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# THE GOOD FIGHT: THE EGOCENTRIC BIAS, THE AVERSION TO COGNITIVE DISSONANCE, AND AMERICAN CRIMINAL LAW

*Daniel S. Medwed\**

## I. INTRODUCTION

The phrase “cognitive bias” often has negative connotations. It is something to be overcome, thwarted, or, at best, circumvented. In this essay, I suggest that two interrelated cognitive biases—the egocentric bias and the aversion to cognitive dissonance—might instead serve as potential assets for a criminal law practitioner in persuading her constituencies. In Part II of this essay, I introduce the basic concepts of the egocentric bias and the aversion to cognitive dissonance. Next, in Part III, I demonstrate how these cognitive biases relate to criminal law practice and can benefit practitioners working in that field.

## II. THE EGOCENTRIC BIAS AND THE AVERSION TO COGNITIVE DISSONANCE

Mark Twain once noted that “[a] man cannot be comfortable without his own approval.”<sup>1</sup> This desire to be comfortable with

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\* Professor of Law, Northeastern University School of Law. I am thrilled to participate in this symposium at Brooklyn Law School, the institution where I launched my teaching career fifteen years ago. Although I have not taught legal writing in many years, I believe it is the most important course in the first-year curriculum. We often talk about teaching our students to “*think like a lawyer*.” As far as I can tell, Legal Writing is the only part of the first year at most schools where we teach them how to “*be a lawyer*.” Professors Marilyn Walter and Betsy Fajans run one of the best Legal Writing Programs in the country, and I am grateful to them for their advice and guidance when I first joined the academy. I would also like to thank Chrisiant Bracken, a member of the Class of

oneself can lead to a particular way of perceiving the world and one's relative importance in it. Indeed, cognitive psychologists have recognized this condition, sometimes branding it the "egocentric bias" or "self-serving bias."<sup>2</sup> This bias explains how people tend to interpret information so as to promote a positive self-image regardless of whether that image is warranted.<sup>3</sup>

The egocentric bias has various components to it. It tends to spur people (1) to overestimate their importance and the importance of the values they hold dear, (2) to think that others share their same values and beliefs, and (3) to attribute good results to their innate talents and bad results to external pressures.<sup>4</sup> Moreover, this bias may lead people to interpret morally ambiguous situations in ways that are consistent with their self-interest as well as to overrate their own abilities.<sup>5</sup> Although not exclusive to any particular population, the egocentric bias appears to be more pronounced in western, English-speaking cultures.<sup>6</sup> It also surfaces in a person's behavior more often during interactions with strangers than with friends,<sup>7</sup> and especially when faced with threatening situations.<sup>8</sup>

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2014 at Northeastern University School of Law, for providing outstanding research assistance.

<sup>1</sup> See DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 38 n.27 (2012).

<sup>2</sup> See *id.* at 210 n.27.

<sup>3</sup> *Id.*; see also Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2142 (2010) ("Social cognitive research has demonstrated that individual decision-makers are highly motivated to maintain moral self-image and avoid self-sanctions.").

<sup>4</sup> See, e.g., Mamadi Corra, *Self-Serving Bias*, in THE CONCISE BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 531, 531–32 (2011).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Neal J. Roese & James M. Olson, *Better, Stronger, Faster: Self-Serving Judgment, Affect Regulation, and the Optimal Vigilance Hypothesis*, 2 PERSP. PSYCHOL. SCI. 124 (2007). As Roese and Olson explain,

Threats represent acute problems that demand quick behavioral responses (e.g., predators require rapid avoidance), because the cost of failure can be severe (e.g., death). In

The egocentric bias resonates with everyday human experience, manifesting itself to some extent within all of us. Take these stock characters from the law school setting: the student who fails an exam may chalk it up not to poor preparation, comprehension, or execution, but to harsh grading by the professor; the professor who receives horrid teaching evaluations does not consider himself a weak communicator but rather a savant too rigorous and demanding to be appreciated; and the dean whose school plummets in the *U.S. News & World Report* rankings is the victim of its dubious methodology rather than her own lackluster leadership.

