

JUDICIAL DECISION- MAKING

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Goals

Provide some background on neuroscience and how the brain works

Explore Heuristics and Cognitive Errors

Present Strategies and Tactics for Intentional Good Practices

Warm-Up

- 1. True/False. Most of our decisions are a product of conscious thought.
- 2. True/False. The brain bases much of its quick decision-making on generalized patterns.
-
- 3. True/False. Doing several tasks at once is useful.
- 4. True/False. Context, narrative and periodic recall help memory.

The Brain

- 1. Weighs: 3 to 4 pounds
- 2. Parts: (a) Primitive Brain Stem (bodily functions)
(b) Sub-cortical Limbic System (emotions – motivation, happiness, fear, sadness, anger, surprise, and disgust)
(c) Cortex (mental processes and consciousness)

It is? A Pattern Seeking Device



The Brain and Learning

Inputs

- Unlimited
- (Focused or Diffused mode)

Working Memory

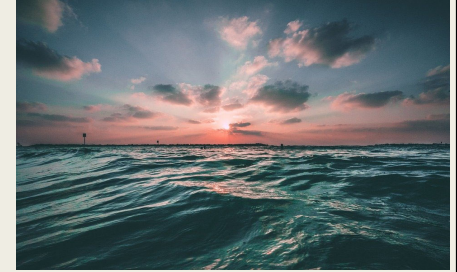
- Temporary storage
- Lots discarded

Long-term Memory

- Storage strength
- Retrieval strength

How Information Enters Memory

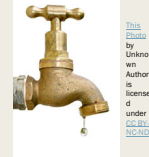
- A. Working Memory
 - 1. Paying Attention/
Using Emotions
(calm, fearful, laughing...)
 - 2. 8 to 10 inputs
[3.141592653589]
- B. Long-term Memory =
Practice + and meaningful
Connection



Old view: decision-making is derived from cognitive analysis, not emotion

- Emotion = inaccuracy, unreasonableness, impulsiveness, politics (“Hot”; motivation; feelings, etc.)
- ***
- Cognition = calculation, critical analysis, deliberation, thoughtfulness

New Neuroscience View: Interdependence



- Cognition--Emotion interdependence [one faucet]
- Impacts perception, reasoning and memory.
- Emotions “focus the mind and prepare the body while leaving room for experience and judgment.”

~ Frans de Waal

The Legal Profession's Traditional Uncoupling of Cognition & Emotion is Outdated & Inaccurate

- "You come in with skulls full of mush, and you leave *thinking like a lawyer.*" ~ Prof. Kingsfield
- Law is cognitive science - cold logic, hard facts, & reason.
- Christopher C. Langdell
- The law scene in the film, *Pretty Woman*

Brain Science Generally Is Not Intuitive

- 1. *Why do we forget the Capital of KY but remember we hate snakes?*
- A. Perceived threats combine with emotion (fight or flight) and stored long-term for quick recall.
- B. Moderate levels of emotional response at the time of an event lead to better retention of explicit memories (Sylvester 1998)
- C. Emotion and context help the mind weave narratives about reality.

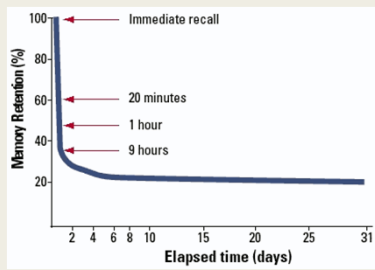
Why do we remember how to drive home?

- 'Neurons that fire together, wire together' (Donald Hebb 1949)
- Stronger storage and retrieval strength
- *Paying attention* to things causes:
 - the brain to change its biology and
 - physically adapt to inputs and sensory stimuli.

Remember?

- Specifics about a restaurant you went to in November?
- First car or first concert?

Problem: The Forgetting Curve



Issue: The Unconscious Brain Creates Heuristics – Fast-thinking Mental Short Cuts

- Why?
-
- Faster.
- More efficient.
- Less effort.

