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# WHAT COGNITIVE DISSONANCE TELLS US ABOUT TONE IN PERSUASION

Kathryn Stanchi\*

## INTRODUCTION

One of the toughest questions that lawyers face is how hard to push in persuasion. We want to advocate strongly enough so that our passion for our client's cause, and our belief in its rightness, is apparent to the court. There is nothing worse than lukewarm advocacy. But we do not want to push so far that we cross from zealous advocacy into obnoxiousness. The problem is that the line between persuasion and coercion is a fine one.

This Article takes the first step in thinking about where good advocacy should draw the line between zeal and coercion. Legal advocates differ about how to navigate that line.<sup>1</sup> Is the best service to the client to be found in the most aggressive, strongest, hard-line approach? Or is a more tempered, reasonable approach most likely to produce the best results?

This fundamental disagreement in advocacy philosophy is certainly not limited to law. In the words of Richard Perloff, a national expert in persuasion science:

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\* Professor of Law, Temple University Beasley School of Law. I would like to thank Marilyn Walter and Betsy Fajans for putting together such a wonderful symposium and inviting me to participate. Many thanks also to Linda Berger and Emily Zimmerman, who provided insightful comments on prior drafts, and Kevin Yoegel and Tam Tran, who provided excellent research assistance.

<sup>1</sup> Compare Kathleen T. Browe, Comment, *A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994), with Robert L. Haig & Robert S. Getman, *Does Hardball Litigation Produce the Best Result for Your Client?*, 65 N.Y. ST. B.J., no. 1, Jan. 1993, at 24–28, 64. See also Peter M. Appleton, *Is Winning Everything?*, 62 OR. ST. B. BULL., no. 6, Apr. 2002, at 21–23.

Many . . . view persuasion in John Wayne, macho terms. Persuaders are seen as tough-talking sales people, strongly stating their position, hitting people over the head with arguments, and pushing the deal to a close. But this oversimplifies matters. It assumes that persuasion is a boxing match, won by the fiercest competitor. In fact persuasion is different. It's more like teaching than boxing. Think of a persuader as a teacher, moving people step by step to a solution, *helping them appreciate* why the advocated position solves the problem best.<sup>2</sup>

On the other hand, well-known trial lawyer Gerry Spence has been quoted as saying that he goes "to court to do battle, not dance the minuet."<sup>3</sup>

This Article looks at cognitive science for guidance on this question. One cognitive process that seems to be integral to tone is cognitive dissonance, a concept I will explain in Part II. I then take a close look at two types of advocacy strategies that exemplify the conflict between the hardline and tempered approaches to advocacy. The first advocacy strategy, addressed in Part III, focuses on how to deal with arguments and information that undermine your position. Is it best to sound like you believe your case to be ideal and that contrary arguments are wholly without merit or even spurious? Or is it best to acknowledge that there are possible reasonable counterviews while still arguing that your position has greater merit?

The second advocacy strategy, addressed in Part IV, is how to approach a controversial rule or premise for which you are advocating. Is the best approach to push early and hard in support of the rule, or to ease the reader into the controversial point by taking her through a step-by-step thought process that guides her to the controversial point?

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<sup>2</sup> RICHARD M. PERLOFF, *THE DYNAMICS OF PERSUASION: COMMUNICATION AND ATTITUDES IN THE 21ST CENTURY* 12 (Jennings Bryant et al. eds., 4th ed. 2010).

<sup>3</sup> Haig & Getman, *supra* note 1, at 26 (citing David Margolick, *At the Bar: Rambos Invade the Courtroom, and the Profession, Aghast, Fires Back with Etiquette*, N.Y. TIMES, Aug. 5, 1988, at B5).

The bottom line is that in both rhetorical situations, cognitive dissonance supports an advocacy approach that, while still strong in pursuit of a favorable outcome, *appears* more gradual, objective, and reasonable. In other words, it is often advisable for lawyers to present arguments in a way that appears to be reasonable, measured, and objective.

Despite this conclusion, I do not take the position that a reasonable, measured approach to advocacy is always the best path. Nor do I suggest that lawyers should actually become educators rather than zealous advocates. There are undoubtedly occasions in which lawyers should push their positions aggressively.<sup>4</sup> Decisions about tone may change given the context and the strengths of the merits of the case. The audience for the argument is also, of course, a consideration—whether it is a judge, a panel of judges, a court of last resort, or a jury.

My proposal is a modest one: lawyers should learn what psychologists know about the typical reaction of human beings to aggressive argumentation. This Article is meant to be a first step in that endeavor and concludes that, in the circumstances described below, the most persuasive approach—the one most psychologically appealing to decision-makers—is one that appears more balanced and reasonable rather than one that is aggressively pushy and one-sided.

## I. COGNITIVE DISSONANCE

Cognitive dissonance is an uncomfortable psychological state that results when a person's strong beliefs (or "cognitions") clash.<sup>5</sup>

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<sup>4</sup> For example, it is sometimes important for lawyers to advance an argument that the judge has expressed displeasure with, or continue to object to a line of questioning, or the like, because it is the right thing to do for the client. At other times, it is appropriate to show outrage at a particular set of facts or a particular legal decision. I do not mean to suggest a bright line rule about tone—that lawyers must always make their arguments in a measured tone. I argue only that, on balance, a reasonable tone often works better to persuade because of how people react to aggressive argumentation.

<sup>5</sup> See JOEL COOPER, COGNITIVE DISSONANCE: FIFTY YEARS OF A CLASSICAL THEORY 2–6 (2007) (explaining that dissonance is aroused when expectations are "discordant" with observations, which is an "uncomfortable,

For example, when a person who considers herself a philanthropist is asked for a donation and does not give, that is a scenario likely to arouse cognitive dissonance, because the person's self-image (as a philanthropist) is clashing with reality (her failure to give money).<sup>6</sup> Or, when a member of Mothers Against Drunk Driving ("MADD") finds herself tipsy and with no way home but to drive her car. Cognitive dissonance can also arise when people's expectations conflict with behavior or reality, such as when people expected the year 2000 to cause a massive technological disaster (the "Y2K problem"), but everything turned out to be fine.<sup>7</sup>

The discomfort of cognitive dissonance arises because people generally do not like inconsistency.<sup>8</sup> When we are confronted with conflicting thoughts, we become uncomfortable and will strive to resolve that discomfort.<sup>9</sup> Dissonance also has a magnitude—the

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unpleasant state" that causes anxiety and agitation). See also ARTHUR ARON & ELAINE N. ARON, *THE HEART OF SOCIAL PSYCHOLOGY: A BACKSTAGE VIEW OF A PASSIONATE SCIENCE* 113–18 (2d ed. 1989); Elliot Aronson, *Dissonance Theory: Progress and Problems*, in *THEORIES OF COGNITIVE CONSISTENCY* 5, 5–6 (Robert P. Abelson et al. eds., 1968).

<sup>6</sup> For more examples of cognitive dissonance, see PERLOFF, *supra* note 2, at 236–38.

<sup>7</sup> PERLOFF, *supra* note 2, at 236; see also COOPER, *supra* note 5, at 2 (giving other examples). Many readers will likely remember that prior to the year 2000, most computers represented the year using only the last two digits of the year—for example, 95 for 1995. In the time leading up to the year 2000, many predicted a massive computer failure because of the inability of computers to distinguish the year 2000 from 1900. This was called the Y2K problem (an acronym for "year 2000 problem"). Some thought that this failure would result in a financial crisis as well as the failures of infrastructure and utilities. People stockpiled food and water, avoided air travel, and withdrew their money from banks. See Frances Romero, *Y2K*, TIME (May 20, 2011), [http://content.time.com/time/specials/packages/article/0,28804,2072678\\_2072683\\_2072599,00.html](http://content.time.com/time/specials/packages/article/0,28804,2072678_2072683_2072599,00.html); Press Release, Decision Analyst, *Americans Planning to Take Y2K Precautions* (Nov. 19, 1999), available at [http://decisionanalyst.com/publ\\_data/1999/Y2K.dai](http://decisionanalyst.com/publ_data/1999/Y2K.dai). January 1, 2000, however, passed by with only minor glitches. See *Y2K Bug Fails to Bite*, BBC NEWS (Jan. 1, 2000), <http://news.bbc.co.uk/2/hi/science/nature/585013.stm>.

<sup>8</sup> COOPER, *supra* note 5, at 2.

<sup>9</sup> See PERLOFF, *supra* note 2, at 238–40 (describing cognitive dissonance as an "amalgamation of physiological arousal, negative affect, and mental

stronger the clash of beliefs, the more acute the feeling of dissonance.<sup>10</sup>

There are a number of ways that people resolve dissonance. In the hypothetical about the woman in MADD, the woman could change her behavior (resolve herself to sleeping in the car), change her belief (driving tipsy isn't that bad), or rationalize (just this once . . . otherwise I'll freeze out here).<sup>11</sup> Cognitive dissonance creates the potential to change not only behavior, but also beliefs.<sup>12</sup> The reality is, however, that when confronted with cognitive dissonance, most people do not change their strongly held beliefs. Instead, most people rationalize.<sup>13</sup> Even more interesting, sometimes when people are confronted with a situation or reality that clashes with their belief, their minds will alter that situation or reality to the extent possible to move it toward consistency with the belief.<sup>14</sup> For example, those who firmly believed that the year 2000 would cause a computer disaster might not have reacted to the reality of the uneventful passing of January 1, 2000 by sheepishly acknowledging that they overreacted. Rather, they might "alter reality" by insisting that the disaster had actually happened on January 1 but that the real consequences would be experienced in the years to come.<sup>15</sup>

Cognitive dissonance is aroused in many advocacy situations, and that means that advocates can take advantage of knowledge about cognitive dissonance in a number of ways. There are situations in which it is advantageous to the advocate to arouse cognitive dissonance. In other situations, the best path is advocacy that helps to avoid or alleviate a decision-maker's dissonance. In

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anguish").

<sup>10</sup> *Id.* at 239.

<sup>11</sup> For a list of possible ways to overcome dissonance, see *id.* at 240.

<sup>12</sup> *Id.* at 239.

<sup>13</sup> *Id.* at 241, 250 ("[H]uman beings are not rational animals, but, rather, rationalizing animals.") (emphasis added) (quoting Aronson, *supra* note 5, at 6).

<sup>14</sup> People will "deny and distort reality, refusing to acknowledge they made a mistake." *Id.* at 241.