Do any of these characters sound familiar? Do any of them sound delusional? Think about the old maxim that “99% of people think they are of above-average intelligence.”<sup>9</sup> It cannot be true for everyone as a statistical matter, but thinking that you are “smarter” than the mean sure makes you feel better. It serves a vital purpose too. The egocentric bias helps to create a cognitive force field to guard against life’s slings and arrows, a defense mechanism that allows many of us to wake up in the morning and persevere. Research indicates that self-serving judgments arguably enhance “optimal vigilance” for people to protect them from genuine threats.<sup>10</sup>

The egocentric bias is related to another concept known as the “aversion to cognitive dissonance,” which is basically the other side of the coin. Because people work hard to construct a positive self-image, they tend to minimize any evidence that would dull the shine from that image and create “cognitive dissonance,” that is, a

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contrast, the behavioral implications of benefits are less pressing (e.g., abundant food may be pursued at a leisurely pace), partly because the cost of failure is less severe (e.g., it takes longer to starve than to be eaten by a predator). Precisely because of this brief temporal window in which responses to threat must occur (e.g., fight or flight), an active mechanism is needed to rapidly restore negative (but not positive) affective shifts back to the set point.

*Id.* at 124.

<sup>9</sup> See Corra, *supra* note 4 (discussing the “above-average effect”).

<sup>10</sup> See Roese & Olson, *supra* note 8, at 124–25. See also Shelley E. Taylor & Jonathon D. Brown, *Illusion and Well-Being: A Social Psychological Perspective on Mental Health*, 103 *PSYCHOL. BULL.* 193 (1988).

cognitive collision between their glowing sense of self and evidence that exposes their flaws.<sup>11</sup> Let's revisit the law school setting for a moment. In order to forge a positive self-image, the student who fails the exam may attribute his failure to unduly tough grading. That same student may discount the fact that he neglected to study at all for the exam because of an aversion to cognitive dissonance—the potential recognition of his laziness clashes with the student's vision of his abilities. Therefore, that fact is discounted or negated.<sup>12</sup>

### III. CONNECTION TO CRIMINAL LAW

These concepts—the egocentric bias and the aversion to cognitive dissonance—affect prosecutors and defense attorneys in multiple ways. First, at the “big picture” level, the tendency to maintain a positive self-image can shape how criminal law practitioners view themselves and their adversaries. Second, having carefully crafted a positive self-image, the confident lawyer can now do her job on a “little picture” level; she can sell her case during a series of pivotal moments throughout the criminal litigation process.

#### A. *Big Picture*

The truth in criminal cases is often gray, not black-and-white. Gray is ambiguous, confusing, and occasionally messy. And for the overworked and often underpaid prosecutor or defense attorney, grappling with the gray—the complicated, emotionally charged facts and legal issues of each case—can be challenging. That challenge is why constructing a strong sense of self that validates, even idealizes, one's role in the process is critically important in order to simply get through the day.

Each criminal lawyer's particular self-image varies considerably, of course, but some general observations are worth noting. Many prosecutors seem to view themselves as vigorous

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<sup>11</sup> See, e.g., Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 81 IND. L.J. 481, 495–96 (2009).

<sup>12</sup> *Id.*

crime-fighters committed to protecting the victim and the public at large—the cavalry in “white hats” going after the bad guys.<sup>13</sup> Defense lawyers, for their part, may envision themselves as guardians of the Constitution, the last line of security for the little guy against the awesome power of the state, modern-day Davids fending off aggressive Goliaths.<sup>14</sup>

Likewise, criminal lawyers might demonize the other side.<sup>15</sup> This is natural. Such an intense, visceral area of the law evokes passions, and with those passions, a dose of antipathy for adversaries. As a young public defender in New York City, I was shocked by the number of times my colleagues brought up World War II imagery. Our hallway chit-chat was laden with references to prosecutors as “Nazis” steamrolling over undeserving citizens while public defenders toiled as undermanned guerilla warriors. These admittedly simplistic images can lead to self-righteousness. Sanctimonious lawyers caught up just as much in their own egos as in the needs of their constituencies—the “people” for prosecutors and the client for the defense lawyer—might not always see their cases clearly. This lack of clarity can distort decision-making.<sup>16</sup>

