

# The Art of Persuasion

# Effective Advocacy Depends on Being *Persuasive*

- Judges and juries are decision makers
- The point of advocacy is not to be right
- The goal is to persuade the decision maker to find in your favor

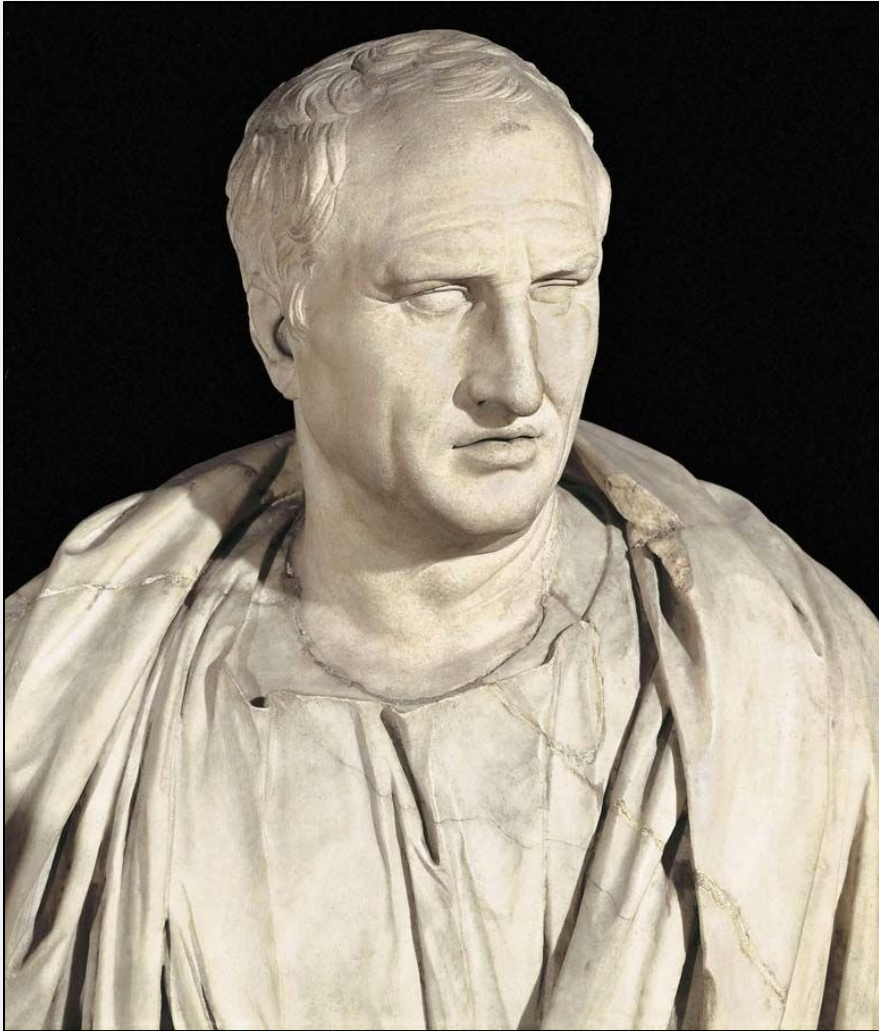


Persuasion skills can be learned.

# The Age-Old Search for the Keys to Persuasion

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# People Have Thought About Persuasion Since Antiquity

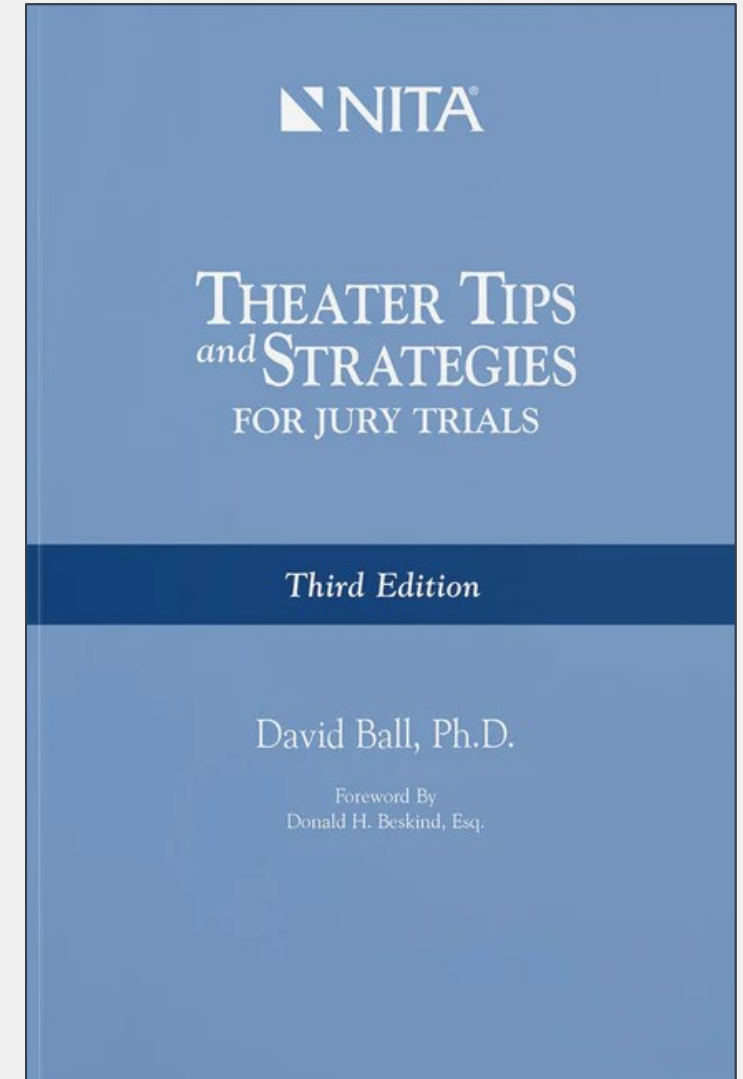
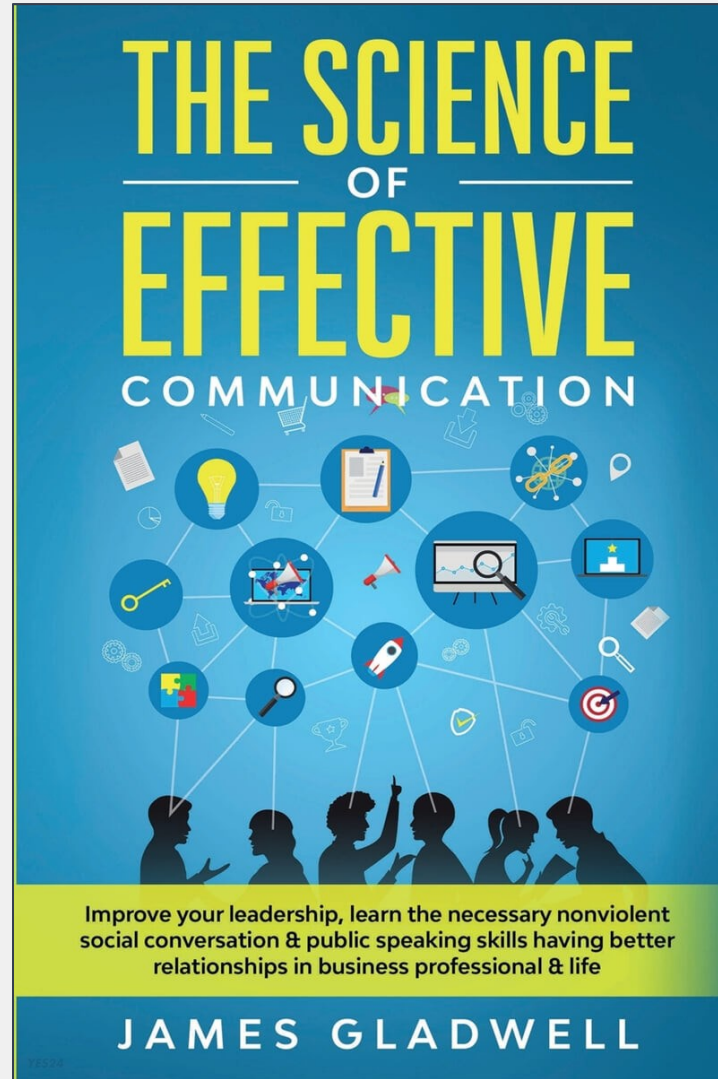
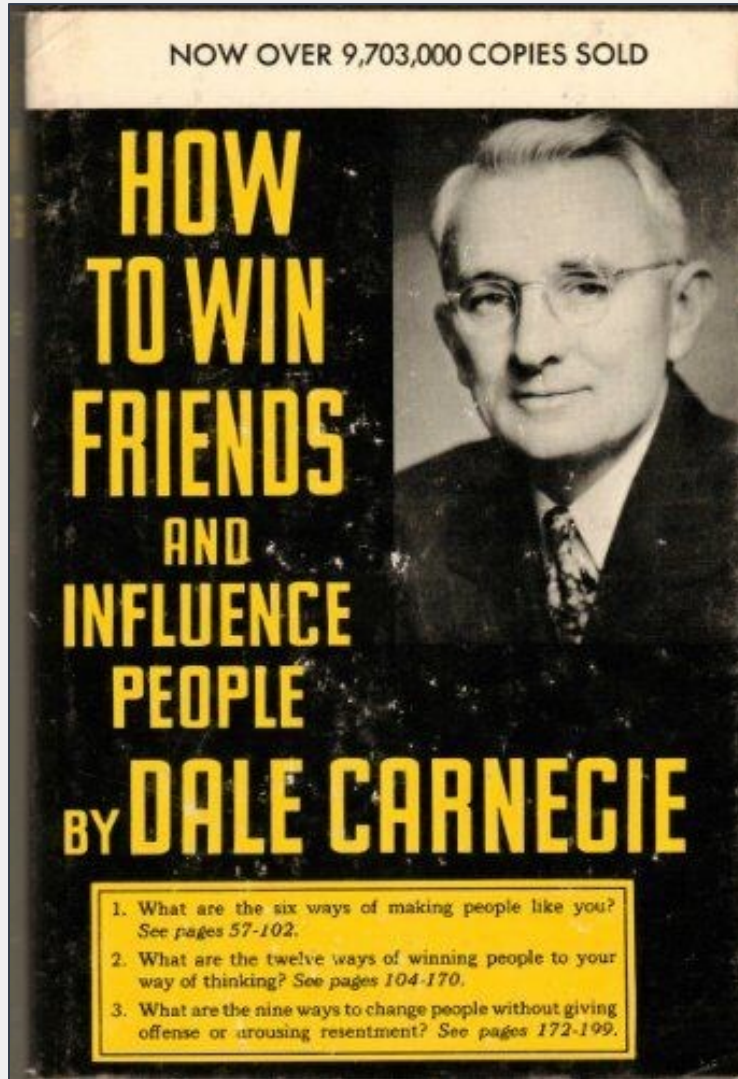