<sup>15</sup> See *id.* at 236. Or, the believers in the Y2K disaster may also assert that no problems occurred because a small number of people were vigilant and solved the problems before they happened.

any event, it is critical for advocates to have a feel for: 1) which advocacy situations arouse dissonance; 2) whether the resolution of that dissonance is potentially advantageous; and 3) how to avoid dissonance, if it would be more advantageous to do so. Those questions are addressed in the following sections.

## II. VOLUNTEERING BAD INFORMATION: SHOWING YOUR WARTS

If you look at the briefs being filed in courts, you will see widely different rhetorical approaches to dealing with adverse information and counter-arguments. Some briefs are aggressive and hard line in arguing their position. These kinds of briefs eschew any shows of weakness, and, if weaknesses appear in them, the weaknesses are quickly and decisively batted away as irrelevant or without merit.<sup>16</sup> These briefs would never be called “educational” or “informational.” They have a clear point of view that is unwavering.<sup>17</sup> One judge described these kinds of briefs as “screaming” and “table pounding.”<sup>18</sup> Clients often like this style of

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<sup>16</sup> See Richard Gabriel, *Professionalism in Today's Competitive Legal Market*, 39 COLO. LAW, no. 6, June 2010, at 65, 66 (noting that repeated use of words “frivolous” “groundless,” and “wholly without merit” are not persuasive). See generally Elizabeth Fajans & Mary R. Falk, *Shooting from the Lip: United States v. Dickerson, Role [Im]morality, and the Ethics of Legal Rhetoric*, 23 U. HAW. L. REV. 1 (2000) (describing various disrespectful rhetorical techniques, including arguments put forth as though there is no reasonable counter-point).

<sup>17</sup> It is worth noting here that sometimes the aggressive approach is a deliberate rhetorical strategy. Other times, though, lawyers fall into a common trap of becoming so involved with the client and the client's case that they quite literally *cannot* see weaknesses in their own cases. As a result, they write briefs in the aggressive style. One commentator refers to this inability to see beyond the strengths of the case as “myopic vision.” Kristin K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 VT. L. REV. 483, 516–22 (2003) [hereinafter Robbins, *Paradigm Lost*]. This trap is quite common for legal advocates, in particular for those who represent a certain category of client over and over. See Jay M. Quam, *Keys to Effective Advocacy: What I Wish I'd Known as a Litigator*, 65 BENCH & B. MINN. 22, 23 (2008) (describing lawyers whose judgment about weak cases get clouded because they want to give the client what he wants).

<sup>18</sup> Gabriel, *supra* note 16, at 66–67. This style of advocacy is also sometimes called “Rambo” advocacy (as in just shoot everyone and everything)

advocacy because it looks like they have someone truly on their side.<sup>19</sup>

Then there are briefs that adopt a more moderate tone. It is clear that these advocates still have an agenda and want to win, but the rhetoric is cloaked in an aura of objectivity.<sup>20</sup> These briefs *appear as though* the advocate has thoughtfully considered both sides and has, upon deliberation, landed on the side favorable to the client. It is, of course, highly unlikely to have been the lawyer's actual process of advocacy to weigh both sides objectively (at least once the lawyer determined that representation of the client was a good idea). Rather, it is a purposeful strategy that makes the argument more closely mimic the judge's process of decision-making.

So what does the science tell us, if anything, about resolving this fundamental philosophical disagreement? At least part of the answer lies in cognitive dissonance. Many studies of persuasive messages, both within and outside the legal context, demonstrate that voluntarily disclosing harmful information makes a message more persuasive, as long as that harmful information is rebutted effectively by the advocate.<sup>21</sup> In other words, you are better off acknowledging your flaws than ignoring them, and you should address why your message should be accepted despite those flaws. But in rebutting whatever counterarguments exist, the advocate should give the appearance of having honestly and objectively considered the other arguments. Glib rebuttals, or those that "scorch the earth," should be avoided.<sup>22</sup>

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or "scorched earth" (as in drop the bomb and consequences be damned). Browe, *supra* note 1, at 755.

<sup>19</sup> Browe, *supra* note 1, at 774–75, 778–79 (clients may want Rambo style advocacy).

<sup>20</sup> These briefs often have numerous demonstrations of lawyer *ethos*—a label Aristotle put on an advocate's reputation for intelligence, truthfulness, and other positive character traits. See MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES FOR PERSUASIVE WRITING* 127 (3d ed. 2012) (defining *ethos*).

<sup>21</sup> See generally Kathryn Stanchi, *Playing with Fire: The Science of Confronting Adverse Material in Legal Advocacy*, 60 RUTGERS L. REV. 381 (2008) [hereinafter Stanchi, *Playing with Fire*] and studies cited therein.

<sup>22</sup> Of course, whether to reveal a flaw in a persuasive argument depends on



How does cognitive dissonance shed light on this question? The uncomfortable psychological state of cognitive dissonance arises both from advocacy that is too positive and acknowledges no flaws, as well as from advocacy that voluntarily discloses flaws. The details of how dissonance operates in both those scenarios are outlined in Section A. The key, though, is how the decision-maker resolves the dissonance. As the following sections indicate, the way decision-makers are likely to resolve dissonance cuts against one-sided advocacy and toward more reasonable acknowledgement of harmful information and counterarguments.

*A. Messages That "Protest Too Much"*

*The lady doth protest too much, methinks.*<sup>23</sup>

In Shakespeare's *Hamlet*, the quote above is spoken by Hamlet's mother, Queen Gertrude, during a scene in Hamlet's play in which the Player Queen vows her eternal love to her husband, the king, and swears never to remarry. Gertrude's response indicates her opinion that the Player Queen's vows are not worthy of belief because she has voiced them so insistently and without qualification.

"Protesting too much" in legal advocacy can take many forms. One common form is the "too-perfect" argument that contains only positive information and does not acknowledge the existence of flaws. For example, a description of a client that makes the client appear to be "too good to be true" protests too much.<sup>24</sup> Arguments that offer only supportive information and ignore any opposing

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the interaction of a number of complex factors—among them how serious is the flaw, how likely is it to be raised by the other side, and is there a way to mitigate or address it. The advocate should consider all those factors. But on balance, if it is a close call or other factors are equal, the science militates in favor of disclosure and refutation. *Id.*

<sup>23</sup> WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 3, sc. 2.

<sup>24</sup> As Ruth Anne Robbins notes, the statement of facts should be written with the client as the hero, and heroes always have flaws. See Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 775–76 (2006).

arguments, so called “one-sided messages,” suffer from a similar problem.

Another common argument that “protests too much” is one that addresses flaws or opposing arguments but does so in a flippant way, or a relentlessly aggressive way. This kind of argument nominally raises flaws, but often the flaws are “straw men” raised only so that they can be knocked down.<sup>25</sup>

Although it can look like it is considering both sides, this kind of argument is actually one-sided. It does not have the appearance of having objectively considered reasonable opposing views; instead, all opposing views, even reasonable ones, are wholly rejected as ridiculous or without merit.

One-sided messages like these protest too much. As a result, they can backfire by leading decision-makers to embrace the opposite of what the message advocates. The backfire results in part from the arousal of the message recipient’s cognitive dissonance. Cognitive dissonance is aroused by messages that “protest too much” because these messages will conflict with two strongly held beliefs: (1) no person or argument is perfect, and (2) all arguments have two sides.<sup>26</sup> These strongly held and widespread beliefs spring from a common natural skepticism that things that appear “too good to be true”<sup>27</sup> are not. The feelings of

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<sup>25</sup> T. EDWARD DAMER, *ATTACKING FAULTY REASONING: A PRACTICAL GUIDE TO FALLACY FREE ARGUMENTS* 221 (7th ed. 2012). Damer describes a “straw man” argument as a weaker “caricature of an opponent’s argument that the faulty arguer substitutes” for the actual argument, for the sole purpose of knocking it down. The “straw man” is a fallacy because it does not rebut the actual opposing argument. *Id.* Although it is a fallacy, the “straw man” can be effective, because it distorts the opponent’s argument (making it seem less effective).

<sup>26</sup> Stanchi, *Playing with Fire*, *supra* note 21, at 397.

<sup>27</sup> See Joseph R. Priester et al., *Whence Univalent Ambivalence? From the Anticipation of Conflicting Reactions*, 34 J. CONSUMER RES. 11, 12, 19–20 (2007) (“[M]any people recognize that there are two sides to every story and that nothing is perfect (or completely worthless).”). See also Michael Burgoon et al., *Revisiting the Theory of Psychological Reactance*, in *THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE* 213, 215–18 (Price Dillard & Michael Pfau eds., 2002) (describing research that showed the audience may interpret a persuasive message that is too strong as a threat to

dissonance aroused by the conflict between the message that “protests too much” and these strongly held beliefs can make the message recipient view the message as biased and overly pushy. Concluding that there is something wrong with the *message* resolves the dissonance and allows the reader to cling to her strongly held beliefs.<sup>28</sup> Once a message recipient’s cognitive dissonance leads her to believe that the message is flawed (by bias or coercive tactics), the message recipient is likely to reject the message.<sup>29</sup>

Because of these strongly held beliefs, when people hear a client described in an unrealistically positive way, or hear an argument that seems improbably airtight, they assume there must be something wrong.<sup>30</sup> That feeling that “something is wrong” is

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freedom of choice and resist that message); Taeda Jovicic, *The Effectiveness of Argument Strategies*, 20 ARGUMENTATION 29, 47 (2006) (arguing that persuasive messages that are too strong “may stimulate a negative evaluation of the message, searching for information to confirm alternatives, and aggressiveness toward the persuader”).

<sup>28</sup> See Russell A. Jones & Jack W. Brehm, *Persuasiveness of One- and Two-Sided Communications as a Function of Awareness There Are Two Sides*, 6 J. EXPERIMENTAL SOC. PSYCHOL. 47, 55 (1970) (concluding that reduced effectiveness of one-sided communications is attributed to audience perception that such messages are biased and are exerting pressure).

<sup>29</sup> An excellent example of this phenomenon appears in *Bennett v. State Farm Mutual Automobile Insurance Co.*, No. 13-3047, 2013 WL 5312398 (6th Cir. Sept. 24, 2013). In this case, defendant State Farm had derided one of plaintiff’s arguments as “ridiculous.” The court had this to say: “There are good reasons not to call an opponent’s argument “ridiculous,” which is what State Farm calls Barbara Bennett’s principal argument here. The reasons include civility; the near-certainty that overstatement will only push the reader away (especially when, as here, the hyperbole begins on page one of the brief); and that, even where the record supports an extreme modifier, “the better practice is usually to lay out the facts and let the court reach its own conclusions.” But here the biggest reason is more simple: the argument that State Farm derides as ridiculous is instead correct.” *Id.* at \*1. Interestingly, at least one experienced insurance lawyer who read this believed that State Farm’s argument had substantive merit, which means that a good argument was rejected in this case because of overly aggressive tone. See E-mail from Elizabeth Shaver to author (October 23, 2013) (on file with author).

