheryl L. Anderson, "Ideological Dissonance, Disability Backlash, and the ADA Amendments Act," 55 WAYNE L. REV. 1267, 1297 (2009).

¹⁴ Kevin J. Lynch, "The Lock-in Effect of Preliminary Injunctions," 66 FLA. L. REV. 779, 806 (2014).

¹⁵ E.g., Nassim Nicholas Taleb, THE BACK SWAN (2007).

¹⁶ <http://www.apa.org/monitor/2012/02/conclusions.aspx>

¹⁷ For examples, judges may generate stories about complainants in domestic violence cases. Katherine E. Schulte, "Restoring Balance to Abuse Cases: Expanding the One-Sided Approach to Teaching Domestic Violence Practice," 28 COLUM. J. GENDER & L. 144, 159 (2014).

¹⁸ C. Tavis, et al., MISTAKES WERE MADE (BUT NOT BY ME) at 20 (2007).

and we all know people who believe this: simply as a function of random distribution there must be areas with high and low incidences of cancer; and a very few areas of very high incidence. These clusters must have an explanation, we think: a nearby factory, landfill, telephone wires—something. But without more, these stories are just that. Fictions.

It gets worse. Narratives *create* memories. In one well known experiment, subjects were asked to recount true stories of their childhood which were recorded in a booklet, along with a false story (about being lost at a shopping mall). After reading the book a significant number of the subjects reported the false story as true.¹⁹ Similar results were obtained when subjects were asked to write a letter with a false story—later, on reading it, many reported the letter was accurate.

Associative Reasoning. This is a profound problem; and it likely underlies the other fallacies. We think in metaphor, for language itself is built of and develops through analogies.²⁰ My use of the word ‘profound’ comes from an ancient combination of words for “before” and “bottom” connoting first physical, and now analytical, depth. Much of our thinking is done just by connection, for the brain is in effect a connection machine. With it, we reach out to new areas and master new skills. Wonderful.

But there are other consequences.

Here’s the experiment. Subjects are asked to interview a person; they think that’s the point of the experiment. Unbeknownst to them, half are given a cold drink to take into the room, and half a warm drink. They are asked afterward their impression of the person. Those who carried a warm drink, think warmly of the person. Those who held cold drinks do not. The brain conflates ‘warm’ in these two senses.

The Halo effect. Studies reveal that people who look nice are thought to be smarter. Taller people are seen as more competent. Decades of research on how the military rates officers shows that grades depend to an extent on how good-looking the subjects were.²¹ We are shocked to be told that Hitler liked little children and dogs because it violates expectations created by the halo effect. And it is commonplace to treat someone with expertise in one area as if she has expertise in entirely unrelated area: Linus Pauling, who won a Nobel in chemistry, was embraced as he touted the benefits of vitamin C (no relationship to his scientific work);²² film and rock stars are thought authoritative on issues of hunger or disease in Africa. This is all associative reasoning, cohering pleasantly, if vaguely and often illogically, to make for a nice story. Ads prey on this effect, persuading us to view happy and good looking people as evidence that detergents and cars are of high quality. As I have suggested elsewhere, associative reasoning often trumps the logical brain when it comes to explicit legal reasoning, as well.²³

¹⁹ <http://faculty.washington.edu/eloftus/Articles/sciam.htm>

²⁰ E.g., Douglas Hofstadter, *FLUID CONCEPTS AND CREATIVE ANALOGIES* (1995); Douglas Hofstadter, "Analogy as the Core of Cognition," in Dedre Gentner, et al., *THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE* 499–538 (2001); George Lakoff, *METAPHORS WE LIVE BY* (2003).

²¹ E.g., Thomas X Bowen, "A Study Of The Navy Officer Fitness Report For The Purpose Of Developing A Preparation Manual" (1962), http://archive.org/stream/studyofnavyoffic00bowe/studyofnavyoffic00bowe_djvu.txt; Officer Fitness Report Evaluation Study (1987); Galily et al., "Effectiveness of Classification Measures in Predicting Achievement in the Israel Defence Forces-Fitness Instruction Trainers Courses as a Case Study," 21 *Sport Science Review* 145, 160 (2012).