Example: The bat and the ball

- A bat and a ball together cost \$1.10.
- The bat cost \$1 more than the ball.
- How much does the bat cost?



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The Fast Thinking Short-cuts Create Unconscious Bias

Examples:

- Voice as narrator?
- HBS study? [“David” vs. Women CEOs]
- Height of male CEOs?

Issue: Pre-judging

- Conscious mind = Slow, effortful and uncertain
- Unconscious mind = major usage, fast and effortless, based on patterns and categories (short-cuts).
- Problem? Often wrong.
- Judgment - closes; curiosity - opens



Common Heuristics

■ The Illusion of competency

- Means: an overestimation of skill, ability, & relationship to the norm
e.g., College students writing papers
e.g., % of drivers estimate they are above average
e.g., *Stereotype Threat*: Live up to or down to stereotypes (women's math performance)

Claude Steele, *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us and what we Can Do*, (2010)

Confirmation Heuristic

- Means: a tendency to seek information that fit own views and beliefs, excluding contradictory data. (e.g., "I have a study")
- A. Inconsistent Selectivity
 - 1. Searching for info
 - 2. Interpreting info
 - 3. Remembering info
 - 4. Criticizing inconsistent info

Negativity Heuristic

- Means: We are more likely to pay attention to and dwell on negative information and experience than positive.
- How was your day? The one bad experience overshadows the 10 good ones.
-
- E.g., Law school, lawyering.
- Grateful for?

Anchoring Heuristic

- Means: a tendency to weigh the first piece of information too heavily. That info is the comparison (the anchor) for assessing later information.
- E.g., “Welcome to Cleveland!”
- E.g., “Here are the expensive cars; now here are the inexpensive ones.”
- E.g., How do you decide an issue with written memoranda?

Availability Heuristic

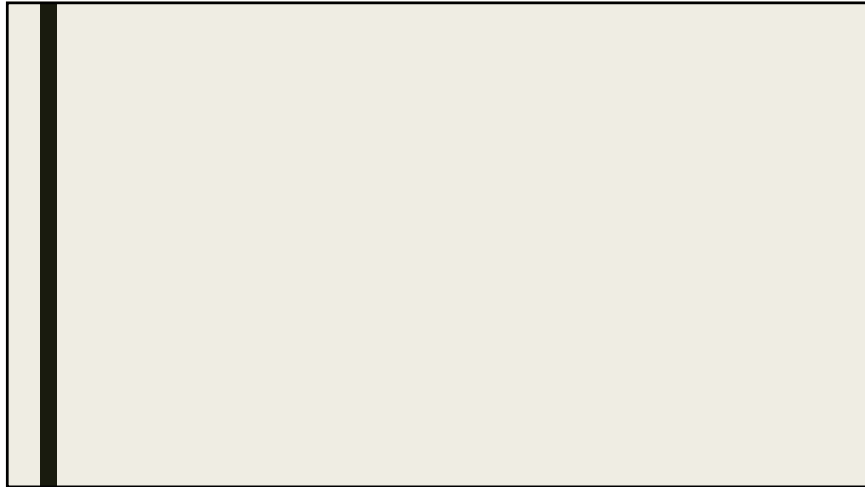
- Means: determining the likelihood of an event is based on how easily we remember similar events.
- Q: Which is a greater likelihood, being killed by a shark attack or falling airplane parts?
- Q: Sharks or fireworks?
- (30 times more likely to die from falling airplane parts. (Death Odds
- 1990 Sept. 24)(10 x more likely to die from fireworks)
- Q: Is it more likely that a word starts with the letter K or has the letter K as its third letter?
- (twice as likely that the letter K is the third letter of a word than its
- first) Tversky and Kahneman (1974)

A Heuristic Problem: 2024 Polarization

- Oversimplification Fallacy: Binaries (Rich/Poor)
- Spectrums – nuances and degrees of difference
- (E.g., Isaac Newton 1672, refractions of light)
- A. Today: broadly used term. E.g., autism, politics, gender, homelessness, etc.