<sup>30</sup> See Jerold L. Hale et al., *Cognitive Processing of One- and Two-Sided Persuasive Messages*, 55 W.J. SPEECH COMM. 380, 387 (1991); Priester et al.,

cognitive dissonance. In messages that protest too much, the belief that nothing is perfect clashes with the reality of a persuasive message that seems to be perfect. The magnitude of dissonance felt will increase with the one-sidedness of the message—the more biased the message, and the more aggressively it is pushed, the more dissonance a decision-maker will feel.

When confronted with a clash between a strong belief that there are two sides to every story and the reality of a one-sided story, there are a few likely results, which are discussed below. None of these likely results favor the advocate who advances the “too-perfect” argument.<sup>31</sup> People will go to great lengths to avoid changing or discarding strongly held beliefs. Rather, like the people who continued to insist after January 1, 2000 that the year 2000 would bring disaster, most people will “change” reality to fit their strongly held beliefs.

*1. The “Too-perfect” Message Arouses Dissonance That Encourages the Audience to Look for Flaws*

One response people can have to the dissonance created by a “too-perfect” message is to look closely for flaws. For many people, finding a flaw will ease the dissonance. Thus, if an advocate presents his client as perfect, the reader may wonder whether there is information missing and may search for failings or weaknesses.<sup>32</sup> In the same way, if an advocate presents only

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*supra* note 27, at 19–20 (noting when confronted by a message that puts forth only “pros” or “cons,” people will feel conflicted and ambivalent).

<sup>31</sup> The only option that does favor the advocate of a “too-perfect” message—changing or modifying the belief that no person or argument is perfect—is unlikely. *See* COOPER, *supra* note 5, at 4–5. In general, it is difficult to change a strongly held belief. *Id.* at 8. In his book, Cooper tells a story of a religious group that had predicted and anticipated the end of the world on a particular date. When the world did not end at the appointed time, the magnitude of the cognitive dissonance of the religious followers was enormous. But, in the end, they *did not* resolve that dissonance by concluding that they were simply wrong. Instead, they believed that their faith had stopped the end of the world. *Id.* at 4–5.

<sup>32</sup> *See* Priester et al., *supra* note 27, at 19–20 (the absence of contrary information makes people concerned that contrary information exists). *See also*

positive arguments, the reader will scrutinize the arguments for holes in a way that she would not if the message were more balanced.<sup>33</sup> In the legal context, while the reader searching for flaws might not find any in the one-sided argument, she is likely to find them elsewhere: the other side's arguments, or by independent research (for example, by a judicial clerk). So, the advocate advancing a "too-perfect" argument has already created problems for himself because he has aroused people's natural skepticism and motivated them to find evidence to support their skepticism.<sup>34</sup>

But things may get even worse once the evidence of a flaw is found—and it almost always will be, because, of course, most things are not perfect. Once a reader finds the flaw he has been seeking, he may feel a surge of relief and satisfaction at the release of the dissonance and the confirmation of the strongly held belief that things are not perfect.<sup>35</sup> In most scenarios, where things are not presented as "perfect," people expect flaws and may react to a flaw with indifference or mild interest. But to someone seeking a flaw in a "too-perfect" argument, finding that flaw is validating and satisfying. It creates the feeling of "Aha! I *knew* it!"<sup>36</sup> The

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Jovicic, *supra* note 27, at 47 (noting that persuasive messages can stimulate a message recipient to search for alternatives to the message); Derek D. Rucker et al., *What's in a Frame Anyway?: A Meta-Cognitive Analysis of the Impact of One Versus Two Sided Message Framing on Attitude Certainty*, 18 J. CONSUMER. PSYCHOL. 137, 138 (2008) ("[W]hen a message presents only one-sided attributes (positive or negative), people sometimes assume that there are opposite attributes of which they are unaware . . . . [W]hen a source indicates that negatives have been considered, concern over possible missing information can be put aside . . .").

<sup>33</sup> See sources cited *supra* note 27. See generally JAMES B. STIFF & PAUL A. MONGEAU, *PERSUASIVE COMMUNICATION* 142–43 (2d ed. 2003) ("[M]essage sources gain a persuasive advantage by making their arguments as complete as is possible.").

<sup>34</sup> See Stanchi, *Playing with Fire*, *supra* note 21, at 404 (noting the natural skepticism in response to one-sided messages).

<sup>35</sup> See Jovicic, *supra* note 27, at 46–47. Psychologists refer to this as "restoration" because the feelings of conflict and dissonance are resolved and a satisfying stasis is restored. *Id.* at 46. Restoration makes people feel good about the "attractiveness of alternatives to the persuasive message." *Id.* at 47.

<sup>36</sup> Think about how common it is for many people to feel satisfaction when they hear that some fabulous celebrity got divorced or was arrested. That feeling

feeling of having cognitive dissonance resolved by confirmation of a strongly held belief makes a reader who feels this sense of achievement unlikely to casually dismiss the flaw or overlook it. Instead, she is going to feel a keen interest in it.<sup>37</sup>

Another outcome, equally unfavorable to the advocate pressing the “too-perfect” message, is that the reader will attempt to resolve the cognitive dissonance by *assuming* that the argument, or client, has flaws but that, for some reason, the advocate has not disclosed them. The reader may then conclude that the advocate is not aware of the flaws because he is not fully informed about the issues or the case. Once the reader concludes that the advocate is not knowledgeable, he is likely to reject the advocate’s other arguments as the product of incomplete information or knowledge. This is called the “discounting hypothesis” because the audience discounts the advocate’s message based on its assessment of the credibility of the advocate herself.<sup>38</sup>

On the other hand, the recipient of the “too-perfect” persuasive message may conclude that the absence of flaws in the argument means that the advocate is deliberately withholding information

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is similar to what happens when a flaw is revealed to someone who is experiencing the cognitive dissonance of a “too-perfect” persuasive message.

<sup>37</sup> Confirmation bias is also certainly at work in this cognitive process. Confirmation bias makes people favor information that confirms their beliefs and hypotheses. See Margit Oswald & Stephan Grosjean, *Confirmation Bias*, in *COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING* 79, 79 (Rudiger F. Pohl ed., 2012). Among other effects of confirmation bias is the tendency to selectively notice or remember certain evidence or interpret ambiguous evidence in a biased way. *Id.*; see also Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Beliefs and Values*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF HEURISTICS AND BIASES* 120, 133 (2002).

<sup>38</sup> See Mike Allen, *Meta-Analysis Comparing the Persuasiveness of One-Sided and Two-Sided Messages*, 55 W.J. SPEECH COMM. 390, 392, 398 (1991) (finding support for discounting hypothesis in study of two sided messages). Because people assume that most arguments have two sides—that there is no perfect argument—they may conclude that the source of a one-sided message simply does not know enough about the topic to know all of the pros and cons. See also SMITH, *supra* note 20, at 149 (noting that the more an advocate can establish herself as a capable and intelligent source of information, the more the audience will give her arguments credibility).

from her. That will lead her to conclude that the advocate is not credible or honest.<sup>39</sup> And once a subject has decided not to trust the advocate, she will be less likely to accept a message from that source. That response to dissonance is called "reactance" and it can cause a subject to reject an entire message.<sup>40</sup> It is a kind of "baby out with the bathwater" reaction, because the whole message can suffer once reactance has been aroused.<sup>41</sup> Reactance will be explored more deeply in the next section.

2. *The Cognitive Dissonance Aroused by the "Too-perfect" Message Can Lead the Audience to Reject the Message*

Legal persuasion can be seen, in many ways, as a social situation between the advocate and the decision-maker. The advocate and decision-maker have tacitly agreed to engage in a process in which the advocate can try to convince the decision-maker of some fact or theory, and the decision-maker will listen and be receptive to the arguments and render an unbiased decision.<sup>42</sup> This agreement between advocate and decision-maker,

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<sup>39</sup> See *supra* note 38 and accompanying text.

<sup>40</sup> See SHARON S. BREHM & JACK W. BREHM, *PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL* 1-4 (1981) (finding that an attempt to persuade can be a threat to decision-making freedom). See also Jones & Brehm, *supra* note 28, at 55 (noting that overt, strong persuasion can be perceived as exerting pressure).

<sup>41</sup> Jones & Brehm, *supra* note 28, at 49. This study noted that a message that pressures a person to adopt a particular position threatens that person's decisional freedom, and the person will try to restore the threatened freedom by rejecting the message. *Id.* Messages that address only positive or supporting arguments are more likely to lead to reactance, because they represent a greater threat to decisional freedom. *Id.* at 49, 55. See also Jovicic, *supra* note 27, at 47 ("[Reactance] stimulate[s] negative evaluation of the message, searching for information to confirm the alternatives, and aggressiveness toward the persuader.").

<sup>42</sup> See generally FRANS VAN EEMEREN ET AL., *FUNDAMENTALS OF ARGUMENTATION THEORY: A HANDBOOK OF HISTORICAL BACKGROUNDS AND CONTEMPORARY DEVELOPMENTS* (1996). See also Jovicic, *supra* note 27, at 31. Jovicic summarizes a group of argumentation theorists, including the Amsterdam school, the formal dialectics, the Woods-Walton and the Walton approach as all agreeing that argument is a social, dialogic activity. *Id.* at 31-32;

like most social situations, has unwritten social norms. One of those social norms is that the advocate will not try to persuade by deception. If a decision-maker resolves cognitive dissonance by concluding that the advocate has purposefully withheld information, the decision-maker may feel that the advocate has violated the norms of the persuasive social situation.<sup>43</sup> When a decision-maker resolves cognitive dissonance by concluding that the advocate has purposefully withheld information, the advocate's "too-perfect" message can lead to what is called "reactance." Reactance (sometimes called a "boomerang" reaction) is a backlash against a persuasive message in which decision-makers reject the entire message, not because of the merits of that message, but because they oppose the feeling of being controlled.<sup>44</sup> When a persuasive message is "too-perfect" or when it pushes too hard in its tone, as when the rebuttal of opposing arguments is too strident or contentious, the decision-maker may feel manipulated or controlled. And the feeling of being manipulated can arouse all kinds of negative feelings, including anger and betrayal. Decision-makers may feel like the advocate has threatened their decision-making autonomy.<sup>45</sup> The line between persuasion and coercion has

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see also DOUGLAS WALTON, *ONE SIDED ARGUMENTS: A DIALECTICAL ANALYSIS OF BIAS* 29–32 (1999) (persuasion as a dialogue with a collective goal).

