

# Law & Cognition

Prof. Dan Kahan  
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Fall 2011

## General Information & Course Outline

### A. Nature of the Seminar

The focus of this seminar will be a set of interrelated frameworks for studying how legal decisionmakers think. These frameworks use concepts and methods from a variety of disciplines, including social psychology, behavioral economics, and political science. What unites—but also divides—they is their ambition to generate empirically grounded accounts of the various cognitive elements of legal decisionmaking: from values and motivations to perceptions and reasoning processes.

For our purposes, “legal decisionmakers” will mean mainly judges and jurors. Our aim will be to assess the contribution that the various frameworks make to explaining, predicting, and identifying means for improving the judgments of these actors. Because we will be interested in how the cognitive tendencies of these two groups of decisionmakers diverge, moreover, we will also afford some consideration to the professional(ized) habits of minds of lawyers more generally.

There are a number of things that we will *not* be examining in great detail. We will not be trying to identify how the study of cognition can be used to enhance the regulatory efficacy of the law, for example. Nor will we be examining the contribution that the study of cognition might make to improving the law’s use of forensic science. We will, of course, form some insights on these matters, for it is impossible to evaluate the cognitive functioning of legal decisionmakers without reference to its impact on the effectiveness of law and the accuracy of adjudication. But the limited duration of the seminar will prevent us from systematically assessing the relevance of the frameworks to these objectives—in large part because doing so adequately would require consideration of so many phenomena in addition to how legal decisionmakers think.

The seminar will also have a secondary objective: to form a working familiarity with the empirical methods featured in the study of cognition. We will not be designing studies or performing statistical analyses. But we will be devoting time and attention to acquiring the conceptual knowledge necessary to make independent critical appraisals of the empirical work we will be examining.

### B. Logistics & Requirements

1. *Readings.* There is no “book”—all materials (mainly studies and commentaries, but likely some cases, along with “questions” & perhaps from time-to-time “problems”) will be distributed via the course’s Isites page. They will be uploaded in “installments,” which will consist of readings to be assigned over the course of multiple upcoming sessions. **Assigned readings will be posted via Isites on a weekly basis—no later than Thursday of the week before the session in which they will be discussed.** The assignments will refer to page numbers, which will run consecutively across the reading installments.

2. *Idea papers.* a. Each week one-third of the students enrolled in the course will be assigned to write a short paper. The paper should present a single, cogent *idea*—in the form of an argument, informed conjecture, critical problem, or the like. The idea should relate in a concrete way to some aspect of the assigned readings, but can be focused on only a portion of them (even on only one study, e.g.). Indeed, while it is permissible for the idea to engage the readings as a whole, the papers should *not* present a mere summary of the readings (or of any portion of it). There is no length requirement—only an expectation that the paper will say something that reflects thoughtful engagement with the material and promotes the same for readers of the paper. I would guess, however, that papers will typically be somewhere between four and ten paragraphs.

b. In any given week, the assignment posting will designate either “group 1,” “group B,” or “group III,” membership in which will be posted on the Isites page, as responsible for writing idea papers. **Students** are free to “trade” assigned weeks—and can do so without obtaining permission from me—but **cannot unilaterally elect to defer paper-writing assignments to future weeks**. (Missing one paper will result in a penalty of some sort; missing two or more will result in denial of course credit.)

c. Papers **must be posted to the iSites page discussion board by noon on the Wednesday** before the session in which the assigned readings will be discussed. I encourage students to comment on each other’s papers on the Isites discussion board. I will read the papers before class, and will supply off-line reactions to their authors.

3. *Isites discussion.* I encourage on-line discussion of issues presented by the readings or addressed (or not addressed) in our weekly sessions. I will chime in now and then—either responding to comments or initiating threads—but not as often as I am likely to be inclined to, since I don’t want the discussion to take a spoke-hub form.

4. *Grades.* Grades will be based on the papers and on contributions to in-class discussion (but not Isites discussion).

5. *Extra-credit paper.* I am willing to supervise papers relating to the subject of the seminar for appropriate additional credit. Such papers are for additional credit only and are not an alternative to the semi-weekly idea papers. Students interested in writing an extra-credit paper should see me.