## Cicero's Five Elements of Argument:

- Invention
- Arrangement
- Style
- Memory
- Delivery

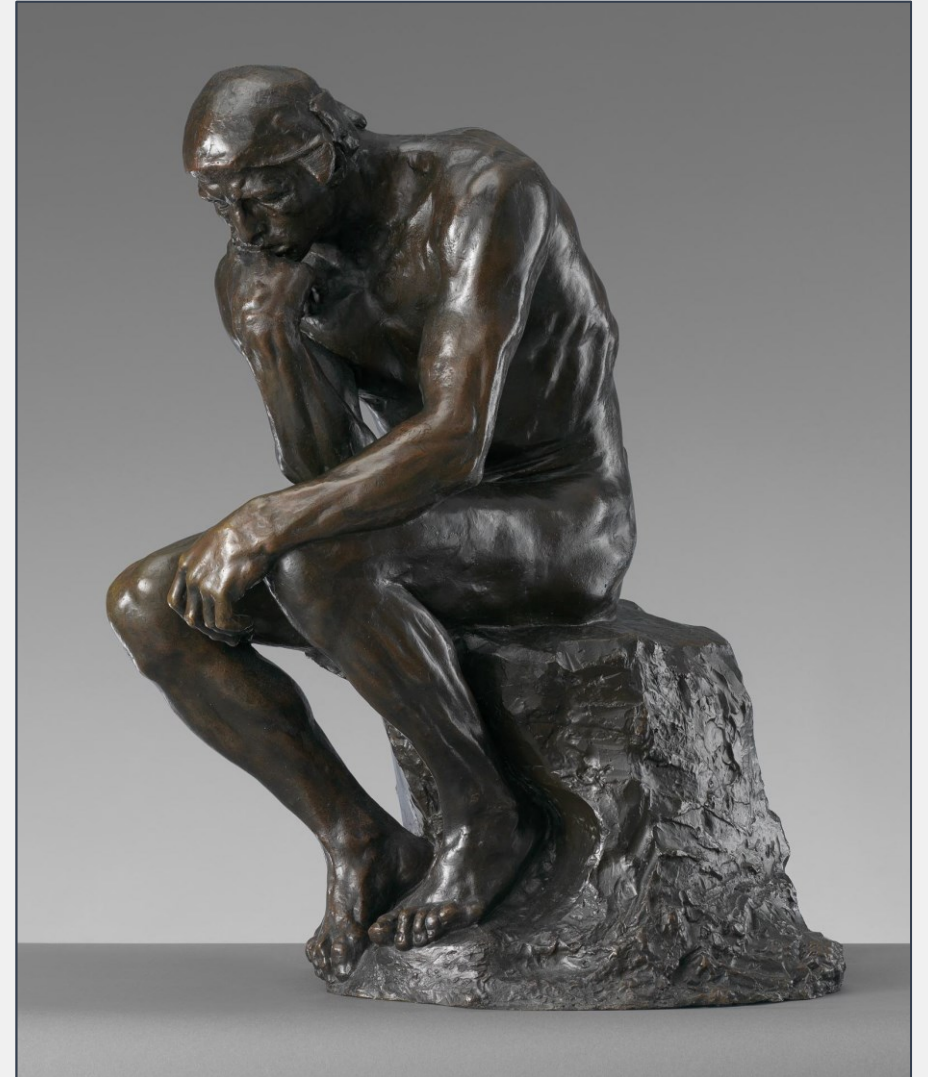


# The Search Continues . . .



# Two Key Questions

- (1) How do people make decisions?
- (2) How can you shape your arguments in light of the decision-making process?

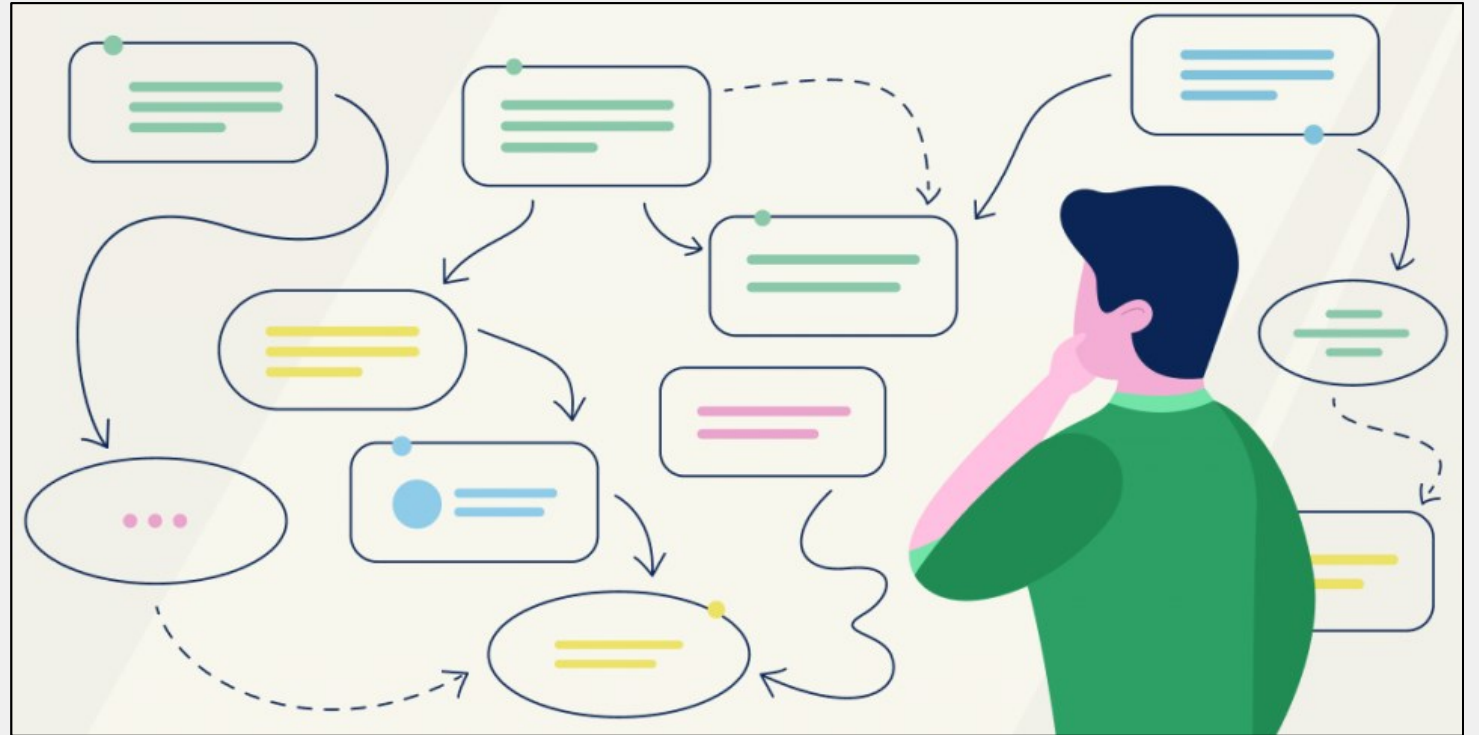


# The Decision-Making Framework

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# People Make Decisions by Creating a Framework

Jurors “engage in an explanation-based decision process: They actively evaluate conflicting claims and **construct a narrative framework** that provides a plausible interpretation of the evidence.”



Bornstein & Green, *Jury Decision Making: Implications for and from Psychology* (2011)



# How the Framework Works

People create their frameworks **quickly**:

- Process evidence based on framework
- React to evidence as they experience it
- Use less information than they think



# People Search for Evidence to Support Their Conclusions

## Heuristics and Biases in Judicial Decisions

Eyal Peer & Eyal Gneezy

A famous tale talks about three baseball umpires who were asked how they rule on a ball. One said, "I call it like I see it." Another said, "I call it like it is." And the last one (and this is attributed to umpire Bill Klem) said, "It ain't nothin' till I call it." While the first umpire admitted he was an imperfect human observer, the second and third umpires claimed they were infallible and judged cases only based on their objective merits. So, what can be said about court judges? Are court judges such impartial rulers that they can "call it like it is"? Or, as the first umpire humbly confessed, are they limited human observers confined by the boundaries of human cognition?

In this article, we briefly review some of the accumulating evidence suggesting that in some cases judges could be prone to cognitive fallacies and biases that might affect their judicial decisions. We review several studies on cognitive biases relating to elements of the hearing process (considering evidence and information), ruling, or sentencing. These findings suggest that irrelevant factors that should not affect judgment might cause systematic and predictable biases in judges' decision-making processes in a way that could be explained using known cognitive heuristics and biases.

Heuristics are cognitive shortcuts, or rules of thumb, by which people generate judgments and make decisions without having to consider all the relevant information, relying instead on a limited set of cues that aid their decision making.<sup>1</sup> Such heuristics arise due to the fact that we have limited cognitive and motivational resources and that we need to use them efficiently to reach everyday decisions. Although such heuristics are generally adaptive and contribute to our daily life, the reliance on a limited part of the relevant information sometimes results in systematic and predictable biases that lead to sub-optimal decisions. Amos Tversky and Daniel Kahneman (who later won an economics Nobel Prize for his joint work with the late Tversky) introduced the heuristics-and-biases approach by first identifying key heuristics and the biases they sometimes cause. For example, the availability heuristic is the one by which we judge the probability of an event based on how easy it is to recall instances of such an event. Try to think, for example, of words that start with the letter "r" compared to words that have "r" as the third letter. Although the latter is more frequent in English, people think there are more words that start with "r" simply because they are easier to recall.<sup>2</sup>

The use of the availability heuristic, as with other cognitive

If people have a preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregard evidence pointing to the contrary. This confirmation bias makes people search, code, and interpret information in a manner consistent with their assumptions, leading them to biased judgments and decisions.<sup>6</sup>

During a trial, judges are presented with evidence; they may ask for additional or other evidence, they may judge evidence as inadmissible, or they may decide to give more (or less) weight to certain pieces of evidence. Such tasks in the hearing process might be affected by several cognitive biases including the confirmation bias, the hindsight bias, or the conjunction fallacy.

### Confirmation Bias

If people have a preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregard evidence pointing to the con-

### Footnotes

1. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974).
2. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) [hereinafter *THINKING*]; JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES

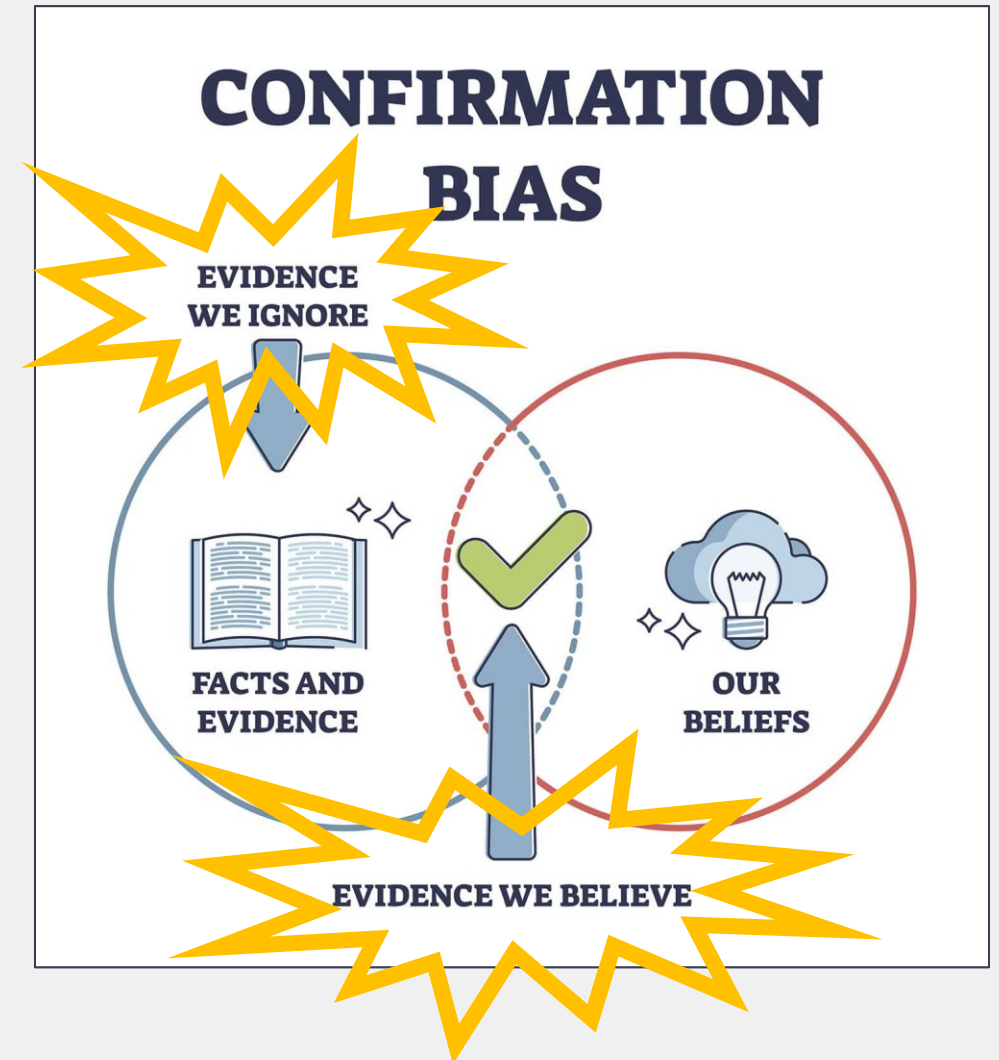
(Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982); Tversky & Kahneman, *supra* note 1.

3. See, e.g., *THINKING*, *supra* note 2.
4. *Id.*
5. See *id.* for a recent review of heuristics and biases.

# All New Information is Processed Through the Framework

“*First* we pick an answer and *then* we look for facts to support that choice.”