<sup>43</sup> See FRANS VAN EEMEREN ET AL., *FALLACIES AND JUDGMENTS OF REASONABLENESS: EMPIRICAL RESEARCH CONCERNING THE PRAGMA-DIALECTIC DISCUSSION RULES* 203–20 (2009) [hereinafter EEMEREN ET AL., *FALLACIES AND JUDGMENTS*] (discussing how fallacies are "violations of the rules of critical discussions"); see also Jovicic, *supra* note 27, 32–33 (describing strategic maneuvering in which parties to an argument agree on "norms, rules and stages of argument").

<sup>44</sup> *Id.*; Burgoon et al., *supra* note 27, at 214. See also EEMEREN ET AL., *FALLACIES AND JUDGMENTS*, *supra* note 43, at 144–45 (describing how censoring or redacting arguments results in movement of belief toward the censored argument); Mark V. A. Howard et al., *How Processing Resources Shape the Influence of Stealing Thunder on Mock-Juror Verdicts*, 13 *PSYCHIATRY, PSYCHOL. & L.* 60, 65 (2006).

<sup>45</sup> See BREHM & BREHM, *supra* note 40, at 1–2, 20–21, 25; Jones & Brehm, *supra* note 28, at 48, 55. Reactance theory "assumes that individuals believe they have specific behavioral freedoms and proposes that if a freedom is threatened, the motive to reassert the freedom will be aroused." *Id.* at 25. When



been crossed and the social norm broken. Reactance is a typical response to these kinds of feelings. And, it is not a good response for the advocate. Reactance means the decision-maker is emotionally motivated to reject the message and is likely to do so.<sup>46</sup>

Even if the decision-maker does not feel that the "too-perfect" message was intentionally deceptive, she may still feel that the advocate is trying to bias her decision. In this scenario, even if she isn't angry, the decision-maker will no longer feel the need to abide by the norms of the persuasive situation because the advocate has already broken them. Recall that in the social situation of persuasion, the decision-maker's "agreement" is to listen, be receptive, and render an objective judgment on the merits. If the decision-maker concludes that an advocate has withheld information, the decision-maker may (subconsciously) feel released from these obligations. A decision-maker who is psychologically freed from the obligation to listen and assess the merits of an argument is one who can more easily reject a persuasive message.

Thus, a "too-perfect" or too-strident message, whether the decision-maker concludes it is intentionally deceptive or just an advocate's idealization of the case, can lead to reactance and to a rejection of the advocate's message, regardless of the merits.

Professor Jim Stratman provides an example of reactance in his think aloud study of clerks who read an appellant's brief that was a strident attack on the judicial opinion from which it was appealing.<sup>47</sup> In this study, Professor Stratman had the appellant's

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decisional or behavioral freedom is threatened, the person is likely to oppose the threat, even sometimes if that means acting against self-interest, or acting against other strongly held beliefs. *Id.* at 1 (telling the story of a shop owner who, though sympathetic to the message of civil rights demonstrators, closed his shop rather than give in to their demands).

<sup>46</sup> Once a decision-maker is motivated to reject the message, she will likely look for reasons to support her judgment against the message of the offending advocate. See generally Jonathan Haidt, *The Emotional Dog and its Rational Tail*, 108 PSYCH. REV. 814 (2001) (people make decisions by intuition and emotion, and then use logic to generate reasons for the emotional decision). The *Bennett v. State Farm* case referenced *supra* note 29 is an example of reactance.

<sup>47</sup> James F. Stratman, *Investigating Persuasive Processes in Legal*

attorney record his thoughts while drafting a brief, and had the judge's clerks record their thoughts while reading that brief.<sup>48</sup> In one of his recordings, the appellant's attorney describes his strategy to attack virtually every aspect of the adverse decision below. His brief does seem to address counterarguments, but does so in a way that is simultaneously superficial, aggressive, and somewhat contemptuous. The advocate has fallen into one of the kinds of "too protesting" arguments. This is an excerpt from the appellant lawyer's recorded thoughts:

I think I will make, yes, the attack on the lower court opinion,  
[I] can attack its failure to deal with Philadelphia Eagles and Barsky,  
I can attack its reliance on *Meta v. Yellow Cab* [all cases cited by the lower court],  
I can attack its reliance on the right to jury trial cases,  
I can attack its failure to address Conestoga Bank,  
and I can attack . . . .<sup>49</sup>

While, of course, it is an appellant's job to find fault with the opinion below, the advocate here may have become too caught up in "attacking" and framed his argument using rhetoric that was too "uncompromising."<sup>50</sup> First, the tone of the brief was harshly negative about the opinion below.<sup>51</sup> And, second, the advocate attacked almost every aspect of the court's decision, from the smallest point to the largest, and did so with an unwavering stridency.<sup>52</sup> This is a common advocacy problem, in which the lawyer, overcome with zeal for his client's cause (or anger at opposing counsel), cannot separate trivial (or even imagined)

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*Discourse in Real Time: Cognitive Biases and Rhetorical Strategy in Appeal Court Briefs*, 17 DISCOURSE PROCESSES 1, 44, 46–47 (1994).

<sup>48</sup> *Id.* at 18–23.

<sup>49</sup> *Id.* at 35 (emphasis added).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (noting that the advocate's zeal might have pushed his rhetoric from "righteous indignation" to "ridicule").

<sup>52</sup> *Id.* at 35–36. As Professor Stratman puts it, the advocate's zeal leads him to "attack shadows as well as substance." *Id.*

wrongs from serious ones.<sup>53</sup>

The clerks in Professor Stratman's study had a classic reactance response to the "protesting" quality of appellant's brief. The strength of the appellant's attack interrupted the flow of their reading and evaluation of the merits and the clerks bristled at the tone. Instead of focusing on the substance of the arguments, the clerks instead focused on the lawyer and his tactics. Ultimately the rhetoric made them recoil and they rejected the argument.

For example, when one clerk reads the portion of the appellant's brief that hammered away at a small, and relatively inconsequential, point in the court's opinion below, the clerk notes:

I didn't see [the court] assuming that—

That's not really being fair to the Commonwealth Court—

I didn't read that the Commonwealth Court opinion even suggests that . . .

This is the typical mode of argument where you set up a straw man and then knock it down.<sup>54</sup>

The "straw man" comment, in particular, shows that the clerk felt that the advocate was trying to mislead or dupe her, and she reacts with the anger typical of a reactance response.<sup>55</sup> Ultimately, this response does not serve the appellant well, as the clerks reject his argument largely on the basis of tone as opposed to substantive

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<sup>53</sup> See Robbins, *Paradigm Lost*, *supra* note 17, at 516–23. This is an example of "myopic vision" noted above. See *supra* note 17 and accompanying text. The advocate's zeal has effectively blinded her to any strength or merit in the other side's argument. An example of this is when lawyers bring up some unprofessional behavior of opposing counsel, or trivial discovery disputes, in merits briefs. This is more common than it should be and likely to get a stinging response from a judge. See Judith D. Fischer, *Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok*, 50 WASHBURN L.J. 365, 372–74 (2011) (providing examples of discipline for incivility to opposing counsel); Fajans & Falk, *supra* note 16, at 43–44 (criticizing a litigant's "peevisish ad hominem attacks" against an opposing party). See also Robert Sayler, *Rambo Litigation: Why Hardball Tactics Don't Work*, 74 A.B.A. J., no. 3, Mar. 1998, at 79, 81 (likening hardball litigators to General Custer, who famously fired off "in every direction").

<sup>54</sup> Stratman, *supra* note 47, at 39.

<sup>55</sup> *Id.* at 42.

merit.<sup>56</sup>

In addition to reactance, people can have another common response to a violation of the social norms of persuasion. If a decision-maker feels that the persuasive message is biased, or that their decision-making autonomy has been otherwise corrupted or manipulated, she might “over-correct.”

Over-correction occurs when a decision-maker feels that an advocate or another factor has caused her decision-making process to become biased.<sup>57</sup> As with reactance, the decision-maker has become distracted from the merits of the argument and has been made acutely conscious of the persuasive situation. Like the clerks in Stratman’s study, the decision-maker is now not thinking about the merits of the case but instead about the manipulation of the persuasive context. When this happens, the advocate has lost the attention and good will of the decision-maker.

But while reactance can cause decision-makers to reject the message outright, over-correction is often a little more subtle. With over-correction, the decision-maker has identified some factor or piece of evidence that she feels has unfairly influenced her decision-making process. She may then try to “put her finger on the scale” and correct for the perceived bias.<sup>58</sup>

The problem is that people are rarely accurate in their assessment of what an “unbiased” decision would be.<sup>59</sup> Commonly, people “over-correct” for bias, meaning they swing the pendulum far away from the decision they perceive as unfairly biased. Therefore, in trying to make a balanced decision, they end up making a decision counter to the message of the advocate who

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<sup>56</sup> See *id.* at 44–46.

<sup>57</sup> See Richard E. Petty et al., *Flexible Correction Processes in Social Judgment: Implication for Persuasion*, 16 SOC. COGNITION 93, 96–97 (1998).

<sup>58</sup> See Durairaj Maheswaran & Shelly Chaiken, *Promoting Systematic Processing in Low Motivation Settings: Effect of Incongruent Information on Processing and Judgment*, 61 J. PERSONALITY & SOC. PSYCHOL. 13, 24 (1991).

<sup>59</sup> Duane T. Wegener & Richard E. Petty, *The Flexible Correction Model: The Role of Naïve Theories of Bias in Bias Correction*, in 29 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 141, 143 (1997). Psychologists note that, on balance, people are pretty incompetent to correct for perceived bias and use “naïve theories” of bias to judge bias in persuasive messages. *Id.* at 143, 149–51.

has introduced the biasing factor.<sup>60</sup> The important psychological point is that over-correction does not lead to unbiased decisions; it leads decision-makers to *feel* as though they have made unbiased decisions (relieving their cognitive dissonance). So, if an advocate's tone or rhetoric makes a decision-maker feel that she is being unfairly influenced or biased, the advocate may have actually moved the decision-maker toward a decision for the other side. And the greater the perceived bias, the more vigilant the decision-maker will be in her pursuit of correction.<sup>61</sup>

In one study in the trial context, for example, psychologists tested whether mock jurors would over-correct if key witness testimony was discredited.<sup>62</sup> The study involved a simple dog bite case in which plaintiff suffered a bite from a German Shepherd. The main issue for jurors was whether the dog belonged to defendant.<sup>63</sup> In the control version, mock jurors heard testimony both for and against each party; the case was designed to be close.<sup>64</sup> In one experimental version, jurors heard an additional pro-plaintiff eyewitness who testified that the dog belonged to the defendant.<sup>65</sup> The experimental eyewitness testimony was designed to clearly sway the case in the plaintiff's favor. The pro-plaintiff eyewitness testified vehemently in favor of the plaintiff and phrased her testimony in an accusatory manner.<sup>66</sup> The catch was that the pro-plaintiff eyewitness was later seriously discredited on

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<sup>60</sup> See *id.* at 143, 146, 151–52. Although sometimes attempts at correction can result in a decision in favor of the persuasive message, this is unlikely if reactance has been aroused. The more likely decision is one that rejects the message. *Id.* See generally MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH (Jennings Bryant & Mary Beth Oliver eds., 3d ed. 2009) (reactance motivates counter-arguing and leads to a judgment against the message that stimulates the reactance).