### C. Provisional Outline

The seminar readings and sessions will be divided into four primary groups: Decision science (mainly juries); New Realisms (mainly judges); Original Realism; and Neuroscience. Each group will be divided into topics, which are expected to span one or more sessions, as indicated below. This plan for the coverage and pace is subject to revision to accommodate the impact that discussion has on our insights and curiosity.

**A. Decision science (mainly juries)**

1. Story-templates & prototypes
2. Culpable control
3. Motivated reasoning & cultural cognition
4. Bounded rationality
5. IAT
6. Social influence & deliberation

**B. New Realisms (mainly judges)**

1. Ideology
2. Posnerology
3. Psychology

**C. Original Realism (mainly judges, also lawyers)**

1. Llewellyn's "situation sense"
2. Frank's "Modern mind"

**D. Neuroscience (both)**

1. "Neurocorrelates of . . ."
2. Neural networks

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## Session 1—Story templates & prototypes

*Readings* (indexed to pagination of course readings):

1. Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 J. Personality & Social Psychol. 242 (1986)..... 1
2. Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519-57 (1991)..... 18
3. Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. Personality & Social Psychol. 857 (1991)..... 58
4. Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 L. & Human Behavior 507 (1993)..... 74
5. Vicki L. Smith & Christina A. Studebaker, *What Do You Expect?: The Influence of People's Prior Knowledge of Crime Categories on Fact-Finding*, 20 L. & Human Behavior 517 (1996)..... 104
6. Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 Hoffstra L.J. 793 (2000)..... 120

### Idea-paper: Group 1

*Something to think about as you read:*

### *Self-Defense?*

by Emily Mathews & Dan Kahan

Rick is charged with the murder of Frank.

Rick works in the city. He often spends long hours at the office, returning home very late at night, when the streets are normally empty. After reading about a string of late-night robberies in the vicinity of his office, Rick obtained a permit that allowed him to carry a handgun, which he kept in a pocket of his overcoat.

On the night in question, Rick again worked late. Leaving his office building just after midnight, Rick saw a man on the sidewalk on the other side of the street. The man, Frank, appeared to be weaving and staggering, and was mumbling to himself. Watching for a few seconds, Rick noticed Frank had what appeared to a bottle of whiskey in one hand and an open switchblade knife in the other.

Looking up and seeing Rick across the street, Frank shouted, “What are you looking at, you freak? I’m going to cut your damned throat.” Almost falling as he stepped off the curb, and continuing to stagger and weave, Frank lurched toward Rick. Rick drew his gun from inside his overcoat, and when Frank was approximately ten feet away, fired. Frank fell to the ground.

Rick then turned and used his electronic key card to re-enter the locked office building. From the lobby, he called 911 on his cell phone, telling the operator, “A guy was going to stab me so I shot him.”

The police arrived within two minutes, and an ambulance within three. Frank was pronounced “dead on arrival” at the hospital less than ten minutes later.

*Murder.* Anyone who knowingly or intentionally causes the death of another person without a legal defense is guilty of murder. The penalty for murders is 25 years’ to life imprisonment.

*Self-defense.* Self-defense is a lawful defense to a charge of murder. An individual may use deadly force against another in self-defense when that individual honestly and reasonably believes that doing so is necessary to avoid an immediate threat of death or extreme bodily harm.

### **Questions:**

Imagine you were either the defense lawyer or the prosecutor in a case with these facts. How do you think potential jurors would be inclined to decide on whether Rick should be acquitted of homicide on grounds of self-defense? How should you present the case in order to incline them toward your position? Does it matter whether the legal definition of self-defense explicitly imposes a “duty to retreat”? Whether it explicitly affords the right to “stand one’s ground” if attacked with deadly force?

Try answering these questions now; then try answering them again after you read the articles by Pennington & Hastic and by Smith et al. (pp. 1-119). Do those materials change or sharpen your answers?