Bornstein and Greene, *Jury Decision Making: Implications for and from Psychology* (2011)



# People Search for Evidence to Support Their Conclusions



Breonna Taylor

Case 3:22-cr-00086-RGJ Document 15-1 Filed 08/23/22 Page 1 of 6 PageID #: 52

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U.S. DISTRICT COURT  
W/D OF KENTUCKY

Plea Agreement Addendum – Kelly Goodlett Factual Basis

Date: Aug 23, 2022

- In late 2019 and early 2020, Det. Kelly Goodlett worked in the Place-Based Investigations

- On one occasion, on January 16, 2020, Det. Jaynes and Det. Goodlett had seen J.G. pick up a package at Breonna Taylor’s apartment. They did not have any evidence of what was in the package, but based on what they knew of J. G., they suspected that he was picking up drugs or drug proceeds. The detectives therefore wanted to get a warrant for Taylor’s home, in the hopes that they would find drugs, currency, or evidence of drug trafficking there. The detectives, knowing that they needed actual evidence, rather than just a gut feeling, to get a warrant, attempted to find evidence supporting this gut belief. They were unable to find any other evidence that J.G. received packages at Taylor’s apartment or any evidence that J. G. even went to Taylor’s apartment after January 2020.

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- Specifically, Det. Jaynes advised Det. Goodlett that he asked Sgt. J.M. to use his contacts at the U.S. Postal Inspection Service (USPIS) to investigate whether J.G. was receiving packages at Taylor’s apartment. About a week later, Det. Goodlett followed up with Det. Jaynes to ask if Sgt. J.M. had responded. Det. Jaynes told her that Sgt. J.M. had found that “there’s nothing there,” or similar words to like effect (meaning there was no evidence of J.G. getting mail), and that Taylor’s address was “not flagged” by Postal for receiving any suspicious packages. Det. Jaynes expressed his disappointment to Det. Goodlett. Det. Goodlett knew from her training and experience that this information cut against their assumption that J.G. kept drugs or drug proceeds at Taylor’s home. Det. Goodlett knew

# Understanding How the Framework Works

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# The Judge's Admonition is Close to Hopeless



## **M Civ JI 2.06 Jurors to Keep Open Minds**

(1) Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in the case until after you have (a) heard all of the evidence, (b) heard the closing arguments of counsel, (c) received all of my instructions on the law and the verdict form, and (d) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Sympathy must not influence your decision. Nor should your decision be influenced by prejudice or bias regarding disability, gender or gender identity, race, religion, ethnicity, sexual orientation, age, national origin, socioeconomic status or any other factor irrelevant to the rights of the parties.

Each of us may have biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

# People React to Information as They Experience It

“The mind isn’t just a passive information processor; it’s also emotional. In reality, **once people begin to experience that evidence in real time, they will inevitably react to it as they go along.** We won’t need to see later information if we already love or hate the very first piece.”

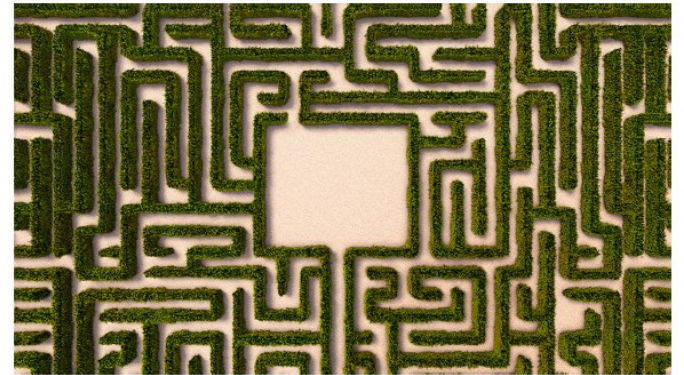
Harvard  
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Decision Making And Problem Solving

## We Use Less Information to Make Decisions Than We Think

by Ed O'Brien

March 07, 2019



Dmitri Otis/Getty Images

**Summary.** We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before choosing. Having so much information at our fingertips has made us... [more](#)

We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before

# People Believe Information That Aligns With Their Values

“Ordinary members of the public credit or dismiss scientific information on disputed issues based on whether the information strengthens or weakens their ties to others who share their values.”

Published: 27 May 2012

## The polarizing impact of science literacy and numeracy on perceived climate change risks

Dan M. Kahan [✉](#), Ellen Peters, Maggie Wittlin, Paul Slovic, Lisa Larrimore Ouellette, Donald Braman & Gregory Mandel

*Nature Climate Change* 2, 732–735 (2012) | [Cite this article](#)

33k Accesses | 1149 Citations | 1474 Altmetric | [Metrics](#)

### Abstract

Seeming public apathy over climate change is often attributed to a deficit in comprehension. The public knows too little science, it is claimed, to understand the evidence or avoid being misled<sup>1</sup>. Widespread limits on technical reasoning aggravate the problem by forcing citizens to use unreliable cognitive heuristics to assess risk<sup>2</sup>. We conducted a study to test this account and found no support for it. Members of the public with the highest degrees of science literacy and technical reasoning capacity were not the most concerned about climate change. Rather, they were the ones among whom cultural polarization was greatest. This result suggests that public divisions over climate change stem not from the public's incomprehension of science but from a distinctive conflict of interest: between the personal interest individuals have in forming beliefs in line with those held by others with whom they share close ties and the collective one they all share in making use of the best available science to promote common welfare.

# People Use Much Less Information than They Think

- MBA students told to write *exactly* the number of essays they believed a professional hiring manager would review.
- Students who wrote too many or too few essays lost the job.
- On average, the students wrote **4 essays**.
- On average, the hiring managers reviewed only **2 essays per applicant**.





# The Ford Motor Co. Investment Example



“Boy, do they know how to make a car!”

- Chief Investment Officer

Kahneman, *Thinking, Fast and Slow* (2011)



# The Harder the Question, The More People Rely on Peripheral Information

When jurors don't understand a situation, **they focus on aspects they can understand** such as an expert witness's credentials, a counsel's pay, a witness's amiability, etc.


Solerna, Bottoms, Peter-Hagene (2017); Levett & Kovera (2009); Cooper & Neuhaus (2000)



# Decision Making is Emotional

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# People Process Information Based on Emotion

  
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## Jury Decision Making: Implications For and From Psychology

Brian H. Bornstein<sup>1</sup> and Edie G.  
<sup>1</sup>University of Nebraska-Lincoln and <sup>2</sup>University of Colorado

**Abstract**  
Jury trials play a centrally important role in the perceive, interpret, and remember evidence, a fundamental cognitive and social psychological to reasoning, memory, judgment and decision logical research can inform trial procedures, decision making has implications for psychology

**Keywords**  
juries, decision making, public policy

The jury is a unique institution: It requires who lack legal training to hear evidence, conflicting facts, and apply legal rules to reach which all (or sometimes just most) jurors only a small and diminishing proportion of ultimately resolved by jury trial, thousands decided by juries each year, and prediction verdicts influence decisions to settle civil law and accept plea bargains in criminal cases assume a role of central importance in the law.

Juries also interest psychologists who individuals perceive, interpret, and remember the ways they reach consensus with others real-world laboratory for examining the related to reasoning, memory, judgment and decision attribution, stereotyping, persuasion, and group behavior. Conversely, psychological research can inform trial procedures. Thus, jury decision making has implications for psychological research and vice versa.

Arguably, no other institution so thoroughly entrusts citizens to govern themselves. Many countries (including Australia, Canada, England, Wales, Ireland, New Zealand, Korea, Scotland, Spain, Japan, Russia, and the United States) use juries in criminal cases, and some do so in civil cases also. In the United States, if selected persons meet minimal requirements concerning citizenship, age, literacy, and residency, they take their turn as jurors. Ironically, though, the democratization of jury service has also led to controversy about jurors' ability to deliver justice fairly and predictably. Among the concerns

Research on jurors and juries affords the opportunity to conduct basic and applied research simultaneously, and juries are a natural laboratory for examining individual decision making as well as group dynamics. Research can focus on decision processes (e.g., attribution, hypothesis testing), as well as decision outcomes (e.g., verdicts). In addition, the findings can be used to inform real-world policies and procedures, such as improving jury instructions or deciding whether to allow jurors to ask questions of witnesses (Greene & Bornstein, 2000).

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decision-making outcomes. In addition, jurors' emotions and moods can affect their judgments in various ways: by influencing the type of information processing in which they engage, by inclining them to construe evidence in a direction consistent with their moods, and by providing informational cues about the appropriate verdict (Feigenson, 2010).

# Understand Your Impact on Your Audience



I've learned that people will forget what you said, people will forget what you did, but **people will never forget how you made them feel.**

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Maya Angelou

American Poet

# Changing Minds is Hard

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# Changing Someone's Mind is Very Difficult

## Winning Arguments: Interaction Dynamics and Persuasion Strategies in Good-faith Online Discussions

Chenhao Tan

### ABSTRACT

Changing someone's opinion is arguably one of the most important challenges of social interaction. It is difficult to study: it is hard to know when and whether and how someone's opinion changes. ChangeMyView, an active community where users present their own arguments and others to contest them, and acknowledge when the ensuing discussions change their original views. In this work, we study these interactions to understand the mechanisms behind persuasion.

We find that persuasive arguments are characterized by interesting patterns of interaction dynamics, and degree of back-and-forth exchanging similar counterarguments to the language factors play an essential role between the language of the opinion terargument provides highly predictive power, since even in this favorable situation, we investigate the problem one's opinion is susceptible to being difficult task, we show that stylistic expressed carry predictive power.

### 1. INTRODUCTION

Changing a person's opinion is a ranging from political or marketing professional conversations. The importance is well-recognized, leading to a tremendous amount of research [9, 15, 17, 42, 46, 47]. Thanks to the interactions online, interpersonal persuasion is possible at a massive scale [19]. This paper studies persuasion in practice, without the limitations of laboratory experiments. We raise new methodological challenges regarding dynamics in real life, due to the lack of the degree of experimentation. This raises new methodological challenges.

It is well-recognized that multiple factors influence persuasion. Beyond (i) the characteristics

Changing someone's opinion is arguably one of the most important challenges of social interaction.

Beyond the characteristics of the arguments themselves, such as intensity, valence and framing, and social aspects, such as social proof and authority, there is also the relationship between the opinion holder and her belief, such as her certainty in it and its importance to her.

which efforts succeed) should be easy to extract.<sup>1</sup> One forum satisfying these desiderata is the active Reddit sub-community /r/ChangeMyView (henceforth CMV).<sup>2</sup> In contrast to general platforms such as Twitter and Facebook, CMV requires

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occur, as we shall show.  
<sup>1</sup><https://reddit.com/r/changemyview>  
<sup>2</sup>It is not necessary for the reader to be familiar with timelines, but a brief summary is: a pool of money is maintained where the annual payouts are divided evenly among all participants still living.