<sup>61</sup> See Wegener & Petty, *supra* note 59, at 149.

<sup>62</sup> Nina Hatvany & Fritz Strack, *The Impact of a Discredited Key Witness*, 10 J. APPLIED SOC. PSYCHOL. 490, 494 (1980).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 494–95. There is another experimental version where the eyewitness testified in favor of the defendant. *Id.* at 495.

<sup>66</sup> *Id.*

cross-examination, and she recanted her testimony.<sup>67</sup> Jurors were then told to disregard her testimony.

The study shows that the testimony of the accusatory pro-plaintiff witness, who is later discredited, pushed jurors to more often find for the defendant. Mock jurors who heard the discredited and accusatory pro-plaintiff eyewitness found for the defendant in significantly greater numbers than the control jurors.<sup>68</sup> By testifying confidently and accusingly for the plaintiff and then being discredited, the pro-plaintiff witness made it more likely that defendant would win.<sup>69</sup> The mock jurors believed that they had been biased by the false eyewitness testimony, and they over-corrected by finding for the defendant.<sup>70</sup>

This study illustrates that when decision-makers feel as though they have been biased by an argument, or their objectivity has been compromised, whether it is strident testimony or an argument that “protests too much,” the decision-maker may react by fighting against the argument and over-correcting against the perceived bias.<sup>71</sup> The result is a decision against the strident or protesting advocate.

*B. The Lesson About Acknowledging Flaws: There is Real Power in Showing Vulnerability*

Pushing your perspective too stridently in a persuasive situation leads to cognitive dissonance, and that dissonance can lead a decision-maker to reject the message out of hand. But cognitive dissonance causes another wrinkle in the question of whether to disclose flaws. Studies have shown that, paradoxically, an advocate who *does* acknowledge counter-arguments, or who

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<sup>67</sup> *Id.* at 494–95.

<sup>68</sup> *Id.* at 501.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 504.

<sup>71</sup> Of course, there are other possible reactions. Over-correction to bias can be tricky because a person can overthink and ping back and forth between biasing one side or the other. What the science, shows, however, is that the advocate who pushes too hard runs a real and significant risk that his argument will actually push the audience away from his message.

volunteers information that seems to damage her case, is *also* likely to arouse cognitive dissonance in the decision-maker. As in the “too-perfect” message, the cognitive dissonance reaction here has to do with the decision-maker’s expectations. For example, most people do not expect a first date to voluntarily blurt out faults (“Actually, I don’t have a source of income—can you get the check?”); rather, we expect a person on a first date to put his very best foot forward. If a flaw is disclosed on a first date, people are surprised and may experience cognitive dissonance.

Advocacy situations can work similarly. In situations in which people expect advocacy, such as trials or other legal advocacy situations (and first dates), people may not expect an advocate to voluntarily raise flaws, even if they believe that all arguments have two sides.<sup>72</sup> Therefore, if an advocate freely discloses bad information, that may arouse dissonance. The clash in this scenario is between the expectation that advocates are only supposed to offer information beneficial to their side, and the reality that an advocate is openly admitting harmful information.

It may seem here that persuasion scientists have contradicted themselves. Do people expect experts to raise both sides of an argument, or do they expect experts to present only a rosy picture? The answer is we don’t really know: it depends on context. Recall how Dr. Perloff described persuasion as more like teaching than boxing.<sup>73</sup> That may be true, but advocacy is really a spectrum. Sometimes people can tolerate or even expect pushier advocacy—think about car salesmen, or pitchpersons trying to sell things on infomercials. Most people do not expect car salesmen or hawkers on infomercials to detail the flaws of a car or product. In other situations, though, people expect advocates to be more like teachers—objective and educational, similar to experts on a talk or news show, or expert witnesses. If we think of persuasion scenarios on a spectrum between teaching and boxing, then where the advocate and scenario fall on the spectrum influences the

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<sup>72</sup> Kipling D. Williams & Lara Dolnik, *Revealing the Worst First: Stealing Thunder as a Social Influence Strategy*, in *SOCIAL INFLUENCE: DIRECT AND INDIRECT INFLUENCES* 213, 216 (Joseph P. Forgas & Kipling D. Williams eds., 2001).

<sup>73</sup> See *supra* note 2 and accompanying text.

audience's expectations.<sup>74</sup> And our expectations are the key to cognitive dissonance. Not surprisingly, studies show that people have far different expectations of advocates who are advertisers or salespeople than they do of advocates who are experts trying to educate us.<sup>75</sup> Both advocates are trying to persuade us of something, but we expect different behavior from them.

Where on the spectrum do legal advocates fit? Are we more like car salesmen or more like experts interviewed on a news program? It is not easy to say, but we are a little of both. While some judges, for example, may have a strong expectation (or desire) that advocates disclose both sides,<sup>76</sup> lay juries may expect us to be one-sided "hired guns." For my purposes here, the important point is that *regardless* of how people view legal advocates, cognitive dissonance works in favor of the advocate who discloses flaws. I have already discussed why cognitive dissonance favors disclosure of flaws if the decision-maker expects to hear both sides. But, it also favors disclosure of flaws if the decision-maker does *not* expect a lawyer to disclose.

As noted above, when human beings experience dissonance, they are highly driven to resolve it.<sup>77</sup> Reactance and over-correction are just two possible reactions. Our brains will do whatever is needed to alleviate this uncomfortable psychological state. When a person experiences dissonance because of the incongruity of hearing a flaw in the advocate's own position from an advocacy source that he expects to be biased, the person can

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<sup>74</sup> See PERLOFF, *supra* note 2, at 13–14.

<sup>75</sup> See Daniel O'Keefe, *How to Handle Opposing Arguments in Persuasive Messages: A Meta-Analytic Review of the Effects of One-Sided and Two-Sided Messages*, 22 COMM. Y.B. 209, 226–27 (1999) (noting that expectations differ as between political and social messages, such as anti-smoking campaigns, and pure advertising).

<sup>76</sup> See, e.g., RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ADVOCACY 25–26 (2d ed. 2003) (criticizing briefs that fail to mention adverse authority and arguments).

<sup>77</sup> Indeed, this is the key to cognitive dissonance theory—that it is not simply that we *prefer* messages that are two sided to those that are one-sided; it is that one-sided arguments arouse in us an uncomfortable state that we are driven to resolve. See PERLOFF, *supra* note 2, at 3.



actually feel protective of the message.<sup>78</sup> In other words, people may resolve the cognitive dissonance—which is created by the apparently counter-productive act of disclosing harmful information—by mentally fighting against the harmful information.<sup>79</sup> The decision-maker may try to figure out why a biased source is providing her with information that seems bad. Unlike the scenario described above, the decision-maker does not feel coerced or manipulated, but she may feel confused. Her cultural expectations have been contradicted. This cognitive dissonance reaction is stronger, of course, to the extent that the person agrees with the message, but the reaction can also arise in decision-makers who are undecided.<sup>80</sup>

One possible reaction to this kind of dissonance is that decision-makers will be driven to develop arguments that dispute or undermine the harmful information.<sup>81</sup> In this scenario, the introduction of bad information functions like a vaccine-introduced virus.<sup>82</sup> Our body will fight a vaccine-introduced virus, making us immune to an attack by that virus. Similarly, our minds can fight the introduction of harmful information from an unexpected source by attacking the harmful information with our own

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<sup>78</sup> Raising flaws or counterarguments in a persuasive message can arouse feelings of “threat” in the message recipient. This feeling can lead the message recipient to try to “protect” the message by mentally generating arguments that undercut the flaw. See STIFF & MONGEAU, *supra* note 33, at 289–90 (noting, however, that “threat” works largely for messages and arguments with which a person agrees; it is less effective for arguments with which the audience does not agree); Stanchi, *Playing with Fire*, *supra* note 21, at 406–07 (discussing why inoculation works).

<sup>79</sup> See PERLOFF, *supra* note 2, at 240–41.

<sup>80</sup> See STIFF & MONGEAU, *supra* note 33, at 289. See also Michael Pfau et al., *Efficacy of Inoculation Strategies in Promoting Resistance to Political Attack Messages*, 57 COMM. MONOGRAPHS 25 (1990) (inoculation strategy in political advertisements worked best with strong party identifiers; also worked with others, but less consistently).

<sup>81</sup> See STIFF & MONGEAU, *supra* note 33, at 289; see also PERLOFF, *supra* note 2, at 240–41; Pfau et al., *supra* note 80, at 29.

<sup>82</sup> See William J. McGuire, *Inducing Resistance to Persuasion: Some Contemporary Approaches*, in 1 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 191 (1964) (discussing the original inoculation experiment).

counterarguments.<sup>83</sup> This process of counterargument has an interesting vaccination-like effect on our decision-making. It makes a persuasive message resistant to negative attacks by the other side.<sup>84</sup>

Another related reaction to this dissonance is that the decision-maker may mentally change the bad information to be less harmful. Like the person who insists after January 1, 2000 that the computer disaster will still happen, the decision-maker will mentally alter "reality" by making the bad information less "bad." This resolves her dissonance, because if the information is not really "bad," the advocate's disclosure of it is consistent with the decision-maker's belief that advocates do not disclose flaws. Psychologists call this cognitive process "change of meaning."<sup>85</sup>

Consider an example in which you've paid a considerable sum of money to see a show. The show turns out to be disappointing.<sup>86</sup> Any number of "changes of meaning" can occur here, some overt, some subtle. You can convince yourself that the show was actually pretty good. Or, more subtly, you can "add consonant cognitions"—you can tell yourself that it was worth seeing the show because one of the actors was very good, or that the set design was excellent.<sup>87</sup> One of the most interesting aspects of this cognitive process is that the decision-maker is an active participant in the persuasion—because of the dissonance she feels, she

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<sup>83</sup> See *id.*; see also STIFF & MONGEAU, *supra* note 33, at 298.