²² The Prize was for "his research into the nature of the chemical bond and its application to the elucidation of the structure of complex substances." http://www.nobelprize.org/nobel_prizes/chemistry/laureates/1954/pauling-facts.html. He also won the Nobel Peace Prize. No one else has won two undivided Prizes.

²³ Curtis E.A. Karnow, "Similarity In Legal Analysis & The Post-Literate Blitz," 15 *GREEN BAG* 2D 243, http://www.greenbag.org/v15n3/v15n3_articles_karnow.pdf

Which among us has not glanced at the name of the lawyer or law firm on the papers, and thought, well, this may be a valid (or pointless) argument? As my introductory remarks suggested, we may be influenced by the lawyer' or parties' appearances—too much gold bling? White socks and sandals (god forbid)? One federal judge I knew did not appreciate lawyers from New York: the judge's vague views of the insistent, sassy denizens of that City carried over to the people in the courtroom. Might we not rely more on a well written and beautifully organized brief, shying from the overwritten, hyperbolic, underlined, italicized, bolded dregs of the other side—even if the first brief is wrong? We might.²⁴ Judges and juries—as we suspected—are overly impressed with well-known institutional affiliations.²⁵ Our law under Evidence Code § 352 knows this too: admitting isolated past bad acts may have an overwhelming influence on the jury's view of the defendant.²⁶

We are biased because without defaults we'd never survive: we can't figure out everything every time. Some biases may be genetic, such as fear of snakes,²⁷ but most are learned: we learn to avoid large trucks on the freeway, stay away from a cliff's edge, how to play the piano—and sometimes, to be racist.²⁸ Our gut reactions help us maneuver through a complex world, but they are dangerous in the courtroom when we anticipate the cogency of someone's legal argument, devise criminal punishment, evaluate treatment plans, or decide if an expert has an adequate basis for her opinion. Actually, there may be *evidence* on what works and what doesn't,²⁹ and our visceral reaction, even when born of long-standing experience, may not be the best guide.

Feeling confident is not good enough.

A list of key (as well as more peripheral) readings in the area of cognitive fallacies is available at http://works.bepress.com/curtis_karnow/11/

²⁴ John B. Nesbitt, "The Role of Trial Court Opinions in the Judicial Process," N.Y. ST. B.J. 39, 41 (September 2003).

²⁵ Jeffrey L. Harrison, "Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses," 18 YALE J. ON REG. 253, 295 (2001).

²⁶ *People v. Christensen*, 229 Cal.App.4th 781, 796 (2014) (Evid. C. §§ 1108 and 352 analysis); generally, Joseph A. Aluisse, "Evidence of Prior Sexual Misconduct in Sexual Assault and Child Molestation Proceedings: Did Congress Err in Passing Federal Rules of Evidence 413, 414, and 415?," 14 J.L. & POL. 153, 188 (1998).

²⁷ Arne Öhman, et al., "The Malicious Serpent: Snakes as a Prototypical Stimulus for an Evolved Module of Fear," 12 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 5 (February 2003), <http://cdp.sagepub.com/content/12/1/5.short>.

²⁸ Well, not just sometimes. Almost everyone who takes a famous test—including people of color—show significant biases against minorities. You can take the test too, and I encourage you to do so. See implicit.harvard.edu/implicit/. (By the way, it doesn't matter if you know how the test works.) The documentary film "Promises" (2001) provides an interesting view of how children learn to despise those seen as 'different'. <http://www.imdb.com/title/tt0282864/>

²⁹ E.g., Roger K. Warren, "Evidence-Based Sentencing: Are We Up To The Task?," 23 FED.SENT.R. 153, 153 (2010); Matthew Herr, "Outsourcing Our Children: The Failure to Treat Mental Illness in-State," 36 N.C. CENT. L. REV. 66, 73 (2013).