# Changing Someone's Mind is Very Difficult

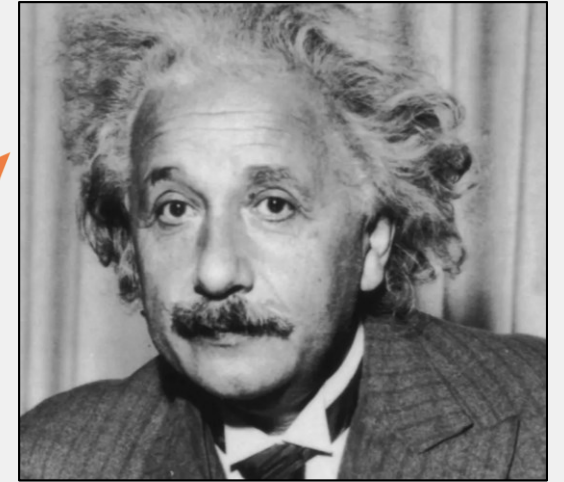
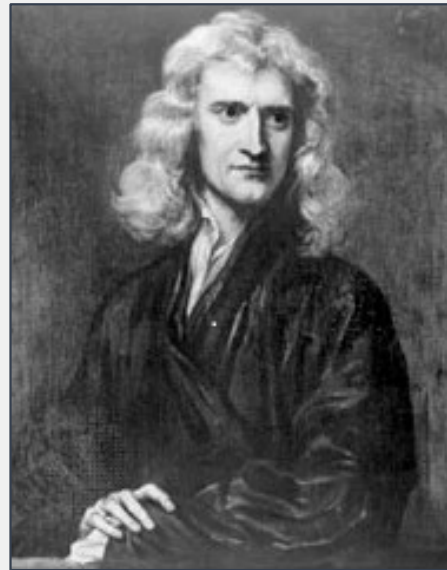
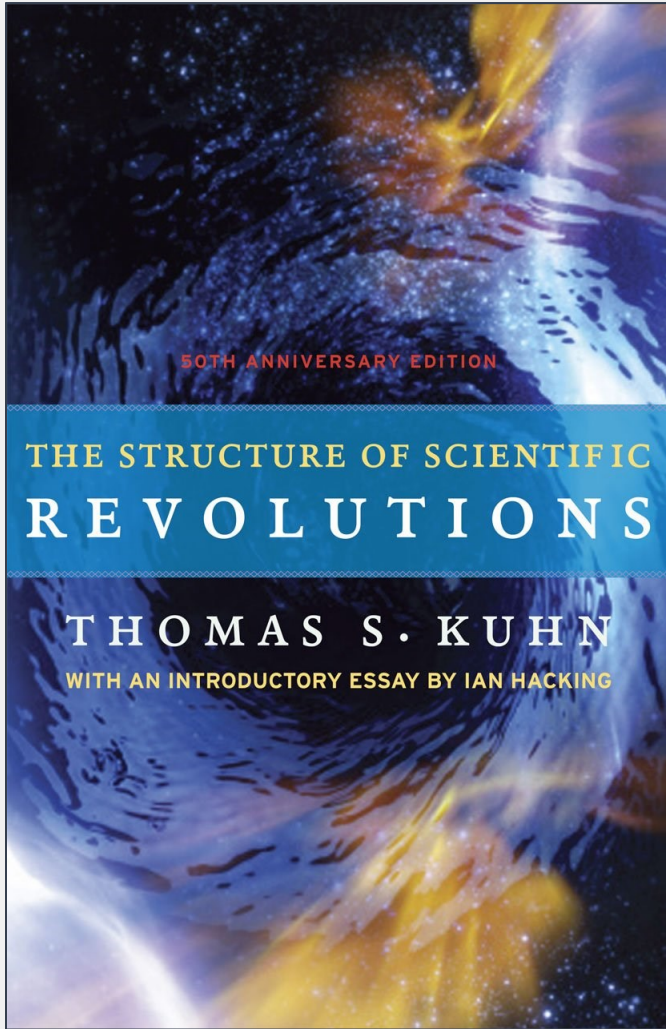


**Azhar Puerini**

@AzharPuerini

i still think my favourite thing that's ever happened to me on the internet is the time a guy said "people change their minds when you show them facts" and I said "actually studies show that's not true" and linked TWO sources and he said "yeah well I still think it works"

# Changing Someone's Mind Is Very Difficult



## How Does Change Happen? Wisdom In An Old Joke



How many psychiatrists  
does it take to change a  
light bulb?

None: the lightbulb has to want to change.

# Changing Someone's Mind is Very Difficult



I didn't convert anybody. They saw the light and converted themselves.

First, you realize that one's perception is one's reality. Whatever somebody perceives becomes their reality, whether it's real or not, it is their reality. It's what they believe. And they only know what they know. So, **if you try to attack somebody's reality, you're going to fail** because it's real to them and they're going to defend it nail and tooth, whether or not their argument makes any sense or not, it's real to them. So you're better off not attacking their reality if you want to see them change.

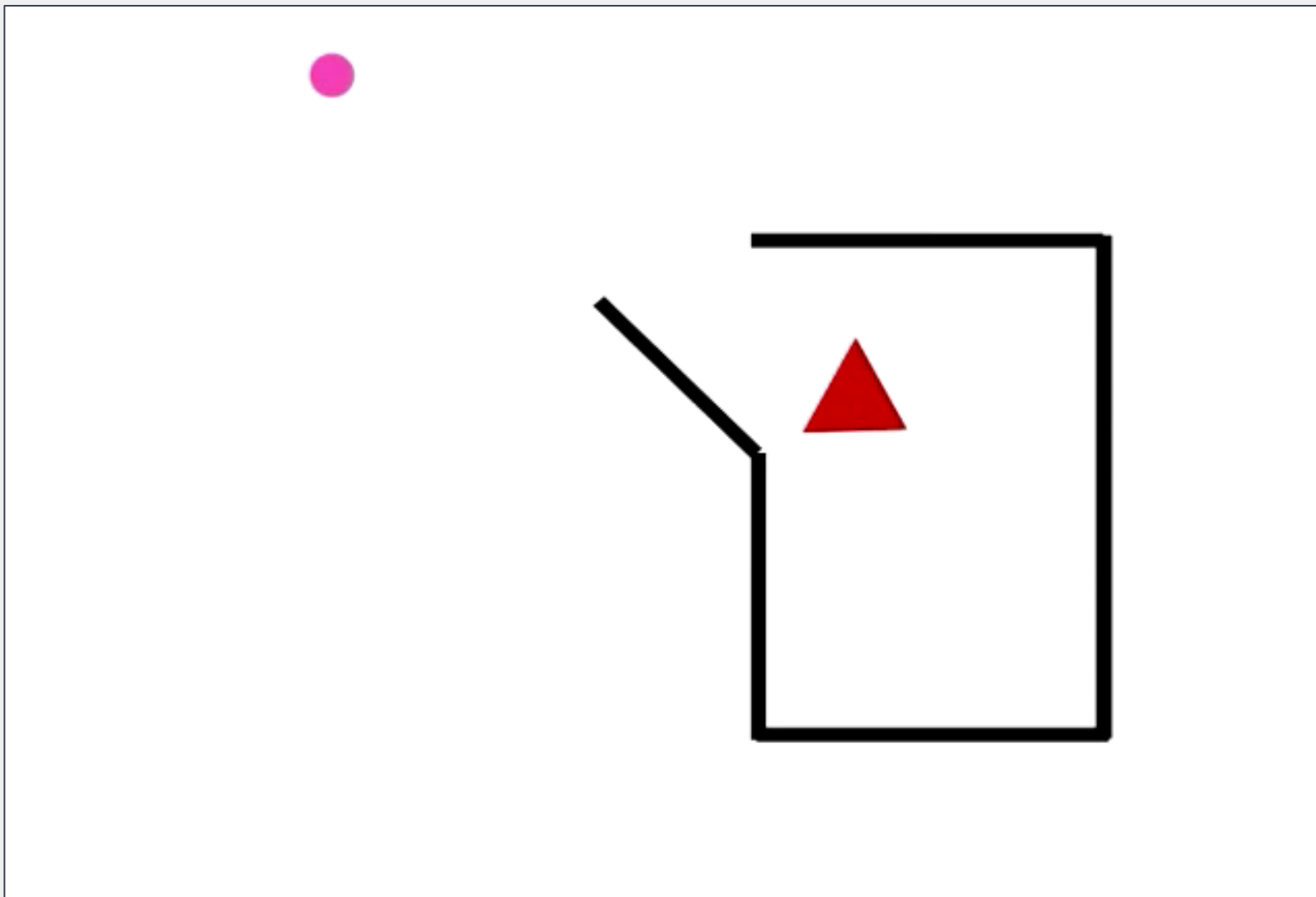
Daryl Davis



# Recommendations for Effective Advocacy

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# A Classic Video



# People Understand Stories

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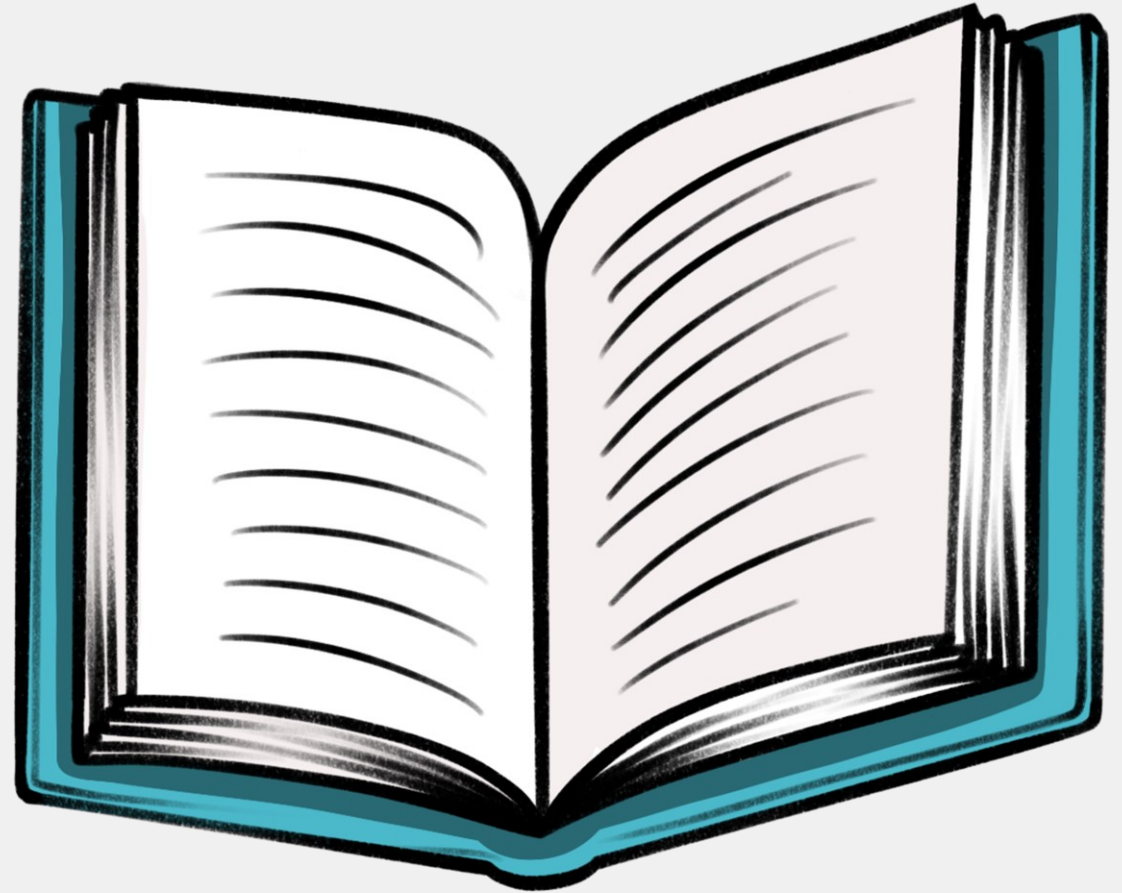
# Present Your Case as a Narrative

Stories constitute the single most powerful weapon in a leader's arsenal.

Dr. Howard Gardner

Sometimes reality is too complex. Stories give it form.

Jean Luc Godard



# People Understand Stories

www.plaintiffmagazine.com

JANUARY 2018

## The psychology of jurors' decision-making

It's your job to know how they think, what persuades and what puts them off

By SONIA CHOPRA

Jurors make decisions just like other human beings do, but they do so in an environment that is different from everyday individual decision-making. The conditions of trial and the group setting create some demanding characteristics that can lead to the use of cognitive shortcuts or unconscious biases influencing decision-making, and group dynamics can also play a role. What is *not* true is the belief that jurors are not intelligent enough to make decisions in complex cases, that their decisions are arbitrary and baseless, or that passion drives every verdict. Going into trial with that view of the jury pool will impact the way you present your case, to your detriment.

If the jurors don't understand the case or don't base their decision on the relevant evidence, that is in part your fault. It is your job as attorneys to know your audience, to know how they think, what is persuasive to them and what is off-putting. It is your job to make your case interesting, understandable, and compelling. To do that, it is useful to become familiar with the way human beings make decisions generally, and how the trial setting and case themes interact with those processes.

We'll start with discussing cognitive psychology concepts known as cognitive biases. While we usually use the word "bias" to refer to an undesirable or negative trait, cognitive biases help human beings survive in a high-information world. We all have these cognitive biases; we all use them. Learning about these biases

and how they may influence your case presentation will help you become better advocates for your clients.

### Confirmation bias

Confirmation bias, also known as "my side" bias, is the tendency to seek out, attend to, and better recall information, for example, evidence and arguments, that confirms one's preexisting attitudes and beliefs while at the same time discounting or ignoring information that is contrary to one's preformed opinions.<sup>1</sup> When evidence is ambiguous – as it often is in cases that make it to trial, it is interpreted in a way that confirms the initial belief.