<sup>84</sup> This has led researchers to liken voluntary disclosure of negative information to medical immunization because it appears that disclosing negative information within a persuasive message can actually "inoculate" the message from future attacks. See McGuire, *supra* note 82, at 193.

<sup>85</sup> Lara Dolnik et al., *Stealing Thunder as Courtroom Tactic Revisited: Processes and Boundaries*, 27 LAW & HUM. BEHAV. 267, 269 (2003); see also S.E. Asch, *The Doctrine Of Suggestion, Prestige, And Imitation In Social Psychology*, 55 PSYCHOL. REV. 268–69 (1948) (decision-makers changed meaning of phrase "peaceful revolution" depending on who they thought source of statement was); Kiva Zunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 495 (1990) (a decision-maker's motivation can change her reasoning, her process of deciding, and her evaluation of evidence).

<sup>86</sup> This example is adapted from PERLOFF, *supra* note 2, at 240.

<sup>87</sup> See PERLOFF, *supra* note 2, at 240.

participates in *persuading herself*.<sup>88</sup>

In one key study of “change of meaning” in the legal context, message recipients were surveyed to determine their reactions to a trial strategy that voluntarily disclosed bad information, and one that waited for the other side to disclose.<sup>89</sup> In the study, subjects read a trial transcript of a criminal trial involving a car accident in which one driver died.<sup>90</sup> The other driver escaped with only minor injuries. The driver with minor injuries is charged with vehicular homicide. The prosecution’s theory is that the defendant was driving recklessly. The defendant’s theory is that the other driver died due to the negligence of the ambulance crew that responded to the accident. Researchers tested several different pieces of bad information: evidence that the defendant had been drinking before the accident, evidence that the defendant was speeding, and forensic evidence that the defendant had veered into the other lane.<sup>91</sup>

Across all of these variables of bad information, subjects who heard the defendant voluntarily disclose the bad information consistently discounted it. They quite literally remembered it as being weaker and less damaging when compared with the trial in which the prosecution disclosed the flaw.<sup>92</sup> In other words, the subjects’ minds actually *changed the meaning* of the bad information to be less harmful. This is an excellent example of Dr. Perloff’s observation about how the persuasive process works: “[p]eople persuade themselves . . . [the advocates] provide the arguments. They set up the bait . . . We make the change.”<sup>93</sup> In the vehicular homicide trial, the advocate simply put out the “bait” by volunteering harmful information and creating the uncomfortable feeling of dissonance. The mock jurors resolved the

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<sup>88</sup> *Id.* at 13–14 (“One of the great myths of persuasion is that persuaders convince us to do things we really don’t want to do . . . . This overlooks an important point: People persuade themselves . . . [advocates] provide the arguments. They set up the bait. [But] we make the change, or refuse to yield.”).

<sup>89</sup> Lara Dolnik et al., *supra* note 85, at 277.

<sup>90</sup> *Id.* at 271, 277.

<sup>91</sup> *Id.* at 277.

<sup>92</sup> *Id.* at 283.

<sup>93</sup> PERLOFF, *supra* note 2, at 13–14.

dissonance by convincing themselves that the evidence was not that harmful.<sup>94</sup>

Change of meaning is largely an unconscious mental process. In the vehicular homicide case, it is unlikely that the mock jurors realized they were feeling or resolving dissonance. They may not even have remembered feeling uncomfortable about the disclosure—they simply remembered the harmful evidence as not so harmful.<sup>95</sup> And once decision-makers, on their own, come to that belief about the evidence, it becomes their own belief. And once embraced, viewpoints are powerful and difficult to alter.

There are many lessons that can be drawn from these studies. As an initial matter, there certainly seems to be an explicit advantage to disclosing negative information voluntarily—and first. From a broader perspective, another lesson is that there are times when it is advantageous to put forth a less-than-perfect persuasive message—a more balanced approach that acknowledges weakness. The studies show conclusively that there is real power—persuasive power—in acknowledging some vulnerability in your argument.

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<sup>94</sup> This is, of course, not the only possible response. The key to the dissonance (and its resolution) is the expectation of the audience that advocates will put forth only positive support for their cases. If the jury does not have this expectation, the result might be different. If, for example, people assume that the lawyer brought up a flaw because he is incompetent, they might have a different reaction.

<sup>95</sup> There is one key problem with extrapolating too widely from this study. In this study, once the defendant voluntarily disclosed the harmful evidence, that was the last the jury heard about it. The prosecution did not harp on the harmful evidence, or try to reframe it, either in cross-examination or in closing. It is an open question whether jurors would change meaning if, as in an actual litigation, one side discloses a flaw and the other side has a field day with it on cross-examination. That more realistic scenario is the subject of a current field study. See Deirdre Bowen & Kathryn Stanchi, *Thunder Road: Does the Timing of Disclosure of Bad Evidence Really Matter in Civil Trials?* (unpublished manuscript) (on file with author).

### III. AVOIDING DISSONANCE: EASING THE READER INTO CONTROVERSIAL OR DISPUTED PREMISES

In addition to the way advocates treat flaws in their arguments, another key aspect of adopting a reasonable tone, and avoiding dissonance, is by approaching positive arguments in a subtle way. Arguments supporting an advocate's position can arouse dissonance when they are over-argued or uncompromising. This is particularly dangerous for premises that are controversial, hotly disputed, or that have limited or no supporting authority. These more problematic premises are common for legal advocates to encounter. What legal advocates need to know is that when they find themselves needing to argue a controversial or hotly disputed premise, they are confronting a situation likely to arouse cognitive dissonance in their decision-maker.

Controversial premises arouse dissonance because all decision-makers want to act in a way that is consistent with their prior decisions, self-images, and egos.<sup>96</sup> Thus, the more controversial or unsupported an argument is, the more dissonance it is likely to arouse. Conversely, an argument that has a lot of support or seems reasonable feels good to us in part because it avoids the discomfort of dissonance and arouses the positive feelings of consistency.

Indeed, researchers remain uncertain about whether we change our beliefs to sustain consistency (as with our rationalizations about the bad, expensive show) or whether we simply observe our own behaviors and draw conclusions from that (i.e. the show must have been good, because I stayed until the end and I am not the kind of person who wastes money on bad shows). Whichever is the true source of our behavior-belief connection, the bottom line is that if an advocate presents an argument that allows the decision-maker to feel as though he is behaving consistently with his beliefs and his prior decisions, the argument is more likely to be persuasive. On the other hand, an argument that somewhat abruptly asks the reader to embrace something entirely new and strange will be uncomfortable for the reader.<sup>97</sup>

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<sup>96</sup> See PERLOFF, *supra* note 2, at 248-49.

<sup>97</sup> We would expect judges to place a particularly high value on

The difficulty here, of course, is that most advocates do not know the beliefs of the decision-makers in front of whom they argue. Would that we did! We may have some clues if we are appearing before a judge we know or who has previously decided cases similar to ours. But with jurors, we have no idea, and with many judges, we will have no trail that gives us a clear picture of the judge's beliefs on our issue.

But even if an advocate does not know the decision-maker's beliefs, the advocate can present an argument that makes the decision-maker experience the good feeling of consistency and avoid the bad feeling of dissonance. Science suggests that if we organize our arguments so that our ultimate argument—the goal for which we are striving—appears to be the natural consequence of a series of arguments with which the decision-maker will agree, we can minimize the bad feeling of dissonance associated with a controversial premise and maximize that good feeling of consistency.<sup>98</sup>

In other words, the advocate should slowly and methodically lead up to a controversial premise with “baby step” arguments with which the decision-maker is likely to agree. The key is to carefully choose the baby-step arguments that lead up to the more difficult premise. This approach mimics how people reason. It creates a set of expectations in the decision-maker such that a decision consistent with the argument feels good, and a decision contrary to the ultimate premise would trigger cognitive dissonance.

In one study, for example, scientists tried to get homeowners in a development to post on their lawns a large sign about safe driving.<sup>99</sup> When, as a first step, scientists asked people to put up the large sign, most people declined. But the scientists were able to

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consistency, given the value of consistency in American jurisprudence, which is based on *stare decisis*.

<sup>98</sup> See studies cited *infra* notes 101–06.

<sup>99</sup> See Jonathon J. Freedman & Scott C. Fraser, *Compliance without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. 195, 199 (1966). See also Jerry M. Burger & David F. Caldwell, *The Effects of Monetary Incentives and Labeling on the Foot-in-the-Door Effect: Evidence for a Self-Perception Process*, 25 BASIC & APPLIED SOC. PSYCHOL. 235 (2003) (conducting similar experiment with a homelessness petition).

change this high rejection rate by doing one thing: they first asked the homeowners to do something easy—to sign a petition to “Keep California Beautiful.”<sup>100</sup> Most of the homeowners agreed to sign the petition. And once the homeowners agreed to sign the petition, they were much more likely to agree to post the large sign.<sup>101</sup> In other words, the homeowners were much more likely to agree to the big request (one that they ordinarily would have rejected) if they first agreed to an easier request.<sup>102</sup>

This phenomenon is sometimes called the “foot-in-the-door” strategy.<sup>103</sup> There is some disagreement about why it works. Some scientists believe that it works because people look at prior behavior to ascertain their values and beliefs; others believe it works because of cognitive dissonance.<sup>104</sup> The bottom line is that our decision-making grows out of our prior behavior and decisions. When we are asked to make a decision, our brains go through a fast process in which we try to determine whether we have made a similar decision previously and what we decided. We tend to treat

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<sup>100</sup> Freedman & Fraser, *supra* note 99, at 199–201.

<sup>101</sup> *Id.* at 200–01.

<sup>102</sup> *Id.* at 201–02.

<sup>103</sup> *Id.* at 199–202. For a general discussion of foot in the door technique as it relates to legal persuasion, see Kathryn Stanchi, *The Science of Persuasion: An Initial Exploration*, 2006 MICH. ST. L. REV. 411, 418–20 [hereinafter Stanchi, *Science of Persuasion*].

<sup>104</sup> Not all psychologists agree that this process works because of cognitive dissonance. As Richard Perloff notes, some psychologists do not agree that people neurotically change their beliefs to conform to their behavior. PERLOFF, *supra* note 2, at 249. Rather, some believe that people infer or come to their beliefs simply by astutely observing their past decisions and behavior (I eat a lot of pasta and vegetables, so I must be a vegetarian). See DARYL J. BEM, BELIEFS, ATTITUDES, AND HUMAN AFFAIRS 50 (1970). The difference is a subtle one—between noticing behavior and concluding that current decisions must be right because they are consistent with that behavior versus running from an inconsistent decision by changing a belief or behavior. For the purposes of applying the concept to legal advocacy, the subtle distinction is perhaps less relevant, but nevertheless should be noted. *Contra* COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY (Eddie Harmon-Jones & Judson Mills eds., 1999); Andrew J. Elliot & Patricia G. Devine, *On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort*, 67 J. PERSONALITY & SOC. PSYCHOL. 382 (1994).

prior decisions as a kind of precedent and make current decisions that are consistent with past ones.

