

# COGNITIVE BIAS: LAWYERS AND THEIR ABILITY TO MAKE DECISIONS

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Cognitive dissonance: This bias refers to the fact that it is psychologically uncomfortable for most people to consider data that contradicts their view point. Disputants and their attorneys tend to resolve conflicting information to justify their own conducts, blaming others, and denying, downplaying, or ignoring, the existence of conflicting data.

Traditionally, the attorney is viewed as an advocate for a client. The lawyer's task is to zealously represent the client, and it is not for the attorney to decide which side is right or deserve to triumph. It is assumed that the conflict of arguments in the court will ensure that justice is done—"you do not know it to be good or bad till the judge determines it".

This view of the lawyer's role ignores the question of whether, and to what extent, an attorney's personal belief should influence his or her professional conduct. Seldom discussed are the consequences to the attorney of arguing against his or her prior beliefs. Recent social psychological research has revealed that such behavior may have the unintended consequences of altering the attitudes of the advocate. If so, what are the attorney's obligation to protect his or her values and beliefs? How do they relate to his or her professional commitments and responsibilities?

Dissonance theory assumes that people will attempt to achieve consistency among all their views and opinions. When there is an inconsistent thought, a person experience an unpleasant psychological state called dissonance. To avoid this discomfort, the individual will behave so as to reduce the dissonance and restore balance. Dissonance is created by the conflict between, "I believe X," but "I am advocating not X". In attempting to reduce the dissonance caused by this behavior the speaker may change his attitude, so that his "private belief becomes consistent with his public behavior".

The consequences of arguing against one's belief are so substantial that a lawyer has every obligation to avoid doing so. A lawyer should not argue positions which are at odds with views important to him. Each attorney should decide which beliefs are important enough that they should not be jeopardize. It is my view that when these core beliefs are at stake the attorney should not argue against them. Moreover, a lawyer should choose a form of practice which minimizes his likelihood of having clients who will require engaging in counter attitudinal advocacy. A lawyer's obligation to himself and his views should be dominant. Few decisions are as important as each individual's definition of what kind of person to be. This choice shapes his character. In doing so, an attorney is not just preserving his views he is also making sure of the fact that he will not work against his concept of "ideal society". For example, refusing to argue for a variance of an occupational health standard, or against restrictions of unsafe cars, not only helps maintain the advocate's beliefs but it also helps for the welfare of the society. Each attorney is helping to preserve his or her notion of what society should be.

A model is embodied in the ABA code of professional responsibility (herein after referred to as the code). This approach provides the attorney with broad discretion in choosing who to represent. It limits the lawyer's options only in sp far as it is necessary to insure representation for unpopular clients and protection of clients once the attorney is retained. The code provides the lawyer with complete freedom to decide what work he will do. A lawyer is under no obligation to act as advisory for every person who may wish to became his client. Each member of the bar is able to choose the areas he or she wants to work in, and the clients he or she is willing to represent. A lawyer

could, consistent with this provision of the code, refuse employment to the extent it involved counter attitudinal advocacy.

The code limits the attorney's discretion in so far as it is necessary to ensure representation for unpopular individual and causes. A number of provisions in the code emphasize the lawyer's obligation to disregard his beliefs and help those who would otherwise go unrepresented. However, even the court recognizes the basis for declining representation when the motive is the attorney's personal belief and not social pressure.