Confirmation bias is strongest concerning issues that are emotionally charged, and beliefs that we think form the basis of our own self-identity. Politics is the prime example. Conservatives listen to news outlets that support their views; Liberals do the same. We purge our Facebook pages of people whose opinions are different than ours.

Confirmation bias plays a significant role in decision-making and therefore it underscores the importance of jury selection. Every human being engages in confirmation bias. Intelligence, station in life, age, race, gender – none of it matters. Confirmation bias is why 12 people can hear the exact same case and come to vastly different interpretations of what happened, who was at fault, and what the damages should be. You will not change the mind of someone with strong views against essential elements of your case – not in jury selection and not during the trial.

What you must identify those whose perceptions – the most influential in shaping attitudes and opinions – are problematic for your case. This can be accomplished by asking the jurors to be fair and follow the evidence. This is accomplished by asking the jurors to begin with "Do you understand the judge will explain the law to you." It is not uncommon for jurors to hypothesize that they will seek to advance their own interests without making any commitments. Some of these types of jurors may seek to do with the evidence that can cause them to think differently.

### The stereotypes

Confirmation bias plays a significant role in decision-making and therefore it underscores the importance of jury selection. Every human being engages in confirmation bias. Intelligence, station in life, age, race, gender – none of it matters. Confirmation bias is why 12 people can hear the exact same case and come to vastly different interpretations of what happened, who was at fault, and what the damages should be. You will not change the mind of someone with strong views against essential elements of your case – not in jury selection and not during the trial.

We all use stories to make sense of the world. It is how we best learn and categorize information. A story creates a "schema" or narrative of what we believe happened, and then through other cognitive biases, we tend to filter the evidence and arguments through this schema. Jurors come to trial wanting to know what happened. A good story answers this question in the way that is most beneficial to your client but also fits the evidence most succinctly. . . . An engaging story draws people in and makes them care about what happens.

See also Devine et al., *Jury Decision Making 45 Years of Empirical Research on Deliberating Groups* (2001)



# Help The Jurors Build Their Framework

- Do not let the jurors make the narrative framework on their own
- At the beginning of the case, lay out an appealing story for your audience



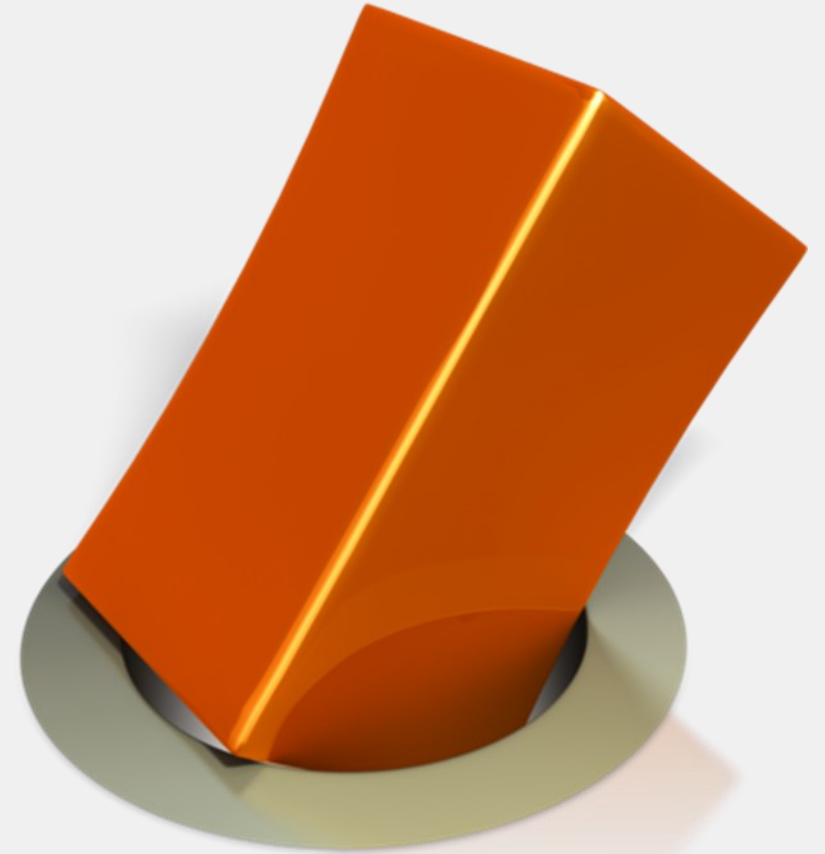
Ladies and gentlemen, this case is about . . .

Hit Your Best Points Early and Often—  
Over and Over and Over Again

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# Focus on the Most Important Evidence

- Not every piece of evidence will fit together perfectly. That's okay!
- Focus on the evidence that **matters**



# Focus on the Most Important Evidence

“When looking to impress, **dedicate most of your time and energy into fine-tuning some information**, rather than worrying and working on every little piece.”

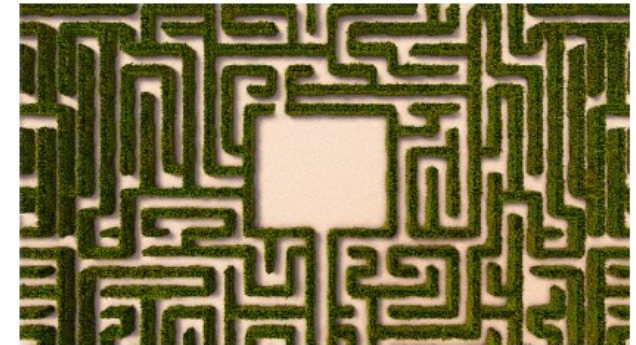
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Decision Making And Problem Solving

## We Use Less Information to Make Decisions Than We Think

by Ed O'Brien

March 07, 2019



Dmitri Ols/Getty Images

**Summary.** We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before choosing. Having so much information at our fingertips has made us... [more](#)

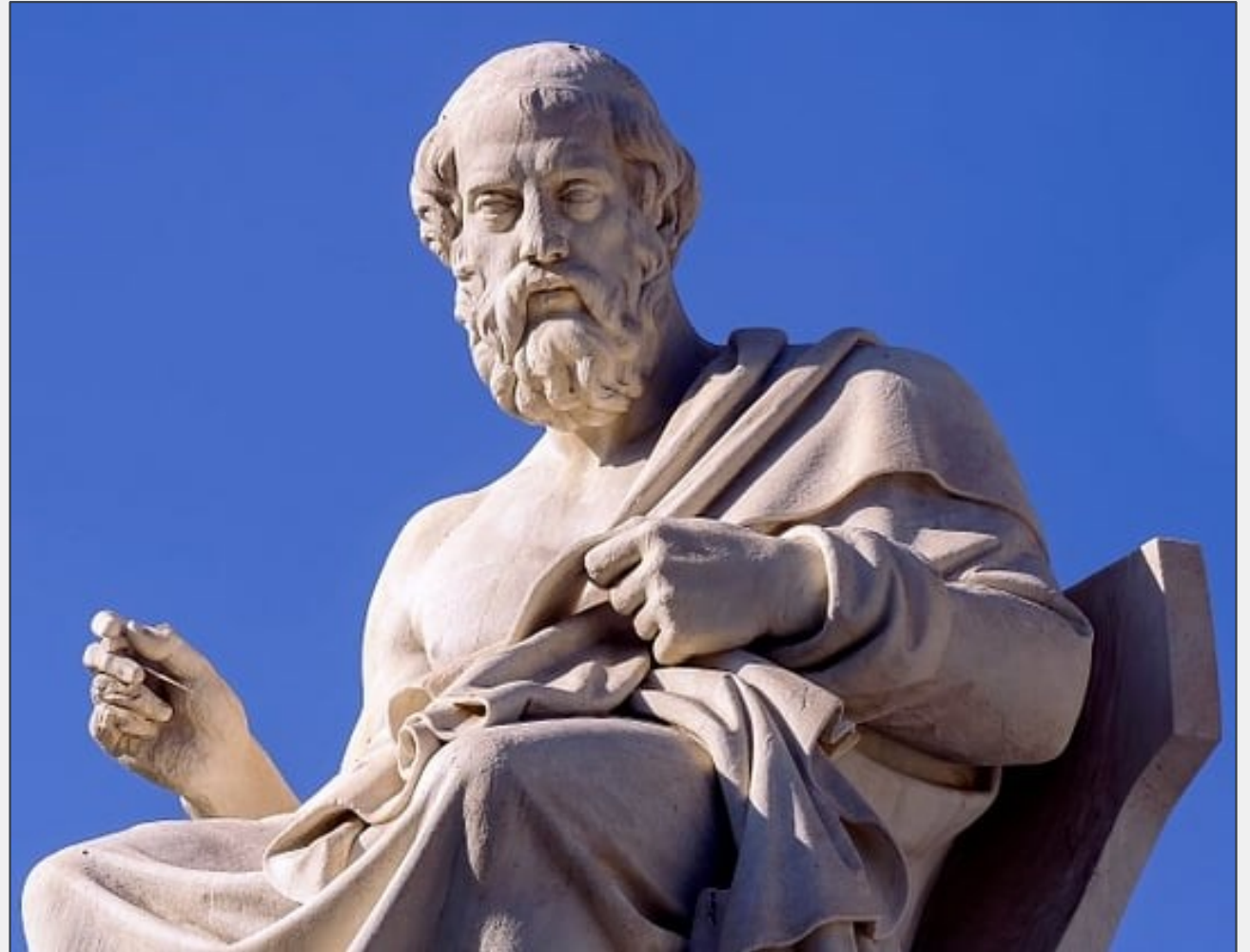
We live in an age of unprecedented access to information. To buy the right phone, find the best tacos, or hire the perfect employee, just hop online and do as much research as you need before



# Repetition, Repetition, Repetition

There is no harm in repeating  
a good thing.

Plato





# Repetition, Repetition, Repetition

Hassan and Barber *Cogn. Research* (2021) 6:38  
<https://doi.org/10.1186/s41235-021-00301-5>

Cognitive Research: Principles  
and Implications

ORIGINAL ARTICLE

Open Access

## The effects of repetition frequency on the illusory truth effect

Aumyo Hassan<sup>1</sup> and Sarah J. Barber<sup>2\*</sup>

### Abstract

Repeated information is often perceived as more truthful than new information, and it is typically thought to occur because repetition and truth are frequently correlated in the real world, people learn to use this correlation. Although the illusory truth effect is a robust phenomenon, almost all research on this effect has been limited to a single repetition. To address this limitation, we conducted two experiments. In experiment 1, we showed participants trivia statements up to 9 times and in experiment 2, we showed them up to 27 times. Later, participants rated the truthfulness of the previously shown statements. In both experiments, we found that perceived truthfulness increased as the number of repetitions increased, and the largest increase was for the second time, and beyond this were incremental increases. These findings add to our theoretical understanding of the illusory truth effect for advertising, politics, and the propagation of "fake news."

**Keywords:** Illusory truth, Repetition, Fluency, Belief, Truthfulness

### Significance statement

Repetition can affect beliefs about truth. People tend to perceive claims as truer if they have been exposed to them before. This is known as the illusory truth effect, and it helps explain why advertisements and propaganda work, and also why people believe fake news to be true. Although a large number of studies have shown that the illusory truth effect occurs, very little research has used more than three repetitions. However, in the real world, claims are often encountered at much higher repetition rates. The goal of the current research was to examine how a larger number of repeated exposures affects our judgments of truth. To do so, we conducted two experiments. In each experiment, we asked participants to read trivia statements such as "The gestation period of a giraffe is 425 days". In Experiment 1, the trivia statements were

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### The illusory truth effect

Not everything that we believe is true. For example, according to a recent survey of teachers in Great Britain and The Netherlands, 48 percent and 46 percent, respectively, falsely believed that people only use ten percent of their brains (Dekker et al. 2012; see also van Dijk and Lane 2020). Problematically, as a result of this false belief, some people also have the misperception that "a

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exposed to this information repeatedly. Consistent with this idea, research has shown that repeated information is perceived as more truthful than new information. This finding is known as the illusory truth effect (for a review, see Brashier and Marsh 2020) and was first reported by Hasher et al. (1977). In this experiment, participants were

# Repetition, Repetition, Repetition

**I have a dream** that one day this nation will rise up and live out the true meaning of its creed: "We hold these truths to be self-evident, that all men are created equal."

**I have a dream** that one day on the red hills of Georgia, the sons of former slaves and the sons of former slave owners will be able to sit down together at the table of brotherhood.