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<sup>13</sup> In the words of Steven Stewart, the chief prosecutor in Clark County, Indiana, “I have the best job a lawyer can have. Every day, I get to walk into court wearing a white hat and fight on behalf of crime victims; to fight for justice. There can be no better job than that.” *Clark County Prosecutor Steven Stewart*, IND. PROSECUTING ATTYS. COUNCIL, <http://www.in.gov/ipac/2950.htm> (last visited Sept. 27, 2013). See also MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS (1999); Cummings, *supra* note 3; Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

<sup>14</sup> As one young public defender recently described the attributes of his job on a university career center website, “if you are competitive, as I am, it is the ultimate thrill. It is the classic David vs. Goliath: all the resources of the government versus you and your client.” Jimmy Chu, *U.C. Berkeley School of Law, '10*, UNIV. OF MICH. CAREER CTR., <http://careercenter.umich.edu/article/jimmy-chu-uc-berkeley-school-law-%E2%80%9810> (last visited Sept. 27, 2013).

<sup>15</sup> See generally Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943 (2012) (discussing the demonization of defense lawyers but also offering some harsh generalizations that many defenders believe about prosecutors).

<sup>16</sup> Zealous prosecutors might discount information pointing to the potential post-conviction innocence of an inmate because such an idea—that they or their offices prosecuted an innocent person—clashes with their positive self-image

Yet, despite the hazards of self-righteousness and the distortions caused by wearing rose-colored glasses, the mental constructs generated by the egocentric bias and the aversion to cognitive dissonance are essential to the criminal lawyer's capacity to overcome obstacles and perform effectively. These obstacles may be very concrete—constraints of time and money, the stresses of difficult clients and witnesses. Or they may be more abstract and metaphysical. *Why am I, hard-working prosecutor, devoting my life to putting people behind bars? Why am I, diligent defender, spending my days protecting the freedom of an often damaged and dangerous client base?*

We need good lawyers to serve as prosecutors and defenders even though their career paths are littered with obstacles quite different from those confronting attorneys in many other fields. These obstacles include relatively low pay, high stress, and potentially unwelcome attention for their work in the media. The egocentric bias and the aversion to cognitive dissonance ensure that good lawyers choose these paths and that at least some of them stay the course over time, enabling them to tackle ever more serious criminal cases. These biases not only create a cognitive shell that protects against indignities, but also build a layer of confidence and self-assurance that empowers lawyers to convince others of the legitimacy of their position. This ability to “sell” a case is a necessary component of a criminal lawyer's work.

### *B. Little Picture*

At bottom, criminal lawyers are salespeople. They must sell their theory of a case to themselves, to their offices, to their opponents, to juries, and to judges. Confident lawyers who fundamentally believe in their theory of a particular case, and the significance of their larger role in the system, will surely have more success in making sales than those plagued by self-doubt and

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and creates inordinate cognitive dissonance. See MEDWED, *supra* note 1, at 123–46. See also Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004); Smith, *supra* note 15, at 943–50 (presenting anecdotes about prosecutors that, according to the author, display “smugness” as well as “self-importance, lack of imagination, and cowardice”).

indecision.<sup>17</sup> The egocentric bias and the aversion to cognitive dissonance can aid in the formation of just this sort of confidence, undeserved as it occasionally may be. Let's turn to four key "little picture" moments in the criminal lawyer's practice.

### 1. *Developing a Theory of a Case*

Lawyers are trained to review each case thoroughly and critically, to probe and prod until they have mastered the facts. Upon completion of that review, it makes sense to articulate a theory of the case that captures its essence in a way that supports the lawyer's viewpoint. This will later prove helpful in pitching it to other audiences; not incidentally, it may help the attorney to rally around her own case and further her own commitment to the cause. Narratives matter and the same set of "facts" can be told in very different ways.