World View

- Narrative – on what assumptions, values and facts does the narrative depend?
- Hypo: Middle Class?
- Earning below \$30,00?
- Earning above \$100,000?
- Food (Favorite Weird Food Growing Up)
- Places (Favorite Place Visited)
- Environments
- Money (Spend on what)



Decision-Making Strategies and tools

- 1. Pay Attention and Be Intentional
- 2. Commit to Listening
- 3. Commit to being curious and to gathering information
- 4. Commit to using schema – diagrams and rubric
- 5. Commit to checking facts – avoid Heuristics. Where find facts? Verify?
- 6. Self assess often
- 7. Use distributed practice (spaced repetition) to create good practices

Strategies and Tools

- 1. Pay attention and be intentional
 - A. Pomodoro – 30 minutes.
 - B. Social Media
 - C. The Narrative or story
 - D. Mindfulness, Meditation
 - E. Motivation matters. $PQ + CQ > IQ$
- 2. Commit to listening as much as the desire to be heard
 - *Exercise:* “What I hear you saying, in essence, is”

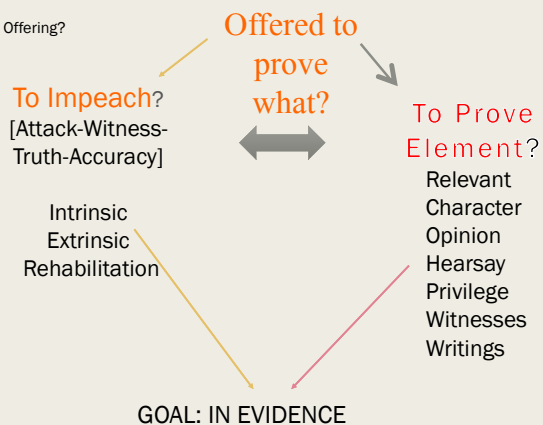
Additional Strategies and Tools

- 3. Commit to being curious and gathering information. Curiosity opens; judgment closes. (inclusivity)
 - “Law is a way of imagining the real.” – Clifford Geertz, cultural anthropologist
 - *Exercise:* In what activities are you curious?
- 4. Commit to using cognitive schema such as rubrics and diagrams.
 - *Exercise:* What rubrics do you use in deliberating on a motion, objection, ruling?

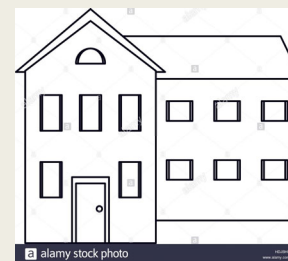
THE EVIDENCE HIGHWAYS

3.0s:

1. Civil?
2. Who's Offering?
3. Form?



“The Big House of Due Process



More Strategies and Tools

- **5. Commit to Checking Facts** – Avoid Heuristics. Verify.
 - A. *Two Parts*: Validity (accuracy of measure – does it really measure what it purports to measure?) and Reliability (consistency of measure)
- **6. Self assess often**. How am I doing? What adjustments might I make?
- **7. Use distributed practice** (spaced repetition) and create good practices.
- *Exercise*: What are good practices for judicial decision-making?

One Caveat: Judicial Decision-Making and Artificial Intelligence

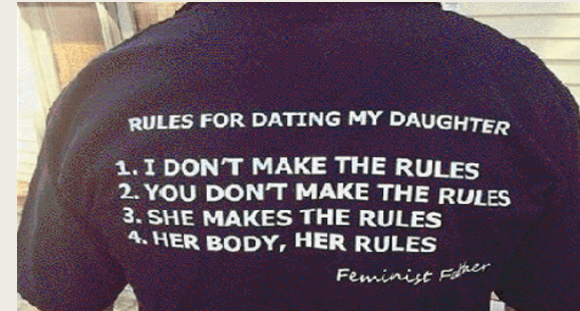
- What is the risk of an offender reoffending?
 - A. Bail
 - B. Sentencing
- Using Artificial Intelligence – machine learning algorithms – that make predictions about the risk of reoffending

Which site is real and which is simply an effort to negatively INFLUENCE OTHERS? (NY TIMES TECHNOLOGY (9/4/18))

"my boyfriend doesn't like it when i.."
"my boyfriend doesn't want me to speak to.."