**I have a dream** that one day even the state of Mississippi, a state sweltering with the heat of injustice, sweltering with the heat of oppression, will be transformed into an oasis of freedom and justice.

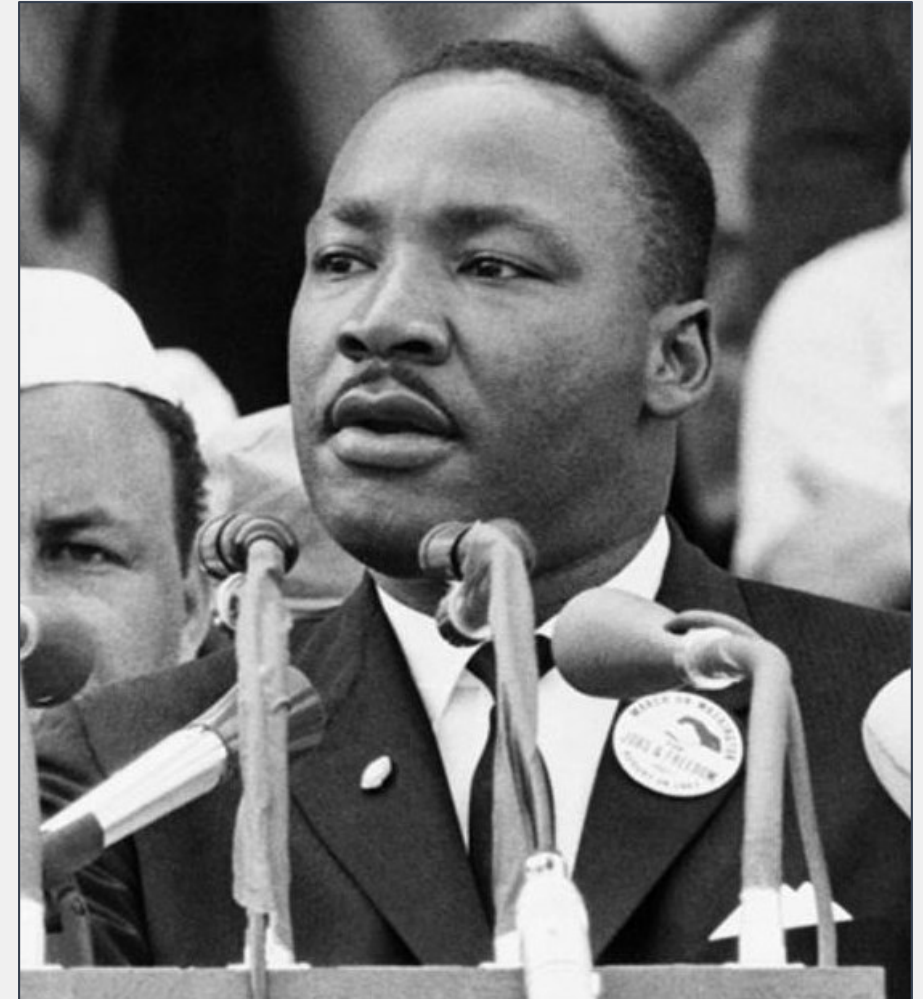
**I have a dream** that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

**I have a dream** today!

**I have a dream** that one day, down in Alabama, with its vicious racists, with its governor having his lips dripping with the words of "interposition" and "nullification" -- one day right there in Alabama little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers.

**I have a dream** today!

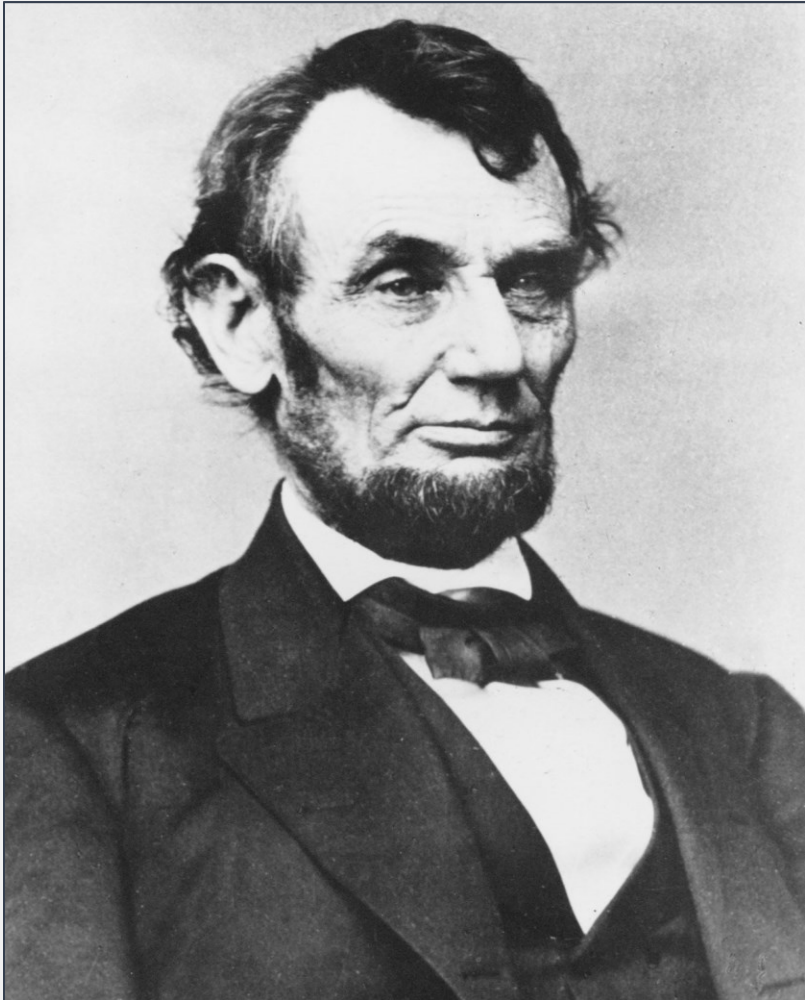
**I have a dream** that one day every valley shall be exalted, and every hill and mountain shall be made low, the rough places will be made plain, and the crooked places will be made straight; "and the glory of the Lord shall be revealed, and all flesh shall see it together."



# Use Sententia

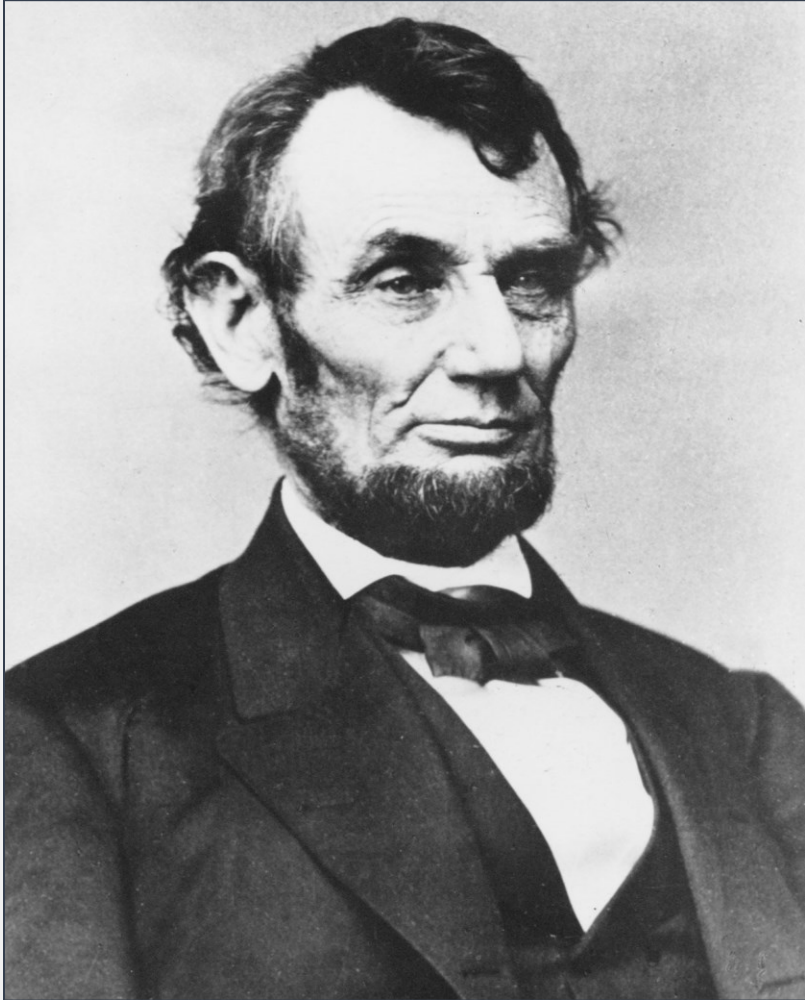
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# A Historical Example of Sententia



“We are now well into our fifth year since a policy was initiated with the avowed object and confident purpose of putting an end to slavery agitation. However, under the operation of that policy, that agitation has not only not ceased but has constantly augmented. In my opinion, it will not cease until a crisis shall have been reached and passed.”

# A Historical Example of Sententia



“We are now well into our fifth year since a policy was initiated with the avowed object and confident purpose of putting an end to slavery agitation. However, under the operation of that policy, that agitation has not only not ceased but has constantly augmented. In my opinion, it will not cease until a crisis shall have been reached and passed.

*A house divided against itself cannot stand.”*



# Sententia in the Courtroom



# Beware of Paltering

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# The Bill Clinton Interview



# The Bill Clinton Interview

**Lehrer:** “No improper relationship.” Define what you mean by that.

**Clinton:** Well, I think you know what that means. It means that **there is not a sexual relationship**, an improper sexual relationship, or any other kind of improper relationship.

**Lehrer:** **You had no sexual relationship** with this young woman?

**Clinton:** **There is not a sexual relationship** – that is accurate.



# People Don't Like Being Misled

## Paltering: The active use of truthful statements to create a false impression

Journal of Personality and Social Psychology  
2017, Vol. 112, No. 3, 456–473

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0022-3514/17/\$12.00 http://dx.doi.org/10.1037/psp0000081

### Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others

Todd Rogers, Richard Zeckhauser, Francesca Gino,  
and Michael I. Norton  
Harvard University

Maurice E. Schweitzer  
University of Pennsylvania

Paltering is the active use of truthful statements to convey a misleading impression. Across 2 pilot studies and 6 experiments, we identify paltering as a distinct form of deception. Paltering differs from lying by omission (the passive omission of relevant information) and lying by commission (the active use of false statements). Our findings reveal that paltering is common in negotiations and that many negotiators prefer to palter than to lie by commission. Paltering, however, may promote conflict fueled by self-serving interpretations; palterers focus on the veracity of their statements (“I told the truth”), whereas targets focus on the misleading impression palterers convey (“I was misled”). We also find that targets perceive palterers to be especially unethical when palterers are used in response to direct questions as opposed to when they are unprompted. Taken together, we show that paltering is a common, but risky, negotiation tactic. Compared with negotiators who tell the truth, negotiators who palter are likely to claim additional value, but increase the likelihood of impasse and harm to their reputations.

**Keywords:** deception, lying, negotiation, paltering, risk

**Supplemental materials:** <http://dx.doi.org/10.1037/psp0000081.supp>

*Jim Lehrer: “No improper relationship” – define what you mean by that.*

*President Bill Clinton: “Well, I think you know what it means. It means that there is not a sexual relationship, an improper sexual relationship, or any other kind of improper relationship.”*

*Jim Lehrer: “You had no sexual relationship with this young woman?”*

*President Bill Clinton: “There is not a sexual relationship—that is accurate.”*

—“NewsHour” With Jim Lehrer, January 21, 1998

Referring to his relationship with Monica Lewinsky, U.S. President Bill Clinton claimed “there is not a sexual relationship.” The Starr Commission later discovered that there “had been” a sexual relationship, but that it had ended months before Clinton’s interview with Jim Lehrer. During the interview, Clinton made a claim that was technically true by using the present tense word “is,” but his statement was intended to mislead: Jim Lehrer and many viewers inferred from Clinton’s response that he had not *had* a sexual relationship with Monica Lewinsky. We categorize Clin-

ton’s claim as *paltering*: the active use of truthful statements to create a false impression. We distinguish paltering from both lying by omission and lying by commission, document the prevalence of paltering, identify important consequences of paltering, and explore why people prefer paltering to lying by commission.