Before turning on to the strategies for improving prosecutor's decision making, in criminal arena which is my area of interest, let us briefly consider some of the ways cognitive bias might impede a prosecutor's neutrality throughout her handling of a case. Consider, for example, the ways in which the phenomenon known as "cognitive bias" could affect attorney's initial charging decision. Because confirmation bias leads individual to seek out and prefer information that tends to confirm whatever hypothesis they are testing, a prosecutor reviewing a file to determine a suspect's guilt would be inclined to look only for evidence that supports the theory of guilt. For instance, the prosecutor might emphasize that a defendant confessed to the crime yet ignore evidence that might undermine the reliability of the confession. The leading cause of error is "tunnel vision" in which investigators and prosecutors hone their sights on one suspect, and then search for evidence inculcating him, to the neglect of exculpatory evidence or the consideration of alternative suspects. Prosecutor's tunnel vision can be viewed as the culmination of confirmation bias and selective information processing, the inclination to search out and recall information that tends to confirm one's existing beliefs, and to devalue disconfirming evidence. As a result of confirmation bias, prosecutor's first search for evidence tending to confirm an initial suspect's guilt. Once an opinion of guilt is formed, selective information processing comes into play, causing the prosecutor to weigh evidence that supports her existing belief more heavily than contradictory evidence. Because of selective information processing, the prosecutor will accept at face value any additional evidence supporting the initial theory of guilt, while ignoring or undervaluing potentially exculpatory evidence. Contributing further to prosecutor's guilt belief is the phenomenon of belief perseverance, in which people adhere to their beliefs even when the evidence that initially supported the belief is proven to be incorrect. In many of the recent exoneration cases, for example, prosecutors have continued to insist that the exonerated defendant is guilty, even when exculpatory DNA evidence undermines the government's initial case. This seemingly inhumane stubbornness can be viewed instead as a very human example of belief perseverance.

A prosecutor who is surrounded in her daily routine only by crime victims, police officers, and other prosecutor's might develop a deepened "presumption of guilt" that can contribute to cognitive bias. Moreover, the vast majority of cases end in conviction, either by trial or by guilty plea. Accordingly, prosecutors are likely to see the end results as validation of their initial theories of guilt. At the same time, they are infrequently challenged by evidence to the contrary. Most prosecutors believe that they have an ethical obligation to peruse charges only against those suspects who are actually guilty. Accordingly, for an ethical prosecutor, the avoidance of cognitive dissonance can be a powerful motivation to adhere to guilt beliefs, lest she admits to herself the difficult truth that she may have charged- and perhaps even convicted- an innocent person.

Focusing on the strategies for reducing cognitive bias that could be implemented immediately and entirely by prosecutors, either individually or at supervisory or institutional level, firstly, some empirical evidence suggest that education can potentially mitigate bias, especially if the education focuses on cognitive processes that lead to bias. This is the easiest reforms for the prosecutors to institute. Most prosecutors' offices already conduct internal education sessions for their lawyers to comply with state bar requirements of continuing legal education. Prosecutors' offices could simultaneously provide training about the various forms of cognitive bias and the dangers they pose for prosecutorial decision making.

Secondly, induced counter- argument and exposure to opposing views can reverse the effects of cognitive bias. If tunnel vision contributes to wrongful conviction, then exposure to adversity of views that challenge presumption of guilt should prevent them. Prosecutors could use this technique in three ways:

1. Individually, through self checking
2. Collectively, through the use of internal review processes
3. Institutionally, by submitting prosecutorial decision making to external review.

Cognitive bias can be mitigated if individual prosecutor make an attempt to neutralize their decision making by articulating arguments that contradicts their existing beliefs i.e. by regularly “switching sides” on their files and reviewing cases from the perspective of defense counsel. To neutralize bias, a prosecutor reviewing a file should not only look for evidence supporting the defendant’s guilt, but also scrutinizing the case with an eye of defense attorney searching for reasonable doubt. To mitigate selective information processing, the prosecutor should not simply accept evidence that appears inculpatory; instead, she should force herself to articulate any basis for skepticism. Similarly, she should not just assume that seemingly exculpatory evidence is fabricated or unreliable; she should force herself to anticipate its value to the defense.

Counter-argument could be particularly effective in exoneration cases to mitigate prosecutorial belief perseverance. In many exoneration cases, prosecutors have adhered to their original guilt assessments by clinging to any remaining evidence that is consistent with the defendant’s guilt, even after the exonerating evidence has called part of the government’s original case into question. For example, regardless of newly available, exculpatory DNA evidence that undermines the physical evidence offered against the defendant at trial, a prosecutor might still point to the defendant’s confession to argue that the defendant is guilty. The rational question, of course, is not whether some evidence exists that is merely consistent with the defendant’s guilt, but rather whether the remaining available evidence- in its totality, including exculpatory evidence is sufficient to support charges. Using the practice of counter-argument, a prosecutor might avoid belief perseverance by working through possible alternative explanations for any remaining evidence of guilt, such as the possibility that a defendant gave a false confession.