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### Session 2—Culpable Causation & Motivated Reasoning I

*Readings* (indexed to pagination of course readings):

1. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 Colum. L. Rev. 269 (1996) .....124
2. M. D. Alicke, *Culpable Causation*, 63 J. Personality & Social Psychol. (1992) .....139
3. M. D. Alicke, *Culpable Control and the Psychology of Blame*, 126 Psychol. Bulletin (2000).....150
4. Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 Cornell L. Rev. forthcoming (2012).....169
5. Dan M. Kahan & Donald Braman, *The Self-defensive Cognition of Self-defense*, 45 Am. Crim. L. Rev. 1 (2008)..... 212-80

(Some) *Questions*:

1. Does Alicke’s “culpable control” model supply any additional guidance for an advocate in a case like the “self-defense” hypothetical introduced in session 1?
2. Do criminal law doctrines relating to the quality of defendants’ volitional states (such as the “heat of passion” doctrine and the “irresistible impulse” formulation of insanity) embody a moral theory of blameworthiness? If so, what is it?
3. Are the dynamics featured in Alicke’s “culpable control” model and Nadler & McDonnell’s study of character and motivated cognition consistent with the theory of blame reflected in criminal law doctrines? Could they be seen as implementing it? As subverting it?
4. Does the mechanism of “self-defensive cognition” featured in Kahan & Braman furnish any guidance for an advocate in a case like the “self-defense hypothetical” introduced in Session 1? Is “self-defensive cognition” consistent with the theory of blame reflected in doctrines relating to quality of volition?

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### Session 3—Motivated Reasoning II

*Readings* (indexed to pagination of course readings):

1. Dan M. Kahan, The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law, 125 Harv. L. Rev. (forthcoming 2011) .....203
2. Avani Mehta Sood & John M. Darley, *The Motivated Plasticity of Harm in the Service of Punishment Goals: Legal Implications of Outcome-Driven Reasoning*, 2010 Conference on Empirical Legal Studies .....292
3. Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, *They Saw a Protest: Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 Stan. L. Rev. (forthcoming 2012) .....332

### ***Idea paper: Group III!***

(Some) *Questions*:

1. Does “cultural cognition” supply any additional guidance for an advocate in a case like the “self-defense” hypothetical introduced in session 1?

2. Are the studies in Sood & Darley & in KHBer *internally valid* (i.e., were they designed in a manner that supports the inferences the respective paper authors’ draw)?

3. “It makes perfect sense that subjects in the different conditions (abortion-clinic protest; military recruitment-center protest) of the KHBer study would reach different results since peoples’ perceptions of the facts will and should be influenced by their knowledge of the respective risk of violence or intimidation in anti-abortion and military-recruitment protests.” Agree?

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### Session 4—Bounded Rationality I

*Readings* (indexed to pagination of course readings):

1. Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. Legal Stud. 287 (1996) .....332
2. K. A. Kamin & J. J. Rachlinski, *Ex Post ≠ Ex Ante - Determining Liability in Hindsight*, 19 Law & Human Behavior 89 (1995) .....415
3. Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571 (1998) ..... 467-84\*
4. David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 Law & Human Behavior 183 (2006) .....586
5. Kahan, *The Anti-Rules of Evidence* .....606

#### ***Idea paper: Group 1!***

(Some) *Questions*:

1. Is “context-dependent decisionmaking” irrational or otherwise undesirable? If so, what, if anything, can be done to counteract it?
2. Is “hindsight bias” irrational or otherwise undesirable? If so, what, if anything, can be done to counteract it?
3. Do fear, anger, disgust, and like emotions generate irrational or otherwise undesirable decisionmaking? If so, what, if anything, can be done to counteract it?

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\* Note: only *part* of article.



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### Session 5—Bounded Rationality II

*Readings* (indexed to pagination of course readings):

1. Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. Experimental Psych. 91 (2001) .....486
2. Dan Simon, Lien B. Pham, Quang. A. E & Keith J. Holyoak, *The Emergence of Coherence over the Course of Decisionmaking*, 27 J. Experimental Psych. 1250-60 (2001) .....499
3. Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 Univ. Chi. L. Rev. 511 (2004)..... 510
4. Jeffrey Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Context Effects in Judicial Decisionmaking* (unpublished) ..... 868

#### ***Idea paper: Group B!***

(Some) *Questions*:

1. Are the processes described in Carlson & Russo irrational otherwise undesirable? If so, what, if anything, can be done to counteract them?
2. Is “coherence based reasoning” irrational or otherwise undesirable? If so, what, if anything, can be done to counteract it?
3. Is judicial decisionmaking likely to be more rational than jury decisionmaking?

