

# The *Desiderata* of Good Decision Making

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**JUSTICE**

# The Adjudicator's Mantra

- do the right thing,
- for the right reason,
- in the right way,
- at the right time,
- in the right words

Do the right thing

**For the right reason**

# For the right reason

The last temptation is the greatest treason, to do the right thing for the wrong reason.

# Cognitive Impediments to Reaching the Right Results for the Right Reason

# Cognitive Impediments

- **Deliberation and the “Hunch” Theory of Judicial Decision-Making**
- **Cognitive Machinery**
- **Cognitive Illusions**
- **Correcting for Cognitive Illusions**

# 1. Deliberation and the “Hunch” Theory of Judicial Decision-Making

- [W]hen the case is difficult or involved, and turns upon a hairsbreadth of law or of fact ... I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch – that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way

# Insight

The moment of insight is the moment of understanding. But it must still be tested by reflection on that understanding. If, upon critical reflection, the insight falls short, then the process begins again. If the insight holds, then it has a practical impact in the world because it culminates in a decision.

## 2. The Cognitive Machinery

# System 1

# System 2

- **Intuition**

- Instinctive
- Inferential
- Unconscious
- Automatic
- Gullible and biased to believe
- Fast
- Emotional
- Inarticulate

- **Reasoning**

- Deliberative
- Argumentative
- Conscious
- Controlled
- Capable of doubting and disbelieving
- Slow, lazy
- Conceptual
- Loquacious

# Justification

- I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision ... I speak of the judgment pronounced, as opposed to the rationalization by the judge on that pronouncement

# 3. Cognitive Illusions

Reliance on these heuristics facilitates good judgment most of the time, but it can also produce systematic errors in judgment. Just as certain patterns of visual stimuli can fool people's eyesight, leading them to see things that are not really there, certain fact patterns can fool people's judgment, leading them to believe things that are not really true. Reliance on these heuristics can create *cognitive illusions* that produce erroneous judgments.

# 3. Cognitive Illusions

- **(a) Framing**
- **(b) Representativeness**
- **(c) Anchoring**
- **(d) Hindsight Bias**
- **(e) Emotional Effects**
- **(f) Confirmation Bias**

# Framing

# Representativeness

- When people make categorical judgments (e.g., assessing the likelihood that a criminal defendant is guilty), they tend to base their judgments on the extent to which the evidence being analyzed (e.g., the defendant's demeanor) is representative of the category.

# Representativeness

- When the evidence appears representative of, or similar to, the category (e.g., defendant is nervous and shifty), people judge the likelihood that the evidence is a product of that category as high (i.e., evidence of guilt). When the evidence being analyzed does not resemble the category (e.g., defendant appears at ease), people judge the likelihood that the evidence is a product of that category as low (i.e., evidence of innocence).

# Anchoring

# Anchoring

- System 2 works on data that is retrieved from memory, in an automatic and involuntary operation of System 1. System 2 is therefore susceptible to the biasing influence of anchors that make some information easier to retrieve. Furthermore, System 2 has no control over the effect and no knowledge of it.
- “People generally adjust away from the anchor, but typically fail to adjust sufficiently, thereby giving the anchor greater influence on the final estimate that it should have.”

# Hindsight Bias

# Emotional Effects

# Emotional Effects

- Emotions are ubiquitous. They wash across the human brain like water on a flat rock. Joy, anger, disgust, and fear ignite quickly in the mind and easily consume reason. Emotions influence what information people process, what they remember, and how they react. The reach of emotions is also difficult to detect and hard to control. Consequently, even with effort, powerful emotional content can easily influence what otherwise appear to be rational judgments in several different ways.

# Emotional Effects

- In the war between judicial heart and judicial head, we do not doubt that judicial head prevails most of the time. ...The results of our experiments, however, suggest that judicial heart wins many skirmishes.
- where the judge is in equipoise and judicial head does not plainly indicate which decision is correct, if the case creates a strong affective response, judicial heart can carry the day.

# Confirmation Bias

# Confirmation Bias

- [T]he most robust and ineradicable biases in the literature of cognitive and social psychology. It is the finding that when we evaluate a proposition, we don't look for evidence on both sides and then weigh up which side is more likely to be true. Rather, we start with an initial hunch and then we set out to see if we can find any evidence to confirm it. If we find any evidence at all, we have confirmed the proposition, and we stop thinking.”

# Correcting for Cognitive Illusions

# Daniel Kahneman's Conclusions

- System 1 registers the cognitive ease with which it processes information, but it does not generate a warning signal when it becomes unreliable.
- There is no simple way for System 2 to distinguish between a skilled and a heuristic response. Its only recourse is to slow down and attempt to construct an answer on its own, which it is reluctant to do because it is indolent.
- The way to block errors that are originated in System 1 is simple in principle: recognize the signs that you are in a cognitive minefield, slow down, and ask for reinforcement from System 2.
- The voice of reason may be much fainter than the loud and clear voice of an erroneous intuition, and questioning your intuitions is unpleasant when you face the stress of a big decision. More doubt is the last thing you want when you are in trouble.

# Coping with Cognitive Illusions

# Insight

Attend carefully to the evidence and the law. The moment of insight is the moment you understand what has happened and how the law applies. But your understanding must still be tested by reflection. If, upon critical reflection, the insight falls short, then the process begins again. If the insight holds, then it culminates in a decision.

**In the Right Way**

**At the Right Time**

# In the Right Words

# The Content of Reasons for Decision

- **Find the facts**
- **Identify the key issues**
- **Assess credibility and reliability**
- **Set out your chain of reasoning clearly**
- **Make the decision**

# Common Sufficiency Pitfalls

- **Conclusory Credibility Findings**
- **Citing a statutory provision followed by your conclusion**
- **Saying without showing you have considered the relevant criteria**
- **Failing to analyze the evidence or explain findings**
- **Disregarding material evidence or failing to deal with important inconsistencies**

# Some Dos and Don'ts

- **Do start writing immediately after hearing arguments**
- **Do the basic things that reasons must do**
- **Do use plain language**
- **Do use headings**

# Some Dos and Don'ts

- **Don't use lengthy quotes**
- **Don't use “boilerplate reasons” or “generic one size fits all” reasons**
- **Do edit ruthlessly**
- **Do consider another set of eyes**
- **Do remember your audiences**

# An Irish Prayer

May you have the hindsight to know  
where you've been,

The foresight to know where you're  
going,

And the insight to know when you've  
gone too far

**FIN**