"Resisters: Girls make the rules and you follow them. If you don't like them you live. End of the story"



Distinguishing the Two?

- The fake ones:
 1. Often appeal to a cognitive schema based on strong emotion
 2. Often use absolutist language
 3. Often use stereotypes



Remember: "Slow thinking" is important to judging

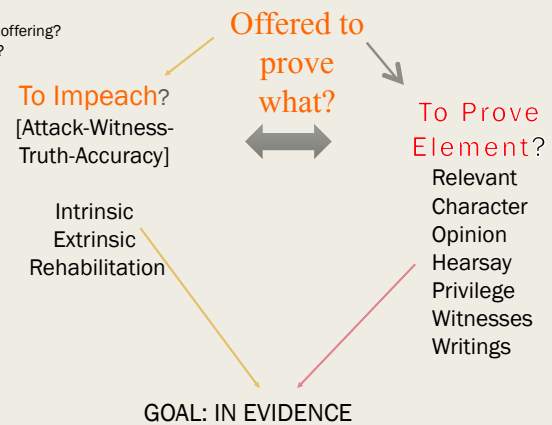
- Means: Conscious, analytical thought.
- Properties: Slow, effortful and uncertain
- Compare to "Fast thinking:" in unconscious mind. It's quick, takes shortcuts, and is often wrong.

Applying This Information to Judging

THE EVIDENCE HIGHWAYS

Three Qs:

1. Civil?
2. Party offering?
3. Form?



Evidence Law Hypo

- Dee (D), the CEO of a large online marketing company, fired Petra (P) and Petra sued Dee for breach of contract. At trial, Defendant Dee offered:
 - (1) Part of an unrecorded oral conversation between P and D.
- Evidence (1) was admitted as a statement by a party opponent.
- P then offered the remainder of the conversation to (1). The trial judge excluded it based on hearsay and under Rule 106 because it was an oral conversation.
- **What is your decision-making process on this question?**

NC Evid Code, Chap 8(c)

- Rule 106. Remainder of or related writings or recorded statements. When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it. (1983, c. 701, s. 1.)

Judicial Interpretation Schema

- 1. Textualism
- 2. Purposivism
- 3. Dynamism

Amendment to Fed. R. Evid. Rule 106

- Rule 106. Remainder of or Related ~~Writings or Recorded~~ Written or Oral Statements
- If a party introduces all or part of a ~~writing or recorded~~ written or oral statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ written or oral statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection

Hypo #2: The Witness lunch

- Two friends are witnesses in a civil action for the Defense. The judge invokes Rule 615, excluding the witnesses from court so they “cannot hear other witnesses’ testimony.” After one testifies, a lunch recess is called and the two friends go to lunch. They talked generally about the case, how long and tiring it was, but not about the specific testimony. They were observed by several of the jurors. After a subsequent objection, the trial judge excluded the second witness’s testimony.
- How would you have created a better outcome?

NC Evid. Code

- Rule 615. Exclusion of witnesses. At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause, or (4) a person whose presence is determined by the court to be in the interest of justice. (1983, c. 701, s. 1.)

Amendment to FRE 615: Excluding Witnesses from the Courtroom

- (a) At a party’s request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses’ testimony. Or the court may do so on its own.
* * *
- (b) Additional Orders...
- **An order under (a) operates only to exclude witnesses from the courtroom. But the court may also, by order: (1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and (2) prohibit excluded witnesses from accessing trial testimony.**

NC Evid. Code

- Rule 702. Testimony by experts. (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.

Standard for 702

- Sufficient evidence?
- Preponderance of the Evidence?
- Probable Cause?

