

October 10, 2014

# The Adversarial System, Three Lemons, and Cocaine: The Role of Confirmation Bias

Curtis E.A. Karnow

## The Adversarial System, Three Lemons, and Cocaine: The Role of Confirmation Bias<sup>1</sup>

By Curtis Karnow

Every mediator and settlement judge knows this moment. The client or the lawyer has just made an outlandish, insane, statement about the value of the case. Silence reigns; discussions come to a grinding halt. What's worse, much worse, is that the speaker seems to really believe this.

She does.

Lawyers see this with clients, too. The client has (as we delicately say) “unrealistic expectations.” The defendant simply cannot believe that real money may be needed to win, or settle. And the plaintiff is convinced his claim is worth millions. Many millions.

It is not that the lawyer or client is alone in his or her echo chamber; it's usually worse: they are not alone. Everyone else at the firm agrees with the lawyer—after all, they are on her side, are they not? And the lawyer eggs on the client: we're going to crush the opposition. *They* are so, so wrong. *We* are so, so right.

In the adversarial system the knight on her steed tilts full forward. Anything less is a lack of confidence, a failure of loyalty, evidence one is not *with the program*; even a lack of imagination (we'll get back to imagination in a minute). But in truth we are faced with a cognitive disability based on brain structures that we all share.

In the legal world, cartoon images of the adversarial system feed, and feed on, what is termed confirmation bias. Those who study this cognitive fallacy—and it is one among the many the subject of current research—say this is the toughest to deal with. Confirmation bias has us reading conflicting data as if it just supported our bias. It has us ignoring information that does not square with our beliefs. Study after study shows this. Give Bush and Kerry supporters the same information on the strengths and gaffs of the two candidates, and the subjects will claim it supports their respective views. Those who support and oppose the death penalty may be given the same data and will conclude the data confirm their opinion. Subjects exposed to data with no apparent link to their beliefs will state it supports their belief, seeing patterns in what is actually just noise.

This has nothing to do with intelligence. And the effect is found in both emotionally-laden as well as neutral decisions. Even when subjects know about the fallacy, they still have great difficulty shedding themselves of the view that the data confirm their earlier belief. This is true with other types of bias as well, such a racial bias. Even those who know they are being tested for racial bias, and know *exactly* how the test works, will still exhibit the bias. (Go ahead. Take the test. <https://implicit.harvard.edu/implicit/takeatest.html>).

Some have heard of the closely related notion ‘cognitive dissonance’: the refusal to accept facts that interfere with prior beliefs. Interesting results come from studying the obverse: the pleasure we

---

<sup>1</sup> Published in a different format in the *Daily Journal* (October 10, 2014) as “Recognizing Confirmation Bias.”

take in fitting pieces of a puzzle, lining up three lemons on the slot machine, getting a reward in a video game, and otherwise having the world confirm our expectations—making it all fit into a whole. This isn't just a matter of imagined pleasure: there is a real chemical basis here. Dopamine uptake may increase when the pieces all fit together, and we really, truly feel pleasure. (Cocaine increases dopamine uptake as well.) We will go far, very far, to avoid cognitive dissonance and to experience the pleasure of a seamless world. We will modify memory. We will not see what is literally in front of us. We will vote against our interests. We don't see ambiguity: either we don't see it at all, or we reconstruct it to fit our current theory of how things are. And some will believe crazy things.

When one adds to this the results of other studies—which is that we come to many of beliefs unconsciously—we have a true problem: sometime irrational beliefs, irrationally supported. This is grim stuff for a profession like ours which prides itself on the rationality of its decision-making processes. We have rules of evidence, we exclude prejudicial items (even when relevant), we follow precedent laid down by disinterested judges, we excuse biased jurors and recuse judges who might have a stake in a case, courts write up opinions with the hard hand of analysis. And in the privacy of a meeting with the client, we do expect lawyers to shift effortlessly from their adversarial posture to that of the cold calculating consiglieri, reporting to the client the bald truth, bad facts, and the reality of a neutral law.

Some research (Mercier and Sperber) suggest the bias is an evolutionary effect: reasoning ability was not designed to find truth, but help us win arguments. (I see some nodding in agreement.) This is the Argumentative Theory of Reasoning. Under this theory, the result of “reason” is justification, not truth. Perhaps there are benefits to acting *as if* a grand pattern existed, if the alternative is paralysis because one cannot distinguish significance from a roiling sea of noise.

Obviously confirmation bias has serious implications for the way judges and juries decide, lawyers advise clients and present argument, parties conduct settlement negotiations, and experts evaluate other opinions—and their own. Knowing about the fallacy isn't enough to defeat it. But it's a start; even if you notice it only in the behavior of others.