In order to neutralize prosecutor’s decision making, apart from his own checks on cognitive bias an additional method is to involve, potentially less biased prosecutors in the decision making process. A “fresh look” by attorneys unassociated with initial charging decisions may dilute the biasing effects of selective information processing and belief perseverance. A new attorney would appear to be particularly helpful in cases where some of the government’s original evidence against a defendant has been undermined. He could review the case considering the remaining evidence, untainted by the effects of self perseverance. A fresh- look attorney would also be in a better position to bring neutrality to a defendant’s claim of innocence, because she would have less of a stake in avoiding the cognitive dissonance of having charged or convicted an innocent person.

A “fresh- look” reviews can take place in the offices in informal or formal way. Offices with sufficient resources could create a formal layer of internal review, at least in some limited categories of high stake cases, such as death penalty cases, other major crimes, or post conviction claim of innocence. Offices that lack the resources can also establish this internal review, by encouraging for informal counter-argument which can be highly productive. Informal debate in which colleagues serve as mock adversaries would solve the purpose of mitigating the effects of cognitive bias.

Although, a fresh look by an attorney can reduce the effects of cognitive bias they may still feel the pressure to conform their opinions to their colleagues. Accordingly, a final method of checking prosecutorial cognitive bias is to introduce external checks on the prosecutors’ decision making. This goal could be achieved indirectly by increasing the transparency of prosecutorial decisions that usually take place behind closed doors- for example by creating prosecutorial public information offices to disclose prosecutorial policies and increase prosecutorial accountability. Prosecutors can also submit to direct external checks on their decision making by permitting outsiders such as judges, civil practitioner, and defense attorneys to review their discretionary conduct. Although, prosecutor might balk at any outside review that threatens the broad discretion they legitimately enjoy, but as I have previously suggested that fresh look committees could serve in an entirely advisory capacity and only over extremely limited factual questions, thereby preserving the full scope of prosecutorial discretion.

### **CONCLUSION:**

The traditional role of the attorney emphasizes obligation to clients and the legal system. Omitted from consideration is the lawyer’s responsibility to his or her own beliefs. It is assumed that at worst arguing against one’s view is an unpleasant but noble duty of the professional. Social psychologists have discovered, however, that this behavior has the unintended consequences of changing the attitudes of the advocate. This paper defines a role for the lawyers based on an obligation to maintain one’s conviction and beliefs.

This paper has sought both to shape the direction of reform and to involve conscientious prosecutors in the ongoing innocence dialogue by focusing on debiasing strategies that can be implemented entirely within the province of

prosecutors, either as individual practice or as institutional policy. In doing so, I hope to encourage prosecutors to accept the olive branch extended to them by the innocence movement's current narrative trend.

Despite heightened awareness about the role that tunnel vision has played in recent wrongful conviction, it is still uncommon for prosecutors to receive any education about cognitive bias or the ways in which it can affect prosecutorial decision making. And despite repeated calls for reforms in the ways by which prosecutors are evaluated for promotions, most prosecutors' offices continue to emphasize conviction rates in measuring an attorney's worth. Prosecutors cannot simply ignore the problems that can contribute to wrongful convictions and expect others to continue to depict them as noble attorneys who sometimes make mistakes.

Outsiders also hold the keys to many of the reforms that are shaped by fault-based initiatives. For example, state bar organization could enact more stringent rules to limit the discretion of the prosecutors. They could bring more charges and impose greater sanctions against prosecutors who are involved in over-charging, non-disclosure of exculpatory evidence, or wrongful conviction. Courts could be less deferential to the broad discretion that prosecutors currently enjoy.

I believe that this redefine role of the prosecutor will force prosecutors to consider the social effects of their actions.