- Rule 702. Testimony by Expert Witness
- A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:
 - (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods.; and
 - (d) the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

A FOUR POINT SCHEMA FOR EXPERTS

1. Reliable Theory
2. Reliable Application of Theory
3. Helpfulness to trier of fact
4. Qualified Witness [R3 HQ]

Hypo

- A man, Macy, was found asleep behind the wheel of a parked truck with the engine running. Officer Raddatz, a drug recognition evaluator, did a drug recognition evaluation at the county jail. She determined that Macy was impaired due to abnormal physiological signs (e.g., eyes lacked convergence, rigid muscle tone). Raddatz concluded that Macy was on the downside of methamphetamine use. Macy was charged with DUI.
- 1. Can Officer Raddatz testify at Macy's DUI trial as a lay witness?

Daubert

- It is the trial court's responsibility under Rule 104(a) to determine if:
 - (1) an expert is proposing to testify to scientific knowledge
 - (2) that will assist the trial of fact in understanding a fact in issue. The trial court can consider various factors in making a reliability determination.
- *Daubert* gives us 3 Rs for expert testimony –
 - Relevant and
 - Reliable
 - Reviewable

Hypo

- Plaintiff sued the manufacturer of a ladder, claiming it was defective and caused plaintiff's injuries. Plaintiff wanted to call an expert, Dr. Suzie Backus, an engineer by training, to testify that the caster stem collapsed on account of a brittle fracture resulting from overtightening. The expert found many articles on brittle fracture after a Google search.
- Allow?
 - See *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887 (7th Cir. 2011).

Hypo

- *State v. Blue*. Defendant Peter Blue shot and killed his cousin Jimmy Shaw after an argument. Late at night, the two were arguing and the decedent pointed an AR-15 at the defendant, who promptly stood up and fired seven shots in rapid succession at decedent with the loaded 9-millimeter Beretta pistol he was carrying. Defendant then said, "What about now, Bozo?...."
- At trial, defendant offered an expert regarding the doctrine of the "use of force." The expert, one Dave Clotter, was going to testify to "pre-attack cues," "reaction time" and "force variables."

Hypo Continued

- The expert was a graduate of the FBI Academy and worked at the NC Department of Justice as an instructor "for subject control and arrest techniques. When asked about his knowledge, Clotter said it came from published articles in the field of use of force and his training as well as the tests used in the Justice Academy. Clotter said he had read and participated in some of the studies.
- What questions should the judge ask the expert as the gatekeeper? Would exclusion of the expert be error? See *State v. McGrady*, 368 N.C. 880 (2016).

HYPOTHESIS

- In a child sex abuse case, defense offers an expert M.D. on repressed memory and the suggestibility of memory. The expert had not interviewed the victims.
- What process should the trial court use in determining the admissibility of this testimony?
 1. Arguments from both sides
 2. Conducted Voir Dire
 3. Considered amended Rule 702
 4. Considered Rule 403
- Excluded the evidence. Proper?

HYPOTHESIS Continued

- The Court found the trial court did not abuse its discretion in excluding defense expert testimony about repressed and suggestible memory.
- The Court observed:
 1. There is no rule that an expert must interview a victim
 2. Rule 702 does not require specific procedural requirements for evaluating expert testimony.
 3. Rule 403 can be considered as well as 702.
 4. Here, the Trial Court did its job, acting as a gatekeeper in determining the admissibility of expert testimony.
- *State v. Walston*, ___ N.C. ___, ___ S.E.2d ___ (May 5, 2017)

Two Broad Narratives From Daubert

- (1) Relocates the line between judge and jury, and turns judges into amateur scientists.
- (2) Creates a managerial model for judges (Case Management), with a new gravitational center – experts

The End

- Finish each day and be done with it. You have done what you could. Some blunders and absurdities no doubt crept in; forget them as soon as you can. Tomorrow is a new day. You shall begin it serenely and with too high a spirit to be encumbered with your old nonsense.”
- *Ralph Waldo Emerson*
- “Here comes the sun. And I say, it’s all right.” - *The Beatles*