Take the following hypothetical. A plainclothes police officer is patrolling a high-crime area known as a center of the local drug trade. He notices a man standing on a corner with no apparent purpose; the man is looking up and down the street and casting furtive glances over his shoulder. The man is also wearing the telltale colors of a gang reputed to sell large quantities of drugs. Based on his experience, the officer knows that drug dealers in this neighborhood are often armed. The officer believes that, even if he lacks probable cause, he at least has reasonable suspicion of criminal activity to justify a "Terry Stop" and conduct a protective frisk to check for weapons.<sup>18</sup>

So, the officer approaches the man—and the man begins walking in the opposite direction. A chase ensues. The officer eventually tackles the man to the pavement; he then conducts a

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<sup>17</sup> Notably, too much confidence can be a hindrance. See, e.g., Adam M. Grant, *Rethinking the Extraverted Sales Ideal: The Ambivert Advantage*, 24 PSYCHOL. SCI. 1024, 1028 (2013) (publishing study "showing that moderately extraverted employees sell more productively than do employees who are low or high in extraversion").

<sup>18</sup> See *Terry v. Ohio*, 392 U.S. 1 (1968). A "Terry Stop" refers to a brief detention of a person by the police based on "reasonable suspicion" of criminal activity but without the requisite probable cause to conduct a full search or make an arrest. *Id.* at 37.



quick pat-down frisk and feels a hard object in the man's waistband. The officer retrieves the object, which is not a weapon but rather a solid packet (a "brick") of heroin. The officer arrests the man for drug possession.

I suspect that prosecutors and defense lawyers might have divergent interpretations of these facts. To the prosecutor, this case might be read as a narrative of bravery: a valiant undercover officer taking a risk to clamp down on crime. But to the defense lawyer, these facts tell something else: a story of an overzealous police officer acting on a hunch and invading the personal space (the waistband!) of a man who had done nothing suspicious besides exercising his right to move freely on the streets of his city. Constructing a powerful theory of a case, in many respects, is the first pivotal advocacy moment in a criminal matter.

## 2. *The Internal Sales Pitch*

Many criminal lawyers work as part of an organization and may not have unfettered autonomy in deciding how to proceed with a case. They may have to convince others about the wisdom of their choices from the get-go, including the decisions for prosecutors about whether and what to charge. Some offices might have charging review committees in which a group of lawyers formally evaluates potential charges. Other offices might have more informal intra-office processes for arriving at an agreeable decision.<sup>19</sup>

Consider *People v. Berry*, a case from California involving a dog that killed a young child in 1987.<sup>20</sup> In that case, Michael Berry owned several pit bulls, including one named "Willy" who was bred for dogfighting.<sup>21</sup> Although Berry secured Willy in his yard with a six-foot chain, there was easy access to his property on one side of his house.<sup>22</sup> Berry shared a common driveway with a family

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<sup>19</sup> See MEDWED, *supra* note 1, at 21–29 (discussing charging review committees).

<sup>20</sup> See *People v. Berry*, 2 Cal. Rptr. 2d 416 (Cal. Ct. App. 1991).

<sup>21</sup> *Id.* at 417.

<sup>22</sup> *Id.* at 418.

next door.<sup>23</sup> One day, Willy killed the neighbors' two-year-old boy, who had strayed into Berry's yard.<sup>24</sup>

A major issue in this case concerned what crime to charge: was this manslaughter or murder?<sup>25</sup> More specifically, were Berry's actions reckless (involuntary manslaughter) or extremely reckless (second degree murder)?<sup>26</sup> The assistant prosecutor who handled the case has described how the charging decision occurred.<sup>27</sup> Evidently, the prosecutor was not even a member of the homicide unit at the time but was merely sitting in his office when he heard several veteran prosecutors discussing the case down the hall. Appalled by the facts of the case, and his curiosity piqued, he walked over to his colleagues and said something to the effect of, "Give me the file, and I'll make it a murder." And he did—he was assigned the case and sought murder charges.<sup>28</sup> The prosecutor's genuine indignation about a man housing a fighting dog next door to a toddler, and his unbridled confidence in his assessment, proved powerful in convincing more seasoned colleagues to entrust the file with him.<sup>29</sup> At trial, the court permitted the murder charge to reach the jury, although Berry was ultimately convicted of manslaughter.<sup>30</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *See* Berry v. Superior Court, 256 Cal. Rptr. 344 (Cal. Ct. App. 1989) (evaluating whether the evidence sufficed to bind over for a second-degree murder charge).

