

# An ELEMENTary Approach to Legal Reasoning

## FIRAC: An ELEMENTary Approach to Legal Reasoning

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## 1.2 Don't believe everything you think.

About 10 years ago, my mother was selected as a prospective juror in a criminal trial. The defendant was a long haired, bearded young man accused of the illegal possession of marijuana. During *voir dire*, the defense attorney challenged my mother for cause. The judge agreed and excused her.

Several weeks later, my mother related her experience to me. She was upset and felt insulted by her dismissal. "I don't understand why they wouldn't let me be a juror," she exclaimed. "You could tell just by looking at him [the defendant] that he was guilty!"

My mother was, no doubt, looking for some sympathy from her attorney son. Instead, I told her "I would have done the same thing." and launched into an explanation of confirmation bias. Once humans form a belief, they tend to seek only evidence that will verify their belief and ignore or rationalize away any evidence that would refute it.

In their book, *Mistakes Were Made (but not by me)* [Harcourt, Inc. 2007], social psychologists Carol Tavis and Elliot Aronson discuss the existence and effects of confirmation bias in the American criminal justice system. One example:

Many detectives do just what the rest of us are inclined to do when we first hear about a crime: impulsively decide we know what happened and then fit the evidence to support our conclusion, ignoring or discounting evidence that contradicts it. Social psychologists have studied this phenomenon extensively

by putting people in the role of jurors and seeing what factors influence their decisions. In one experiment, jurors listened to an audiotaped reenactment of an actual murder trial and then said how they would have voted and why. Instead of considering and weighing possible verdicts in light of the evidence, most people immediately constructed a story about what had happened and then, as evidence was presented during the mock trial, they accepted only the evidence that supported their preconceived version of what had happened. Those who jumped to a conclusion early on were also the most confident in their decision and were most likely to justify it by voting for an extreme verdict. This is normal; it's also alarming. [pp.135-36]

No one is immune from confirmation bias. Not jurors. Not law enforcement officers. Not law students. Not attorneys. Not judges. Not businesspeople, politicians, journalists, scientists, other trained professionals, or anyone else.

And that's one of the reasons I cringe whenever someone justifies an opinion by declaring "It's obvious." or "It's common sense." What the person really means is "I feel certain that I am correct and you should agree with me simply because my belief is so strong." Challenge him with evidence and reasons that discredit his point of view and the probable -- and ironic -- result is that, instead of changing his mind, he will end up being even more convinced that his original opinion is right.

Of course, confirmation bias is not the only cause of thinking errors. In his book, *On Being Certain: Believing You Are Right Even When You're Not* (St. Martin's Press 2008), neurologist Robert A. Burton argues: "Despite how certainty feels, it is neither a conscious choice nor even a thought process. Certainty and similar states of knowing what we know are sensations that feel like thoughts, but arise out of involuntary brain mechanisms that function independently of reason." In other words, feeling absolutely, positively certain that you are correct doesn't mean you are.

Then there is all the research which shows that emotions, such as fear and love, often trump reason. And the popular literature (such as *Blink: The Power of Thinking without Thinking* by Malcolm Gladwell, Little Brown & Company, 2005) which contends that intuition is often as good, and sometimes even better, than conscious, rational decision making. Life would be a whole lot easier, less painful, and more successful if we could rely upon our "gut reactions." That illusion has a seductive appeal. But the reality is that, while our emotions and intuition sometimes steer us in the right direction, they also (more frequently than we're willing to admit -- remember confirmation bias?) lead us far astray.

But reasoned decision making has its shortcomings, too. The human brain can only process limited amounts of information at any one time. We deal with the overload by simplifying the complex -- by ignoring information deemed to be (but which may not be) irrelevant, by utilizing generalizations and stereotypes (which may be inaccurate) , and by formulating simplistic decision making rules (which may omit critical considerations) out of whatever information is readily available (which may be incomplete, false, or immaterial.) Logic skills, language, perceptions, and a host of other factors can also affect the outcome. This leaves a lot of room for bias and error. Appearances can still deceive. Words can still mislead. Unwarranted assumptions and inferences can still generate baseless conclusions.

And the list goes on. If you are beginning to wonder whether you can trust your own judgment, congratulations! Recognizing and accepting uncertainty and being able to deal with it constructively is a hallmark of a good lawyer. On the other hand, if you reject what

you have been reading or picture yourself as the exception, [it is absolutely, positively, certain and blatantly obvious that :)] your confidence exceeds your ability to reason.

Mistakes in thinking are a pitfall that legal professionals must do their best to avoid. It's not just a matter of needing to satisfy some abstract notion of justice. There are very real and serious practical consequences at stake. Faulty reasoning can result in an incorrect understanding of a law, bad advice to a client, ineffective representation in court, erroneous acquittals and convictions, and flawed precedents.

One way to minimize bias and error is to allow our reasoning to be guided by an external process that forces us to proceed methodically and logically and to confront our blind spots and consider disconfirming evidence. A good example of such a process is the "scientific method." Among other things, it requires scientists to try and disprove their hypothesis. This necessitates the search for and evaluation of contrary evidence and alternate explanations, thereby countering the natural tendency to "cherry pick" only the information that supports one's belief.

The analogous reasoning process used by the legal community is known by the acronym, "FIRAC." There are significant differences from the scientific method, of course, but the purpose is the same – to provide a standardized, systematic procedure for effectively determining and evaluating answers to questions. Specifically, the FIRAC approach to legal reasoning:

- provides structure, direction, and focus, which substantially decreases the uncertainty, confusion, and wasted time and effort that typically accompany a flail-in-the-dark or scattergun approach.
- breaks the problem into smaller parts which the human brain is better able to handle.
- inhibits the impulse to jump to conclusions and balances reason against intuition and emotion.
- furnishes a framework that facilitates and improves information gathering and processing. It identifies what information is needed, helps organize the bits and pieces gathered from various sources into a comprehensive and useful whole, and reveals critical gaps that need to be filled.
- highlights determinative issues and pinpoints areas of ambiguity and disagreement. This allows attention and resources to be concentrated where they are most needed and will have the greatest potential impact.
- suggests reasoning methods that can be used to analyze the information and resolve the issues. The necessary deliberation usually exposes and forces the consideration of alternative viewpoints, adverse evidence, and counterarguments.
- improves communication among legal professionals (and others familiar with the FIRAC approach.) Speaking the same language and thinking along the same lines heightens mutual understanding. And that improves a lawyer's ability to perform her professional tasks, including learning law, giving advice, drafting documents, negotiating agreements, and advocating a position.

When applied properly, the FIRAC approach will guide you to a reasonable conclusion and provide ammunition for convincing others that the conclusion you reached is more reasonable than other possible conclusions. What FIRAC will NOT do is produce an empirically testable "correct" answer. Legal reasoning is about formulating a supportable opinion. That opinion is "right" if a human decision maker (such as opposing counsel, a juror, a judge, or an IRS agent) agrees with it; it's "wrong" if he or she disagrees.

This is not to suggest that all opinions are equal. Nor does it imply that characterizing an opinion as “right” or “wrong” is no more meaningful than the flip of a coin. An opinion untainted by bias and supported by the application of impeccable logic to a comprehensive and accurate body of evidence is much more likely to be correct than one that is the product of blind faith, unquestioned belief, prejudice, ulterior motives, flawed logic, or incomplete and erroneous data.

“More likely to be correct” is not the same as certainty. But it’s the best that legal professionals can strive for. And that’s what FIRAC can help them accomplish.

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