We will almost always seek to make a current decision that is consistent with our self-image, which itself is created by our past decisions. A high magnitude of cognitive dissonance is likely to result if we make a decision that is inconsistent with our prior decisions (and the image of ourselves that we drew from those prior decisions).

For legal advocates, the key is that arguments can be structured so that the premise we want the decision-maker to adopt is the one that feels the best—avoids cognitive dissonance and feeds the decision-maker's desire for consistency. Legal advocates can do this by breaking down the controversial premise into component premises that are easier to agree to—the law version of the “Keep California Beautiful” petition.

By breaking down a controversial premise into components with which the decision-maker is likely to agree, the advocate can build and influence the decision-maker's relevant cache of prior decisions. And, because the premises presented by the advocate are the most recent, they are the ones at the forefront when the decision-maker starts that lightning fast search of prior decisions to gauge, and maintain, consistency. The component arguments or premises should have two qualities: they must be easy for the decision-maker to accept, and they must be linked to the ultimate controversial premise. The more attractive the component premises, and the more closely linked to the ultimate premise, the harder it will be for the decision-maker to reject the ultimate premise.<sup>105</sup>

A useful metaphor for this decision-making process is trying to convince a person to jump off the high dive.<sup>106</sup> With the “foot-in-the-door” strategy, the diver is cajoled to step up to the first step, then the second, then the third, and so on, until at some point it becomes easier and more comfortable psychologically to dive than to walk down all those steps. Diving is consistent with having

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<sup>105</sup> See generally Stanchi, *Science of Persuasion*, *supra* note 103.

<sup>106</sup> This metaphor comes from G. RAY FUNKHOUSER, *THE POWER OF PERSUASION: A GUIDE TO MOVING AHEAD IN BUSINESS AND LIFE* 114 (1986).



agreed to step up all those steps; walking down is an acknowledgement that the diver was wrong to agree to take the early steps. Because walking down will create cognitive dissonance, our brains will take great steps to avoid that feeling. That means that the more steps we take toward the high dive, the more likely it is that we will dive.

In written briefs, "foot-in-the-door" can be used to organize arguments in a number of ways to make controversial arguments less dissonant. First, it can be used on a macro level to structure arguments in headings or to decide the order of paragraphs within a heading. Second, on a micro level, it can be used to organize sentences within paragraphs.

Headings in a brief are a good macro-organizational tool to prime acquiescence and reduce dissonance when the reader is asked to agree with the disputed, controversial premise. *Cruzan v. Missouri Dep't of Health*<sup>107</sup> presents an excellent example of this tactic. *Cruzan* involved a highly controversial premise: whether the parents of a woman in a persistent vegetative state should be permitted to discontinue life-saving medical treatment and, essentially, cause their daughter to die.<sup>108</sup> This premise is both legally controversial and emotionally difficult. It is likely to cause all kinds of cognitive dissonance.

The petitioners, the Cruzans, lost in the Missouri Supreme Court and appealed to the United States Supreme Court.<sup>109</sup> Here is an abridged version of the table of contents from the Petitioner's brief:

I. THE MAJORITY BELOW ERRED IN  
HOLDING THAT INCOMPETENT PERSONS  
LOSE THE CONSTITUTIONAL RIGHT TO  
WITHDRAWAL OF UNWANTED MEDICAL  
TREATMENT, AND THAT THE STATE,  
RATHER THAN THAT PERSON'S FAMILY  
SHOULD MAKE DECISIONS ABOUT

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<sup>107</sup> *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990).

<sup>108</sup> *Id.* at 266-69.

<sup>109</sup> *Id.* at 265.

## APPROPRIATE TREATMENT

A. All Persons Have A Fundamental Liberty Interest To Stop Unwarranted Bodily Intrusions By The State

B. Incompetent Persons Retain Constitutional Rights Even Though They Cannot Now Voice Their Choices

C. The Concept Of Family Decision-making Is Deeply Rooted In The Traditions Of This Country

D. Missouri's General Interest In Prolonging Life Is Not Sufficient To Override Nancy Cruzan's Constitutional Rights To Withdrawal Of Unwanted Medical Treatment<sup>110</sup>

Headings A, B, and C are the “foot-in-the-door” premises. They are axiomatic. Who would disagree that people have a right to avoid “bodily invasion” by the state?<sup>111</sup> That incompetent people retain constitutional rights? That “family decision-making” is deeply embedded in our culture? Notice that cognitive dissonance is at work in the crafting of the component premises. The component premises are phrased in such a way that disagreement with them will arouse dissonance. The self-concept of most people, perhaps particularly decision-makers, requires that we agree with premises that seem eminently fair, just, and non-discriminatory—especially to particularly vulnerable people.<sup>112</sup>

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<sup>110</sup> Brief for Petitioners at II–III, *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990) (No. 88-1503), 1989 WL 1115261.

<sup>111</sup> This heading is particularly brilliant in its framing and in the vividness of its imagery. A case that could easily be framed as a woman's parents trying to take her life is reframed into a case about state “invasion” of the woman's bodily integrity.

<sup>112</sup> PERLOFF, *supra* note 2, at 248 (citing Elliot Aronson, *Dissonance Theory: Progress and Problems*, in *THEORIES OF COGNITIVE CONSISTENCY* 5, 24 (Robert P. Abelson et al. eds., 1968)); Claude M. Steele, *The Psychology of Self-*

Once the reader gets to Heading D, cognitive dissonance again plays a role. The advocate has now convinced the decision-maker that A, B, and C are true and part of the decision-maker's strongly held beliefs. The advocate has also linked A, B, and C to D. Therefore, if the decision-maker disagrees with D, dissonance is likely to arise. The decision-maker can avoid this dissonance by accepting premise D. The path to the comfortable feeling of consistency and consonance is diving off the metaphorical high dive: accept the controversial premise that has been linked to a bedrock of prior agreed-to decisions.

The organization of sentences within a thesis paragraph presents a good example of foot-in-the-door used on a micro-organizational level. In well-written briefs, you will often see a paragraph begin with a less controversial premise, or even a series of less controversial premises. The ultimate premise, the one on which the disagreement between the parties truly is based, will follow those less controversial premises. Consider the Petitioner's brief in *Atkins v. Virginia*.<sup>113</sup> In *Atkins*, the petitioner argued that imposing the death penalty on mentally retarded individuals violated the Eighth Amendment.<sup>114</sup> This is another premise likely to cause severe dissonance. Both mental retardation<sup>115</sup> and the death penalty are difficult, uncomfortable issues for many people to address. Adding to the problematic nature of the argument, a recent Supreme Court decision, *Penry v. Lynaugh*,<sup>116</sup> had rejected the idea that the Eighth Amendment categorically prohibits the death sentence for the mentally retarded.<sup>117</sup> So, there was direct,

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*Affirmation: Sustaining the Integrity of the Self*, in 21 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 261, 270 (1988).

<sup>113</sup> Brief for Petitioner, *Atkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), 2001 WL 1663817.

<sup>114</sup> *Id.* at 22-40. See also U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>115</sup> Indeed, using the term "mental retardation" in the brief was an interesting, and I believe, strategic choice by Atkins' counsel. It avoided euphemisms like "developmentally disabled" and confronted head on our likely discomfort with the word "retardation" and "retarded."

<sup>116</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>117</sup> *Penry* was decided just 13 years prior to *Atkins*, and rejected the

adverse precedent.

Counsel for Atkins began the brief, in heading A, by confronting the controversial premise that the mentally retarded categorically do not have the same level of personal culpability as a person of normal intellect who chooses to commit a crime.<sup>118</sup> This was a premise explicitly rejected by *Penry* just thirteen years before.<sup>119</sup> But counsel does not jar the reader by starting the paragraph with this premise. Rather, the thesis paragraph after heading B eases the reader into the controversial premise. These sentences follow the heading in B (the numbers and parenthetical commentary are mine):

1. This Court has repeatedly emphasized the central importance of personal culpability in capital sentencing. (easily accepted, this is Supreme Court law)
2. The death penalty “takes as its predicate the existence of a fully rational, choosing agent.” (easily accepted)
3. This predicate is grounded in the fundamental principle that “the more purposeful is the criminal conduct . . . the more seriously it ought to be punished.” (easily accepted)
4. As a result, the death penalty is an appropriate punishment for those who deliberate or act with calculus. (easily accepted, and adds a note of reasonableness to the argument because it makes the argument two-sided)
5. But it is a disproportionate penalty for those with “an immature, undeveloped ability to

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assertion that “all mentally retarded people . . . by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty.” *Id.* at 338. Admittedly, *Penry* was decided by a divided court and represented something of a compromise on the execution of the mentally retarded, but it was nevertheless bad precedent for *Atkins*.

<sup>118</sup> Brief for Petitioner, *supra* note 113, at 22.

<sup>119</sup> *Penry*, 492 U.S. at 338.

reason," or those without the capacity to make a fully reasoned choice. (disputed premise of case)<sup>120</sup>

With this chain, the writer has set up the decision-maker to accept the last and controversial premise by leading up to it with a series of reasonable, easily accepted premises. If you agree with premises 1 through 4, then premise 5 follows naturally. Notice how the chain makes the tone appear reasonable, moderate, and almost objective. The reader hears nothing controversial until that last premise, and by the time she gets there, that last premise seems hardly controversial. What the writer has done here is structure her argument to reduce the cognitive dissonance likely to be aroused by premise 5, by carefully leading the reader on a reasoning path that leads inexorably to its acceptance.

Many lawyers wonder how this psychological tactic works in conjunction with headings. After all, the chain from the *Atkins* brief directly followed headings that asserted the controversial premises clearly and strongly. The heading gave the reader ample notice of the disputed premise and ample notice that she was going to be asked to jump off the high dive, which means that dissonance might have been aroused as soon as the decision-maker read the heading.<sup>121</sup> The same issue is apparent in the *Cruzan* headings, which start with a major heading (Roman I) that sets out the controversial premise.<sup>122</sup>

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<sup>120</sup> Brief for Petitioner, *supra* note 113, at 26–27 (alteration in original) (citation omitted).