<sup>26</sup> *See id.*

<sup>27</sup> The prosecutor discusses this as part of a presentation to Professor Kate Bloch's criminal law class at the University of California at Hastings. A video recording of this presentation is included as part of the course materials for Professor Bloch's casebook. *See* KATE E. BLOCH & KEVIN C. MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH (2005) [hereinafter Berry Video].

<sup>28</sup> *Id.*; *see also* Berry v. Superior Court, 256 Cal. Rptr. at 351 ("We conclude that it is for the jury to resolve the factual issues of probability of death and subjective mental state. There is sufficient evidence to justify trial for murder on an implied malice theory.").

<sup>29</sup> *See* Berry Video, *supra* note 27.

<sup>30</sup> *See* Berry v. Superior Court, 256 Cal. Rptr. at 351; People v. Berry, 2 Cal. Rptr. at 417.

### 3. *The Plea Bargaining Bazaar*

More than ninety-five percent of criminal cases are resolved through guilty pleas.<sup>31</sup> Indeed, there are strong practical incentives to strike deals.<sup>32</sup> Prosecutors face the uncertainty, time, and expense of trial; defendants face uncertainty as well, plus the risk of a harsher sentence if convicted after trial.<sup>33</sup> There are potent psychological incentives too. Lawyers, like most humans, are prone to “loss aversion.”<sup>34</sup> Simply put, they like to win and hate to lose. For both sides, a plea can be framed as a certifiable “win”—a conviction for a prosecutor and a good deal for the defense team—without the vagaries of going to trial.

What, then, are the key factors in determining the outcome of a particular plea negotiation? Some scholars ascribe to the “market theory” of plea bargaining, in which they assert that both parties barter under the shadow of trial, making offers and counter-offers based on the perceived strength of their respective positions.<sup>35</sup> But case strength is only part of the equation; the individual lawyer’s power of persuasion may prove essential in earning a desirable plea bargain. The egocentric bias and the aversion to cognitive dissonance can help in such efforts by giving attorneys the confidence to sell their positions and extract concessions from the other side.

### 4. *Appearing in Court*

When plea negotiations falter, criminal cases normally proceed to the courtroom for a series of pretrial, trial, and appellate skirmishes. During such encounters, attorneys’ powers of persuasion are at a premium. Selling your theory of a case in court requires knowing your audience and calibrating your pitch accordingly. Trial judges may have different concerns than appellate judges, for instance, and juries may be more partial to

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<sup>31</sup> See MEDWED, *supra* note 1, at 53.

<sup>32</sup> To be sure, prosecutors might be reluctant to offer pleas, and defendants reluctant to accept them, for a variety of reasons.

<sup>33</sup> See MEDWED, *supra* note 1, at 52–68.

<sup>34</sup> *Id.* at 56.

<sup>35</sup> *Id.* at 60.

particular types of narratives than to other accounts.<sup>36</sup> As a result, the skill set needed to excel in court is a multi-faceted one, including the ability to communicate, emotional intelligence, and poise. The connective tissue linking these skills is confidence. The confident orator can summon the rhetorical passion required to sway others to her position; the confident observer who can “read” the audience and trust that assessment can better modify her approach to appeal to that audience; and the confident person can carry herself in a manner that commands respect.

Now, if confidence bleeds into arrogance, then all bets are off. It is hard to influence people when they loathe you, not to mention that an excessively confident person may be a poor listener or otherwise overlook key social cues.<sup>37</sup> But, as long as the egocentric bias and the aversion to cognitive dissonance (a) generate confidence and not arrogance, and (b) produce only a modicum of self-righteousness, then they can be effective tools in the criminal law practitioner’s courtroom tool-chest.

#### IV. CONCLUSION

It is often claimed that cognitive biases, such as the egocentric bias and the aversion to cognitive dissonance, are troubling features of the human condition. They can distort one’s perception of reality and lead to poor decisions. However, these biases can be effective advocacy and persuasion tools for the criminal law practitioner operating in the trenches—in the vivid, gory, and gray world of crime.

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<sup>36</sup> Scholars have long sought to analyze and unpack the mysteries of judicial and jury decision-making, an undertaking that is far beyond the scope of this brief essay. For an interesting and relatively recent discussion of judicial decisionmaking, see Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313 (2012).

<sup>37</sup> See generally Grant, *supra* note 17.