Deception pervades human communication and interpersonal relationships (Bok, 1978). DePaulo et al. (1996) found that people tell, on average, one or two lies per day. Though many lies are harmless, some are significant and consequential. One domain in which deception can substantially change outcomes is negotiations (Bazerman, Curhan, Moore, & Valley, 2000; Boles, Croson, & Murnighan, 2000; Gaspar & Schweitzer, 2013; Koning, Van Dijk, Van Beest, & Steinel, 2010; Lewicki, 1983; Olekalns & Smith, 2009; Schweitzer & Croson, 1999; Shell, 1991; Tenbrunsel, 1998). Negotiations are characterized by information dependence, and negotiators can often exploit their counterpart by using deception (Lewicki & Robinson, 1998; O’Connor & Carnevale, 1997).

Prior deception research has distinguished lying by commission, the active use of false statements (e.g., claiming the faulty transmission on one’s car works great), from lying by omission, the passive act of misleading by failing to disclose relevant information (e.g., failing to mention any information about a faulty transmission). We make a novel contribution to the deception literature by identifying a third, and common, form of deception: paltering (a term initially highlighted in this context by Schaner and Zeckhauser [2009]). Rather than misstating facts (lying by commission) or failing to provide information (lying by omission), paltering involves actively making truthful statements to create a mistaken impression. Though the underlying motivation to deceive a target may be the same, paltering is distinct from both lying by commission and lying by omission. Unlike lying by omission, paltering

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# Visual Argument

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# Capitalize on the Power of Visual Argument

### People Have Thought About Persuasion Since Antiquity



Cicero's Five Elements of Argument:

- Invention
- Arrangement
- Style
- Memory
- Delivery

6


### The Search Continues . . .



7


### Two Key Questions

- (1) How do people make decisions?
- (2) How can you shape your arguments in light of the decision-making process?



8

### The Decision-Making Framework




9

### How the Framework Works

People create their frameworks **quickly**:

- Process evidence based on framework
- React to evidence as they experience it
- Use less information than they think



11

### People Search for Evidence to Support Their Conclusions


**Heuristics and Biases in Judicial Decisions**

**A** If people have a preconception or hypothesis about a given issue, they tend to favor information that corresponds with their prior beliefs and disregard evidence pointing to the contrary. This confirmation bias makes people search, code, and interpret information in a manner consistent with their assumptions, leading them to biased judgments and decisions.

12

### All New Information is Processed Through the Framework


"First we pick an answer and then we look for facts to support that choice."



13


### People Believe Information That Aligns With Their Values

"Ordinary members of the public credit or dismiss scientific information on disputed issues based on whether the information strengthens or weakens their ties to others who share their values."




14

### Understanding How the Framework Works



### The Judge's Admonition is Close to Hopeless



**M Civ JI 2.06 Jurors to Keep Open Minds**


(1) Because the law requires that cases be decided only on the evidence presented during the trial and only by the deliberating jurors, you must keep an open mind and not make a decision about anything in the case until after you have full heard all of the evidence. Do not let the closing arguments of counsel, the recall of any instructions on the law and the verdict form and (6) any alternate jurors have been excused. At that time, you will be sent to the jury room to decide the case. Stereotypes must not influence your decision. Nor should your decision be influenced by prejudice or bias regarding disability, gender or gender identity, race, religion, ethnicity, sexual orientation, age, national origin, socioeconomic status or any other factor irrelevant to the rights of the parties.

Each of us may have biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Michigan Model Civil Jury Instructions (updated January 14, 2022)

### People React to Information as They Experience It

"The mind isn't just a passive information processor; it's also emotional. In reality, once people begin to experience that evidence in real time, they will inevitably react to it as they go along. We won't need to see later information if we already love or hate the very first piece."



### People Use Much Less Information Than They Think

- People thought they would need to taste 3-4 cups of juice to decide if they like it.
- People actually needed only a few sips to decide if they liked the juice.



# Capitalize on the Power of Visual Argument

**10%**

of what we read



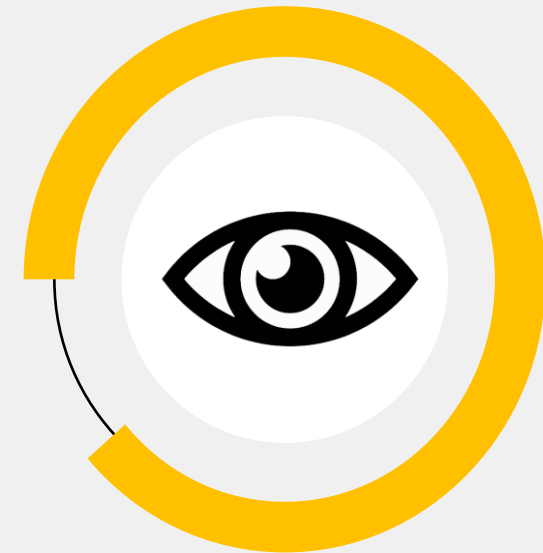
**20%**

of what we hear



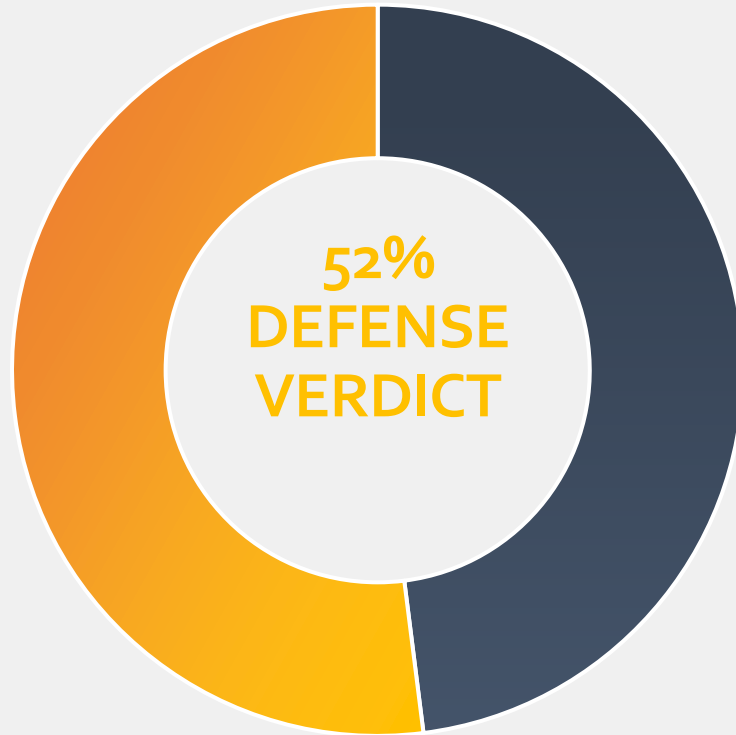
**80%**

of what we see and do

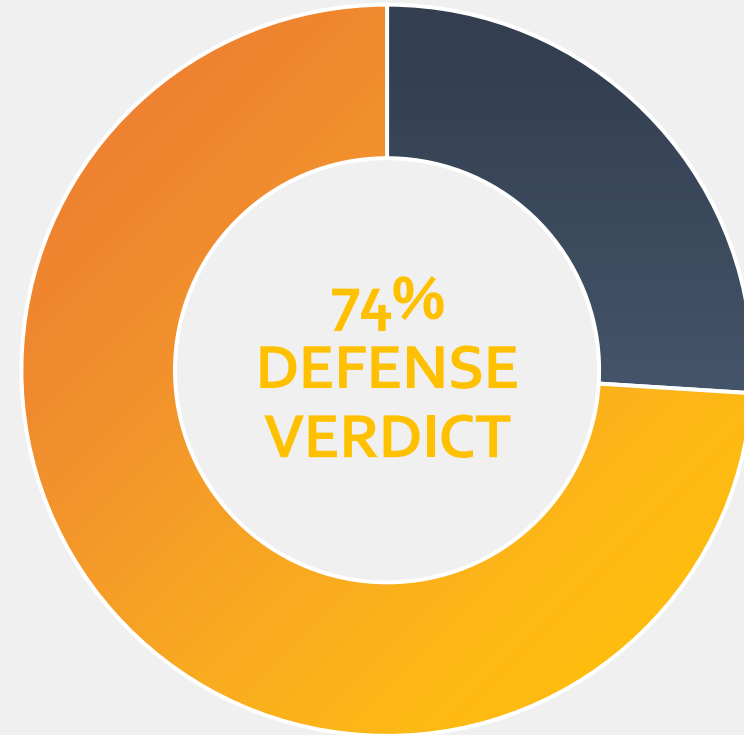


<https://blog.hubspot.com/marketing/power-of-visual-communication-infographic>

# Capitalize on the Power of Visual Argument



**Plaintiffs** used visuals  
**Defendants** did not



**Defendants** used visuals  
**Plaintiffs** did not

# Additional Key Concepts

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# Capitalize on the Primacy Effect



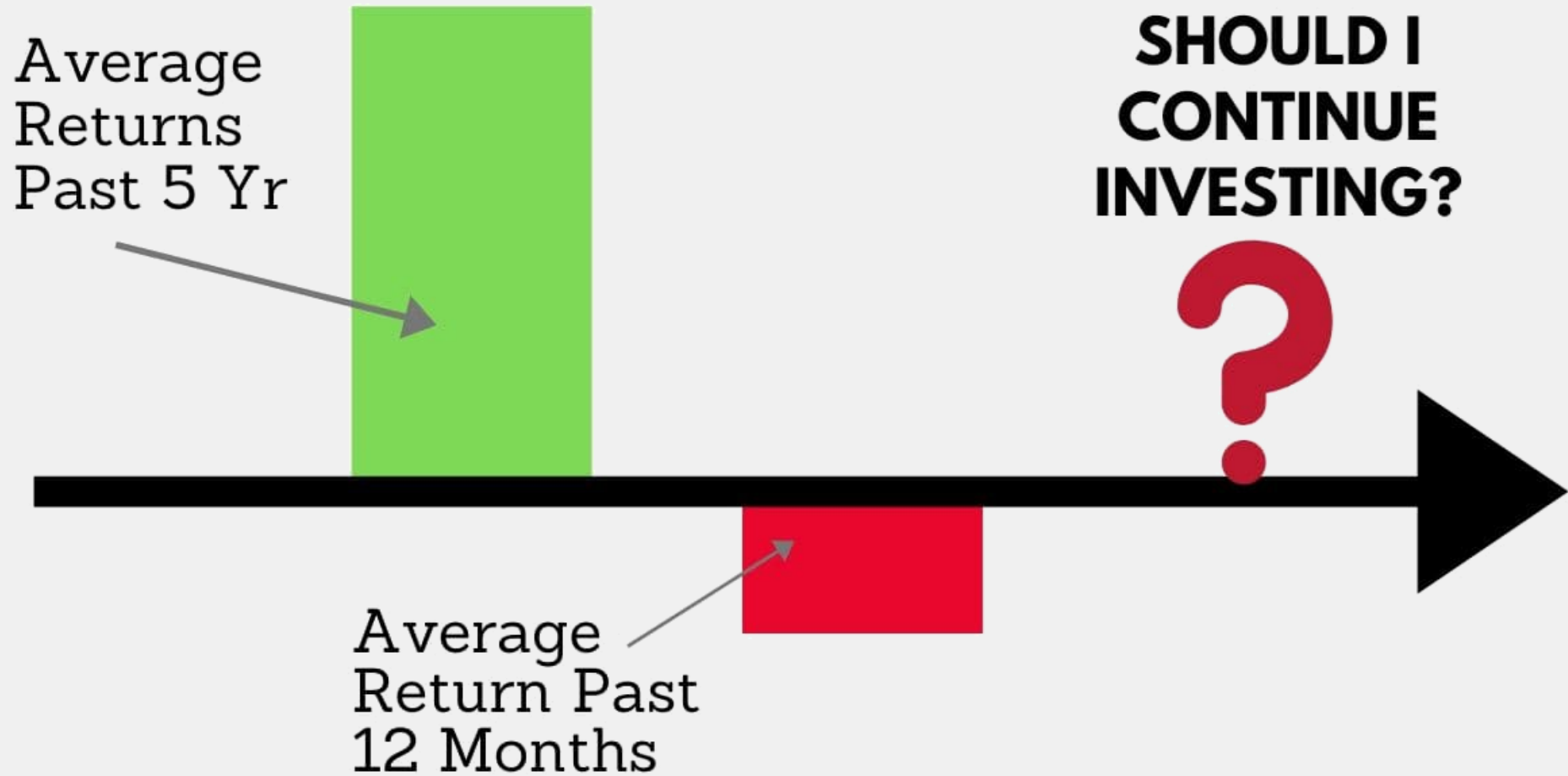
The *Primacy Effect* is the tendency to remember the first pieces of information we receive better than information presented later on.