<sup>121</sup> The chain from *Atkins* followed after these two headings, directly after A:

I. A PROCEDURE THAT PERMITS THE DEATH PENALTY TO BE INFLICTED ON DEFENDANTS WITH MENTAL RETARDATION DESPITE THEIR DIMINISHED PERSONAL CULPABILITY VIOLATES THE EIGHTH AMENDMENT

A. Mental retardation impairs understanding functioning in ways that substantially reduce personal culpability.

Brief for Petitioner, *supra* note 113, at 22.

<sup>122</sup> See *supra* note 110 and accompanying text. See also Brief for Petitioners, *supra* note 110, at II–III.

This is a legitimate question. After all, the scientists in the “foot-in-the-door” experiments did not talk to homeowners about the large lawn sign *before* asking them about the petition.<sup>123</sup> Admittedly, there are many differences between asking homeowners about a lawn sign and trying to persuade a judge. But if we look at the underlying reasons why “foot-in-the-door” works, the differences become less important. Remember that the key to the “foot-in-the-door” reaction is the need for prior decisions, a kind of cache of precedent. This cache of prior decisions helps the decision-maker avoid dissonance (or helps decision-makers determine their belief systems, so that they can act consistently).

The “foot-in-the-door” tactic does not ensure that advocates can entirely avoid decision-makers’ dissonance. To be sure, when the decision-maker sees the “high dive” (the controversial premise), she will likely experience discomfort. But the “foot-in-the-door” strategy helps advocates alleviate or assuage decision-makers’ dissonance. And, it helps resolve the dissonance in a particular direction that is favorable to the advocate.

While it is true that the mere assertion of the controversial premise itself causes psychological discomfort and dissonance, the critical point of decision-making is usually not at the heading stage—in legal writing, the heading is a kind of “herald” of the argument to come. The heading shows the decision-maker the high dive, but the decision-maker has not yet been asked to dive. The social norms of the persuasive situation require that the decision-maker read the arguments that follow the heading before making a decision; at the point of the heading, the decision-maker arguably still has (or should have) an open mind. So, the critical point for the advocate comes later, when the decision-maker has read the arguments and is more likely to ponder whether to agree or not agree with the controversial premise. At that point, the decision-maker can either feel stronger dissonance, or she can feel the comfort of having made a decision that seems to be entirely consistent with her prior experiences and decisions. Organizing a legal argument by easing the reader into the premise can make the reader feel those good feelings of consistency and avoid

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<sup>123</sup> Freedman & Fraser, *supra* note 99, at 200.

uncomfortable feelings of dissonance.

Finally, what about juries? The special relationship advocates have with judges might suggest that easing into controversy is a good idea in that particular relationship. After all, judges are skeptical; they hear arguments all the time and are going to be especially sensitive to over-arguing and obvious persuasion and manipulation. This would make brief-writing the paradigmatic occasion for an argument style that eases into controversy, rather than one that stridently over-argues. However, the relationship between advocates and juries can be seen as quite different, and juries may have very different views about advocacy than judges.

But lawyers also use the “foot-in-the-door” tactic to persuade juries to follow a controversial premise. Gerry Spence has described a tactic that he uses in *voir dire* to diffuse a common and strongly held prejudice that juries have against plaintiffs and plaintiffs’ lawyers.<sup>124</sup> To diffuse the belief that plaintiffs are just trying to make money off the death of a loved one or their own injuries, and that plaintiffs’ lawyers are predators who chase ambulances, Spence constructs a series of premises that lead up to a controversial one. This tactic works because of “foot-in-the-door” principles. Here is the example:

Without me, Shirley White (my client) will have to face this judge and this jury alone with no one to speak for her . . . Without me, there will be no one to stop Mr. Ketchum [the defendant’s lawyer] from dumping improper evidence into the case and there will be no one to argue the law on her behalf to his honor. And without me she will have to argue her case by herself against the likes of Mr. Ketchum, who is a powerful lawyer with power people behind him. So, Mr. Black [juror], is it all right with you if Shirley has chosen me to fight for her rights?<sup>125</sup>

This relatively simple emotional appeal can be deconstructed to reveal a series of cleverly linked arguments. What follows is my

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<sup>124</sup> See GERRY SPENCE, *WIN YOUR CASE: HOW TO PRESENT, PERSUADE AND PREVAIL—EVERY PLACE, EVERY TIME* 119–20 (reprint ed. 2006).

<sup>125</sup> *Id.* at 120. There are also a number of other similar strategies outlined in the chapter. See *id.* at 112–27.

paraphrase of Spence's tactic as a way of exposing the argument chain within the emotional appeal:

1. Shirley White will face this judge and jury alone unless I am here. (Poor Shirley White!)
2. If she is alone, no one can stop the other side from cheating. (Terrible! Notice also that this premise cleverly embeds the idea that the other side would try to cheat if they could.)
3. Without a lawyer, she'll have to face powerful people with no one on her side. (How unfair!)
4. So, isn't it ok that I am here to fight for Shirley White?

The first three premises are akin to the requests of the scientists who asked homeowners to sign a petition before asking them to display a large lawn sign. Once homeowners signed that petition, agreement to the lawn sign on the property was much more easily accomplished. The same process is at work here. Once a juror agrees to 1, 2, and 3—and 1, 2, and 3 are cleverly designed so that the juror will almost certainly do so<sup>126</sup>—she will say yes to premise 4, or else she will be sanctioning unfairness and even cheating! The juror's own self-image as a fair, caring person will force her to accept premise 4, at the risk of a powerful surge of cognitive dissonance.<sup>127</sup>

And, perhaps most cleverly, once the juror says yes to premise 4, Spence can be fairly certain he can safely allow the juror to serve on his case without bias against the plaintiff, perhaps even

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<sup>126</sup> Dissonance is also at work in the agreement to premises 1, 2, and 3. See Tedeschi Schlenker & Bonoma, *Cognitive Dissonance: Private Ratiocination or Public Spectacle?*, 26 AMER. PSYCHOL. 685, 690–91 (1971) (dissonance is aroused by a desire not to look bad in front of others).

<sup>127</sup> This type of persuasion is called "induced compliance." PERLOFF, *supra* note 2 at 244–45, 253 (when an individual is induced to publicly espouse a position contrary to her private beliefs, and she cannot rationalize the public statement away, she will experience dissonance). See also Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 209–10 (1959) (experimentally supporting theory that "if a person is induced to do or say something which is contrary to his private opinion, there will be a tendency for him to change his opinion so as to bring it into correspondence with what he has done or said").



bias in Spence's favor. Spence has changed the cache of information that jurors will consult if they find themselves irritated by Spence's tactics at trial, or if the bias against personal injury lawyers rears its head again. The jurors' cache of personal "precedent" now includes a prior agreement to let Spence speak on behalf of Ms. White. Spence has wedged his "foot-in-the-door"—he has gotten the juror to agree to something (in front of others), and the juror's psychological need for consistency (and to avoid cognitive dissonance) will mean that the juror is likely to put aside his biases about plaintiffs' lawyers. Indeed, the juror may even overcorrect in Spence's client's favor because the juror has recently, and publicly, announced that it was "all right" for Ms. White to have Spence as her lawyer. The momentum will be strongly in favor of finding *for* Spence's client because of the dissonance that will result from the worry that a finding against Spence's client would be "proof" that the juror is not, in fact, a fair person. Most human beings would feel embarrassed and uncomfortable in the face of such "proof" (the cognitive dissonance will be strong) and will do what they can to avoid that feeling.

This example from Gerry Spence might seem to be a peculiar one. In some ways, particularly in its emotional manipulation, it is pretty heavy-handed. Spence is not known for his "light touch" in the courtroom—and indeed, I quoted him above as an example of a lawyer who sees litigation as war.<sup>128</sup> But this gets to the heart of my point: whether we see litigation as a battle or not, it is *how* we do battle that matters. Spence does *not* go into the jury room and say, "You probably don't feel good about plaintiffs' lawyers—you think they are litigious and money grubbing. But that's wrong. I'm not money grubbing—I'm doing this for good reasons. I'm a good guy, on the side of the angels! I'm the guy on the white horse. I'm here to help Ms. White. Mr. Ketchum is a bad man who probably will try to cheat, and I'm the good guy who can stop him. Don't you agree that I'm the good guy here?" Not only would that not likely be allowed at voir dire, but it also would not be effective. Our mental processes do not work that way. When an advocate

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<sup>128</sup> See *supra* note 3 and accompanying text.

tries to push people too hard in a particular direction, people usually respond negatively. Spence's tactic does the same work, but more subtly. Spence is not yelling at jurors to jump off the high dive. Instead he eases them up each rung until they have actually persuaded themselves that they should dive.

In answering the question of the better route to persuasion, what cognitive dissonance and "foot-in-the-door" studies tell us is that a technique that eases the reader step by step to the controversial premise will ease, or even dispel, dissonance. A rhetorical strategy that takes "baby steps" closely mimics an objective decision-maker's reasoning process. It is subtle and gradual; it allows decision-makers to participate in persuading themselves. The advocate is less conspicuous and that makes decision-makers feel more autonomous. Feelings of autonomy avoid reactance. The advocate becomes a guide to be followed, not an aggressor to be fought.

## CONCLUSION

Overt aggression can be tempting and satisfying for the advocate and her client—when you feel deeply the rightness of your cause, it is hard to understand how a decision-maker could fail to see things your way. It is very easy to think, "If I just push harder, more unrelentingly, maybe I can get the decision-maker to embrace my position." But this ignores a fundamental truism about human nature—more often than not, pushing harder does not make the other person see our viewpoint, it makes the other person *push back against it*.

This Article addresses two advocacy scenarios: (1) dealing with adverse information or arguments, and (2) introducing a controversial premise. At first glance, these two scenarios may appear to have little in common. But their commonality lies in the opportunities they present for the advocate to adopt a reasonable tone or a more aggressive one. An advocate can aggressively push a "too-perfect" one-sided argument, and can introduce a controversial premise by hammering it at the first opportunity. But what cognitive dissonance tells us is that in these two scenarios, the better approach may be for the advocate to acknowledge

weakness and present arguments in a way that seems more measured and objective.

Part of the art of advocacy is keeping one's eye on the goal—and the goal is, ultimately, to convince the decision-maker of our position, not to pound the decision-maker on the head (as satisfying as that sometimes might be). And in most contexts, convincing others is a task that needs patience and forbearance: being a boxer but looking like a teacher. In other words, it requires advocates to walk the fine line of showing our zeal and our deep belief in our clients without looking like zealots. This means that sometimes, a tone of reasonableness and temperance is the surest route to the ultimate goal of convincing the decision-maker.