SELLING SPEECH IN THE MARKETPLACE OF IDEAS:
AN ARGUMENTATIVE THEORY OF THE FIRST AMENDMENT

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But all was false and hollow; though his tongue
Dropt manna, and could make the worse appear
The better reason, to perplex and dash
Maturest counsels.¹

The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.²

I. INTRODUCTION

Humans are rational beings. Indeed, the ability to reason is often said to set us apart from every other creature on the planet.³ The study of human reason and rationality “has been one of the central philosophical questions since the beginning of recorded history [] that has brought forth efforts from every major philosophical figure that has ever lived.”⁴ In the domain of cognitive science, the classical view “posits that the main function of reasoning is to correct misguided intuitions, helping the reasoner reach better beliefs and make better decisions.”⁵

¹ Associate Professor, Emory Law School.
² John Milton, Paradise Lost (1667; 1674), Book II, line 112.
⁴ E.g., Michael S. Pardo, Introduction to the Meador Lectures on Rationality, 62 Ala. L. Rev. xx, (at 3) (“Our power to be rational . . . helps to define what makes human animals special and, well, human.”) There is, of course, much debate about whether other animals possess the capacity to reason, mostly turning on the definition of “reason.” See [CITES]. For more on the definition of reason used in this Article, see infra TAN xx-xx.
⁵ Ronald J. Allen, Rationality and the Taming of Complexity, Meador Lectures on Rationality, 62 Ala. L. Rev. 1047, xxxx (at 69).
⁶ Hugo Mercier, Some Clarifications About the Argumentative Theory of Reasoning: A Reply to Santibanez Yanez (2012), 32 Informal Logic 259, 259
Moreover, the classical view tends to focus on the individual reasoner, imagining the ideal of the solitary intellect parsing information and arguments to arrive at knowledge and truth. Despite mountains of experimental findings that demonstrate serious and systematic defects in human reason so understood, we cling to this ideal of our basic and inherent rationality.

In First Amendment jurisprudence, the “marketplace of ideas” metaphor – along with its close relative, the “search for truth” – is closely aligned with this classical view of reason. Perhaps, then, it is not surprising that despite myriad criticisms, the marketplace metaphor has kept so tenacious a hold on First Amendment doctrine and theory. Just this past term, in United States v. Alvarez, a plurality of the Court once again reaffirmed that “[t]he theory of our Constitution (2012) (hereinafter “Clarifications”). See, e.g., Daniel Kahneman, A Perspective on Judgment and Choice, 58 American Psychologist 697, 699 (2003) (noting that “one of the functions of System 2 [elsewhere described as “reason”] is to monitor the quality of both mental operations and overt behavior”).

CITES for examples/summaries of the irrationalities.

Or, when we recognize deviations from the ideal, we believe that those only happen to other people. See Robert Kurzban, Why Everyone (Else) is a Hypocrite: Evolution and the Modular Mind (2010); [cites to motivated reasoning research showing that people think others are biased but not themselves].

Though he didn’t use the exact phrase, the source of the metaphor is Justice Oliver Wendell Holmes’ famous dissent in Abrams v. United States, 250 U.S. 616 (1919), and in particular this iconic passage:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

250 U.S. at 630.

See infra TAN xx-xx.
is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market.’”

Over the past several years, there has been an explosion in knowledge about how humans reason and make decisions. For one thing, scholars across many disciplines, from psychology to neuroscience to law, increasingly acknowledge that much of our decision-making process is implicit, or non-conscious. The critical role of emotion in decision-making has also been elucidated and analyzed. And a host of systematic cognitive distortions such as confirmation (or “myside”) bias, in-group bias, framing effects, hindsight bias, and motivated reasoning, have been by this point exhaustively catalogued.

