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Introduction to the Symposium

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THE IMPACT OF COGNITIVE BIAS ON PERSUASION AND WRITING STRATEGIES

INTRODUCTION

Marilyn R. Walter and Elizabeth Fajans[†]*

Research into the psychology of decision-making has demonstrated that people rely on mental shortcuts to ease the burden of processing complex and ambiguous information. These shortcuts, known as heuristics and biases, sometimes lead to faulty judgments because they are naturalistic and intuitive (involving, for example, “gut instincts” and personal experience) rather than rational consideration of the information presented.

The legal profession has explored the role of cognitive biases in many domains, ranging from their influence on jury and judiciary decision-making to their impact on negotiation. This symposium, *The Impact of Cognitive Bias on Persuasion and Writing Strategies*, refocused the discussion by looking at the function and role of cognitive bias in legal writing. It explored both the persuasive power and the related ethical challenges of cognitive bias in this realm, with an emphasis on improving legal writing and legal writing strategies. The panels, which were moderated by Marilyn Walter and Elizabeth Fajans, exemplified the myriad ways cognitive bias influences audience.

Lawrence Solan’s opening paper, *Four Reasons to Teach Psychology to Legal Writing Students*, explains that the heuristics we use to reason efficiently and to good ends can also lead to errors in reasoning and judgment because we all have psychological propensities—cognitive biases—that undermine

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logical reasoning. He argues that teaching students about the cognitive propensities that interfere with effective communication may help them to understand the underlying grounds for their teachers' criticisms and suggestions, to master basic legal writing skills, and to assist them in transferring those skills to other legal tasks.

Solan focuses on four biases that play out in legal documents. Knowledge of these, he argues, enables lawyers to adjust their writing, and, within ethical bounds, to stave off or exploit them. These include the psychological propensity to appreciate plain, simple writing; the confirmation bias, which is a tendency to seek and value conclusions already reached at the expense of contrary evidence; the correspondence bias, which is an inclination to overemphasize the importance of a person's character and to underemphasize the effect of context on conduct; and the bias blind spot, which make it harder for us to recognize our own biases than to recognize the biases of others. Solan concludes with some suggestions on how to introduce these concepts in the legal writing classroom with exercises that will motivate students to internalize their lessons.

Michael R. Smith argues in *The Sociological and Cognitive Dimensions of Policy-based Persuasion* that familiarity with the mental processes involved in policy-based persuasion enables advocates to produce more effective policy arguments and to appreciate the differences between policy arguments and deductive rule-based reasoning. Because policy arguments advocate for a new rule advancing or protecting a social value, the different or competing social values of judges can lead to more varied decisions from those based on deductive reasoning. They thus require greater awareness of how cognitive processes affect policy-based decision-making.

Smith explains four general cognitive processes relevant to policy-based persuasion and, within each of the four, explores specific cognitive strategies legal advocates can employ. . The first process is fear of future loss. According to Smith, policy arguments based on protecting a future social value are more effective than policy arguments applying to the case currently before the court as well as to future cases. Cognitive phenomena like the uncertainty effect and status quo bias indicate that

arguments that warn of future loss are more persuasive than those warning of immediate impact because the uncertainty that future predictions are imbued with increases fear. Second, policy-based persuasion is more likely to succeed if advocates prove the high probability of asserted consequences. They can effectively do so by using relevant non-legal materials and by exploiting cognitive processes like the conjunctive fallacy and the availability heuristic. Third, policy arguments depend on establishing the importance of the social value at stake. Several cognitive phenomena—loss aversion, the endowment effect, and the negative bias—suggest an advocate can enhance a decision-maker’s perceived importance of a value by phrasing arguments in terms of avoiding loss instead of acquiring a gain. The final cognitive process relevant to policy persuasion is memorability, requiring the persuader to use rhetorical strategies that highlight a point and render an argument more memorable to the reader.

In *What Cognitive Dissonance Tells Us about Tone in Persuasion*, Kathryn Stanchi explains that advocacy often puts people in a state of cognitive dissonance, an uncomfortable psychological state where ambiguity, contradiction, and inconsistency cause people’s deeply held beliefs to clash. To eliminate that dissonance, that conflict, people respond either by changing their beliefs or behaviors, by rationalizing their beliefs or behavior, or by re-conceiving the situation or reality—that is, changing the narrative—to make it comport with their beliefs. Knowledge about these reactions to cognitive dissonance, she notes, can be put to rhetorical advantage if advocates are aware of what situations create dissonance and decide whether avoiding or resolving dissonance is most beneficial to the client. Thus, for example, an aggressive, hard-line message that creates dissonance may backfire because the recipient may think the argument is too one-sided to be true and begin looking for flaws. In this situation, it is better to avoid the dissonance and to take a more measured approach. Stanchi concludes that cognitive dissonance studies suggest that strategies that ease a person toward accepting a controversial claim are the surest way of dispelling cognitive discomfort and achieving the advocate’s goal.