# Capitalize on the Primacy Effect



The *Primacy Effect* is the tendency to remember the first pieces of information we receive better than information presented later on.

# ... And Remember Recency Bias





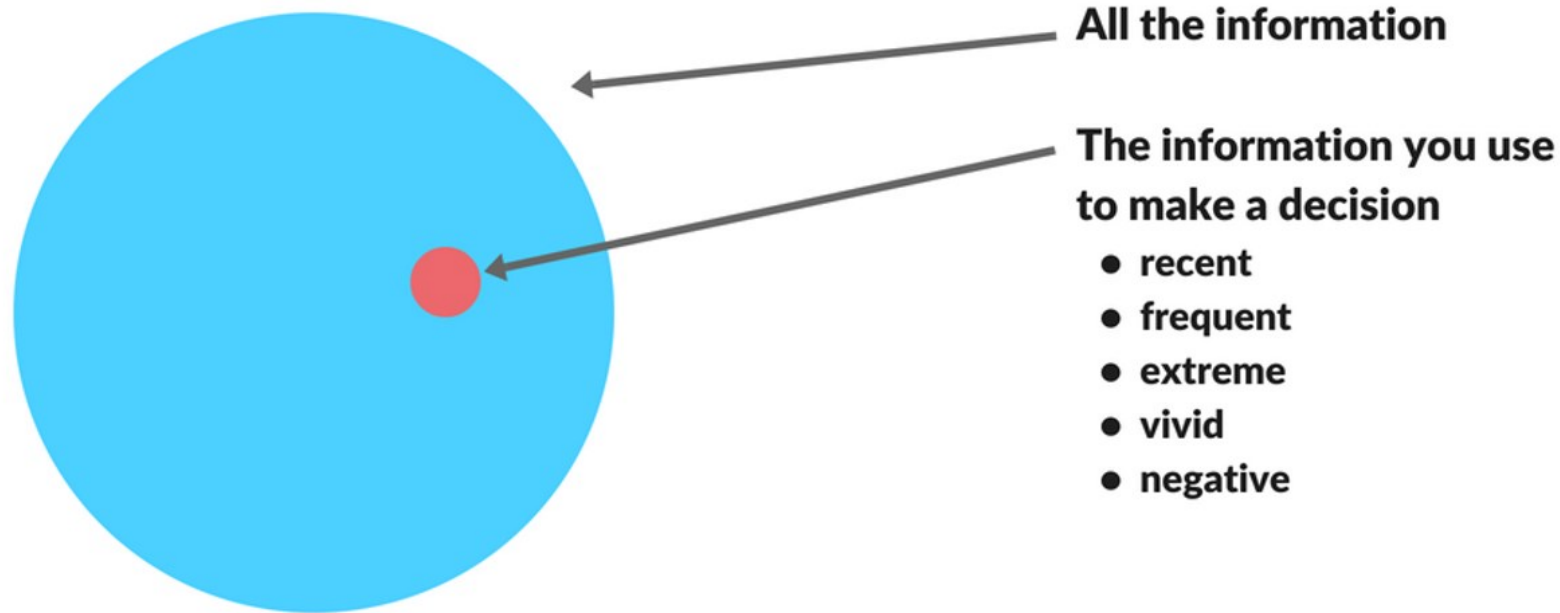
# Capitalize on the Anchoring Effect



The *Anchoring Effect* is the human tendency to be overinfluenced by the first number we hear (the anchor) and to reach an inaccurate judgment by starting at the anchor and insufficiently adjusting downward or upward.

# Capitalize on the Availability Bias

## The availability heuristic



The *Availability Bias* is the human tendency to overweigh evidence that is easy to remember.

We base our decisions on information that is *available* in our mind.



# Make Arguments All Jurors Can Understand



- In a jury, half the people do 70% of the talking.
- If one of those people can't understand your arguments, you are at a disadvantage.

*Am. College of Trial Lawyers, Improving Jury Deliberations through Jury Instructions Based on Cognitive Science (2019)*

# People Commit More Strongly to Decisions They Make



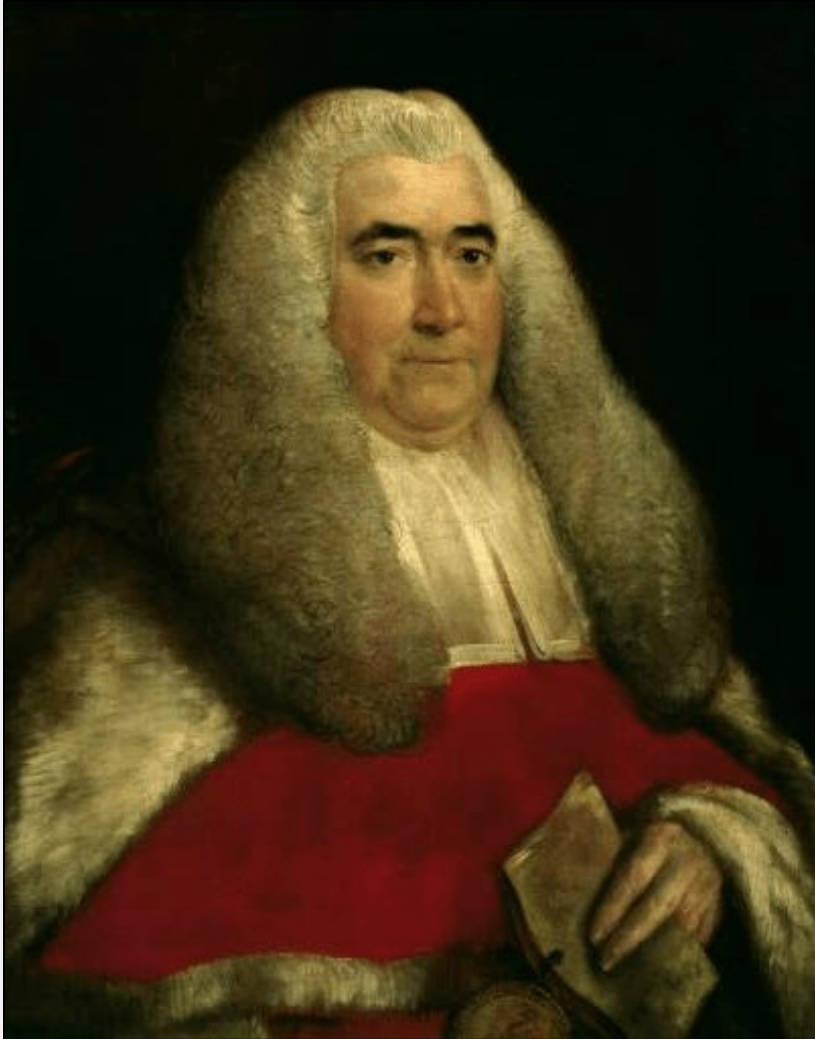
“Don’t tell the jurors what to do or what to think. Persuasion is much more effective when you lay out the pieces and lead them to conclude them on their own. **When jurors come up with themes and analogies and decisions about the behavior of the parties, it is much more powerful than when you tell it to them.”**

Chopra., *The Psychology of Jurors’ Decision-Making* (2018)

# What About Judges?

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# Theories of Judging: Formalism



- The judge's job is to determine the law "not according to his own private judgment but according to the known laws and customs of the land." - Blackstone
- The judge is a "highly skilled mechanic." - Bix
- "The rule of law, as established by precedent or statutory authority, is the equation which guides the judge's decision. Once ascertained, the rule is the scrupulously applied to the case after the judge has examined and determined the relevant facts." - Capurso

Brian Bix, *Jurisprudence: Theory and Context*; Thomas Capurso, *How Judges Judge: Theories on Judicial Decision Making*

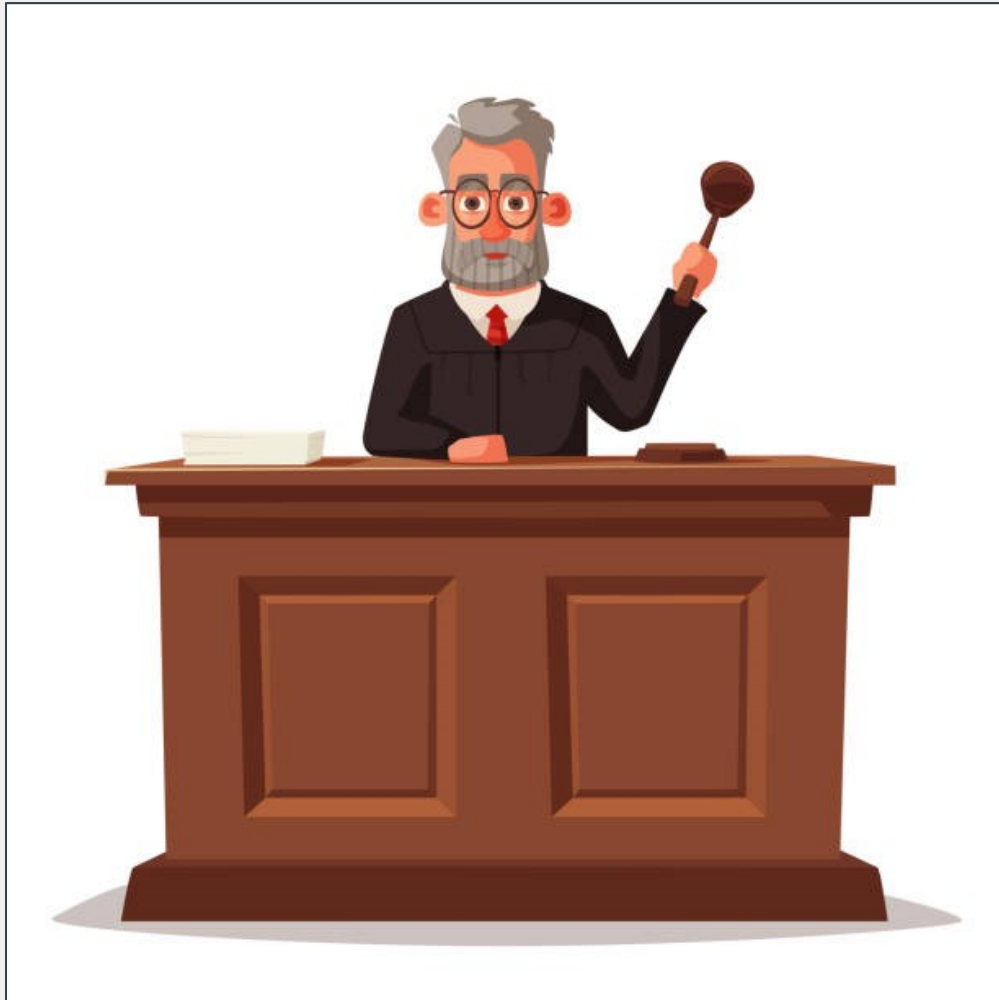
# Theories of Judging: Realism



Judges follow an intuitive process to reach conclusions for which they only later rationalize by deliberative reasoning. The judge “decides by feeling, and not by judgement; by ‘hunching’ and not any ratiocination.” The only later use deliberative faculties “not only to justify that intuition to himself, but to make it pass muster.”

Joseph C. Hutcheson, *The Judgement Intuitive: the Function of the 'Hunch' in Judicial Decision*; see also Jerome Frank, *Law and the Modern Mind*

# So Which is It? Judges are People Too



“Judges are predominantly intuitive decision makers, and intuitive judgments are often wrong.”

Guthrie, Rachlinski, Wistrich (2007)

“At the constitutional level where we work, ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections.”

U.S. Supreme Court Chief Justice  
Charles Evans Hughes (1939)



# Modern Research: the Intuitive Override Model

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## Blinking on the Bench: How Judges Decide Cases

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- “Judges generally make intuitive decisions but sometimes override their intuition with deliberation.”
- Empirical studies show judges are susceptible to:
  - Primacy bias
  - Recency bias
  - Anchoring
  - Inappropriate inferences
  - Implicit bias
  - Justification by hindsight
- The significance of opinion writing is unclear.

# Advice to the Advocate: What Does Move Judges?

Candid judges consistently cite three factors as being persuasive:

- (1) Be prepared
- (2) Be confident
- (3) Maintain your credibility