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### Session 6—IAT

*Readings* (indexed to pagination of course readings):

1. Brian Nosek & Rachel G. Riskind, Policy Implications of Social Cognition, *Social Issues & Policy Rev.* (forthcoming).....942
2. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *Notre Dame L. Rev.* 1195 (2009) .....989
3. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *Journal of Personality and Social Psychology* 597-612 (2006)..... 973

### ***Idea paper: Group III!***

(Some) *Questions*:

1. Are the cognitive dynamics associated with IAT matters of concern for law?
2. Are judges affected by IAT dynamics?
3. Does deliberation help to ameliorate IAT dynamics?

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### Session 7—Deliberation

*Readings* (indexed to pagination of course readings):

1. D. Schkade, C. R. Sunstein & D. Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 Columbia L. Rev. 1139 (2000) ..... 611
2. Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071 (1998) ..... 648
3. Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 Stan. L. Rev. 1239 (2002) ..... 794
4. Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards* ..... 827

#### ***Idea paper: Group 1!***

(Some) *Questions*:

1. Do the studies of Schkade, Sunstein, & Kahneman suggest reasons to think that juries' punitive damage awards are irrational? Do they furnish insight into how deliberation is likely to interact with cognitive biases generally?

2. Whose position—that of Eisenberg and his coauthors or that of Sunstein & his—is more persuasive? What does the debate imply about the relative strengths of experimental and observational studies for assessing the quality of decisionmaker reasoning in law?

3. Do you find the synthesis of Hans and Reyna plausible? Does their position suggest that jury decisionmaking is rational?

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### Session 8—"Ideological" Decisionmaking

*Readings* (indexed to pagination of course readings):

1. Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Virginia Law Review 301-354 (2004)..... 1041
2. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 Journal of Legal Analysis 775 (2009) ..... 1096
3. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 The University of Chicago Law Review 831 (2008)..... 1123
4. Thomas J. Miles & Cass R. Sunstein, *The Real Judicial Activists* ..... 1144
5. Kahan, Ideology in vs. Cultural Cognition of Law: What Difference Does It Make? ..... 1146
6. Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 Columbia Law Rev. 1150 (2004) ..... 1156
7. Linda Greenhouse, *Press Room Predictions*, 2 Perspectives on Politics 781 (2004)..... 1173

#### ***Idea paper: Group B!***

(Some) *Questions*:

1. Does the evidence support the conclusion that ideology rather than adherence to law drives judicial decisionmaking?

2. Is the "New Legal Realism" a theory of cognition? (Does that matter?)

3. Does "New Legal Realism" explain judicial decisionmaking more successfully than whatever it is an alternative to?

3. What is the normative significance of the evidence that judicial decisions track ideology? If these findings are troubling, what, if anything, can be done to remedy the dynamics that generate them?

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### Session 9—Conscious & Unconscious Influences on Judicial Reasoning

*Readings* (indexed to pagination of course readings):

1. Richard Posner, *How Judges Think* (2008) ..... 1177
2. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 *Cornell L. Rev.* 1 (2007) ..... 899

#### ***Idea paper: Group C!***

(Some) *Questions*:

1. How persuasive is Posner's account? Does his account reflect a valid *method* of analysis, one from which confident conclusions can be drawn about how judges decide cases?
2. If it is correct, is Posner's account of how judges decide cases pose compatible with the law's normative expectations of how they *should* decide them? If not, are their ways to eliminate or reduce the conflict?
3. How persuasive is Guthrie, Rachlinski, & Wistrich's account? Do you agree with them that judicial decisions are likely to reflect legal doctrine more faithfully if it is based on deliberative ("System 2") rather than intuitive ("System 1") reasoning?
4. How does Guthrie et al.'s account of "intuition" and unconscious cognitive influences relate to Posner's?