Daniel Medwed views cognitive bias in a different context in his essay *The Good Fight: The Egocentric Bias, the Aversion to*

Cognitive Dissonance and American Criminal Law. He first acknowledges that the phrase “cognitive bias” often has negative connotations. But he then suggests that for the criminal law practitioner, two interrelated cognitive biases—the egocentric bias and the aversion to cognitive dissonance—could be potential assets. He begins by describing the egocentric bias, in which people interpret information and envision themselves in ways that promote a positive self-image, regardless of whether that image is warranted. However, the need to maintain this positive self-image may lead people to minimize evidence that would detract from that image and create cognitive dissonance. Medwed illustrates this theory by focusing on the need of both defense attorneys and prosecutors to validate or even idealize their roles in the criminal process. This validation both creates a psychological shell that protects against indignities and builds a layer of confidence that empowers lawyers to convince others of the legitimacy of their positions. Medwed sees this occurring as lawyers develop a theory of the case, determine which crime to charge at the plea bargaining stage, and present their case at trial – all important stages of the criminal justice system.

In *Metaphor and Analogy: The Sun and Moon of Legal Persuasion*, Linda Berger suggests that novel characterizations and metaphors may compete with entrenched stereotypes (cognitive biases) and conventional categories and make the recipient open to new perspectives and narratives. This insight can aid lawyers in making conscious choices about persuasion. Establishing a foundation for this argument, Berger first notes that according to social cognition researchers, we perceive and interpret new information by following a process of schematic cognition, in which the new data is analogized to the knowledge structures embedded in our memories. Researchers have divided the next step, the decision-making process, into intuitive or analytic systems. Some researchers, like Daniel Kahneman, view intuition as often leading to decisions marked by mistakes and overconfidence. Others,—represented by the experimental psychologist Gary Klein, point out the value of intuition during decision-making because it alerts the problem solver to an analogous pattern. Berger then applies these principles to the processing of analogy and metaphor, contrasting the work of

psychologist Dedre Gentner with that of linguist George Lakoff and philosopher Mark Johnson. For purposes of legal persuasion, she concludes that while conventional metaphors involve only the retrieval of automatic categories, interpretation of novel metaphors may prompt the reader to create meaning and prompt a new way of seeing.

Berger then notes the differences between analogy and metaphor. Analogy, she states, has an explicit literal predictive or explanatory effect, e.g., a corporation is like a person. Metaphors are somewhat different. They vary more in structure than do analogies, may involve an ambiguous and more non-literal use of language, and are more associated with emotion and expression than analogy. Applied to legal persuasion, since novel metaphors may cause the reader to see things in a different way, they are particularly useful to a lawyer in constructing a theory of the case, in framing what the audience perceives, and in channeling the audience's interpretation of an event. Finally, Berger draws upon several case studies to illustrate how novel characterizations and metaphors may provide alternative schemas or structures to counter the effects of stereotypes, to prompt reflective comparison rather than automatic categorization within a particular context, and to activate a persuasive master story.

In the final article, *A Lawyer's Hidden Persuader: Genre Bias*, Bret Rappaport suggests that genre be considered a kind of cognitive bias. Like other cognitive biases, genre in the legal context may skew rational thought in two ways. It constrains the texts that lawyers and judges use in specific circumstances (criminal lawyers, patent lawyers, environmental lawyers, divorce judges), and it influences readers. Indeed, Rappaport reasons that the work of both lawyers and judges is limited by a highly structured set of conventions.

Applying these theories, Rappaport turns first to two transactional document genres, patent applications and wills, to show how these highly structured genres function in the real legal world. For transactional documents, he recommends against never altering genre conventions, since these documents must be timeless, multi-purpose, and infinite. However, with persuasive documents, and in particular the appellate brief—a litigation sub-genre—he somewhat modifies his advice. Although he recognizes

the importance of reader expectations—here, the court— he acknowledges that a compelling reason may at times justify the risk of confounding reader expectations by breaking with convention. He concludes by stating that lawyers who view law and legal writing through the lens of genre bias will better understand how legal texts are “conceived, received, and perceived.”

The Impact of Cognitive Bias on Persuasion and Writing Strategies took a valuable step towards encouraging the legal community to becoming informed about the cognitive heuristics and biases that invariably come into play when recipients read our legal documents. Hopefully, the work of these symposium panelists will motivate others to continue this critical dialogue.¹

¹ Michael Higdon also participated in the symposium.