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### Session 10—*Real* Legal Realism I

*Readings* (indexed to pagination of course readings):

1. Karl Llewellyn, The Case Law System in America  
(P. Gewirtz, ed.; M. Ansaldi, trans. 1989) ..... 1231
2. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals (1960)..... 1285

#### ***Idea paper: Group 1!***

(Some) *Questions*:

1. What is the relationship between Llewellyn’s “realism” and the “New Legal Realism” of Sunstein & Miles?
2. What is the relationship between Llewellyn’s account of intuition—“situation sense” as he calls it in *Common Law Tradition*—and those of Rachlinski et al. and of Posner? What psychological mechanism or mechanisms does Llewellyn’s “situation sense” involve?
3. What does Llewellyn understand “situation sense” to be an explanation *of*? Is it an influence intrinsic to law or extrinsic to it? Is its influence (as he understands or describes it) normatively desirable? If not, can it be counteracted or at least constrained or redirected?
4. Does Llewellyn’s account reflect a valid *method* of analysis, one from which confident conclusions can be drawn about how judges decide cases? How (or how else) might one *test* it empirically?

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### **Session 11—*Prototypes & Cognition***

*Readings* (indexed to pagination of course readings):

1. Howard Margolis, *Patterns, Thinking, and Cognition* (1987) ..... 1436
2. Howard Margolis, *Dealing with risk : Why the Public and the Experts Disagree on Environmental Issues* (1996) ..... 1400
3. Paul M. Churchland, *The Engine of Reason, the Seat of the Soul: A Philosophical Journey into the Brain* (1995)..... 1564

#### ***Idea paper: Group B!***

(Some) *Questions*:

1. How does Margolis's account relate to the "dual process" theory of reasoning that distinguishes between rapid, heuristic-driven forms of judgment (System 1) and reflective, conscious, deductive ones (System 2)?
2. Does Margolis's account of cognition supply a plausible mechanism for the Llewellyn's "situation sense" or for Posner's "intuitionism"? How might one test the hypothesis that it does? If pattern recognition is at work in legal reasoning, how does that affect the normative status of intuition-centered accounts of legal reasoning?
3. What is the relationship between Churchland's account of pattern recognition and Margolis's? Does Churchland's account supply a plausible mechanism for legal reasoning? A morally satisfying one?

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### Session 12—*Neuroscience Perspectives*

*Readings* (indexed to pagination of course readings):

1. Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 Stan. Stan. L. Rev. 1119 (2010) ..... 1616
2. Joshua J. Knabb, Robert K. Welsh, Joseph G. Ziebell & Kevin S. Reimer, *Neuroscience, moral reasoning, and the law*, 27 Behavioral Sciences & L. 219 (2009)..... 1636
3. Jessica R. Gurley & David K. Marcus, *The effects of neuroimaging and brain injury on insanity defenses*, 26 Behavioral Sciences & the Law 85 (2008) ..... 1654
4. Harrison A. Korn, Michah A. Johnson & Marvin M. Chun, *Neurolaw: Differential brain activity for Black and White faces predicts damage awards in hypothetical employment discrimination cases*, Social Neuroscience (forthcoming 2011) ..... 1667
5. Deena Skolnick Weisberg, Frank C. Keil, Joshua Goodstein, Elizabeth Rawson & Jeremy R. Gray, *The seductive allure of neuroscience explanations*, 20 J. Cognitive Neuroscience 470 (2008) ..... 1679
6. Jon Bardin, *Voodoo That Scientistists Do*, Seedmagazine.com, Mar. 25, 2009 ..... 1687
7. Craig M. Bennett, Abigail A. Baird, Michael B. Miller & George L. Wolford, *Neural correlates of interspecies perspective taking in the post-mortem Atlantic Salmon* ..... 1692

### ***Idea paper: Group III!***

(Some) *Questions*:

1. How is the form of neuroscience explanation featured in fMRI analysis of neurocorrelates related to Churchland's neural account of pattern recognition?
2. Do you think that neurocorrelate investigation does now or is likely in the future to shed light on the issues of cognition that we have investigated in this seminar?