11 See, e.g., Julie Seaman, Hate Speech and Identity Politics: A Situationalist Proposal, 36 FL. ST. L. REV. 99 (2008) (summarizing research on social identity and priming effects as well as other implicit situational effects on behavior and decision making);
13 See Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 REV. OF GEN’L PSYCH. 175 (1998).
14 See Miles Hewstone, Mark Rubin, & Hazel Willis, Intergroup Bias, 53 ANN. REV. PSYCHOL. 575 (2002) (reviewing the extensive literature on bias in favor of in-groups at the expense of out-groups).
15 See Dennis Chong and James N. Druckman, Framing Theory, 10 ANN. REV. POLIT. SCI. 103 (2007).
This aspect of the cognitive revolution has had perhaps the most profound effect in the field of economics, which is no surprise for a discipline explicitly modeled on the rational actor.\textsuperscript{19} Thus behavioral economics\textsuperscript{20} has largely been concerned with incorporating insights from experimental psychology into both descriptive and prescriptive economic analyses. In legal scholarship, where the law and economics movement has had such a profound impact,\textsuperscript{21} many prominent scholars have moved to incorporate analysis of the demonstrated irrationalities in the field of behavioral law and economics.\textsuperscript{22} In legal scholarship more generally,

\textsuperscript{20}The so-called “cognitive revolution” in psychology, which began by most accounts in the 1950’s and was centered at Harvard, was a reaction against the behaviorist orthodoxy represented by B.F. Skinner. Its application and analog in economics is labeled “behavioral economics” because it considers the realities of human behavior, but according to one of its early proponents “[t]he field is misnamed – it should have been called cognitive economics [but w]e weren’t brave enough.” Craig Lambert, The Marketplace of Perceptions: Behavioral Economics Explains Why We Procrastinate, Buy, Borrow, and Grab Chocolate on the Spur of the Moment, HARVARD MAGAZINE 50, 52 (March-April 2006) (emphasis in original). Daniel Kahneman, a psychologist, won the Nobel Prize in economics along with his collaborator Amos Tversky in 2003 for their groundbreaking work in behavioral economics.
\textsuperscript{21}Though I assume that no citation is necessary here, see, e.g., ANTHONY T. KRONMAN, THE LOST LAWYER 166 (1993) (stating that “the intellectual movement that has had the greatest influence on American academic law in the past quarter-century is law and economics”).
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much work has explored the implications of findings in the mind sciences.\textsuperscript{23} Yet this cognitive/behavioral revolution has as yet largely bypassed the First Amendment.\textsuperscript{24} This is surprising at first glance because the central metaphor of the First Amendment – the marketplace of ideas – is explicitly economic.\textsuperscript{25} At second glance, it is particularly surprising because First Amendment law is so

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\item For a description of the trajectory of this research and a thorough review of the literature through the late 1990s, see Donald C. Langevoort, \textit{Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review}, 51 \textit{VAND. L. REV.} 1499 (1998). Langevoort groups the literature into eleven broad subject categories, including contract law, tort law, criminal law, and litigation; neither constitutional law generally nor First Amendment law in particular appears on the list.
\item See Paul Horwitz, \textit{Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment}, 76 \textit{TEMP. L. REV.} 1, 5 (2003) (“few if any writers have asked what applications behavioral analysis may have for issues in constitutional law, including the interpretation of the First Amendment”); Lyrissa Barnett Lidsky, \textit{Nobody’s Fools: The Rational Audience as First Amendment Ideal}, 2010 \textit{U. ILL. L. REV.} 799, 804 n.21 (“[a]lthough there is a large and growing body of literature on behavioral economics and cognitive psychology, only two scholars seem to have applied this literature in the First Amendment context”) (citing Derek E. Bambauer, \textit{Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas}, 77 \textit{U. COLO. L. REV.} 649 (2006) and Paul Horwitz, \textit{Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment}, 76 \textit{TEMP. L. REV.} 1 (2003)). In addition to these three treatments of behavioral analysis and free speech, Professor Dan Kahan discussed the First Amendment in his \textit{Harvard Law Review} Foreword, though he was primarily employing it to illustrate his thesis about cognitive illiberalism and the neutrality crisis in constitutional law more generally. \textit{See Dan M. Kahan, Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law}, 125 \textit{HARV. L. REV.} 1 (2011). In addition, scholars working in the hate speech area have long applied insights about unconscious bias and stereotype threat to demonstrate the harms of hate speech to victims and to society more generally. \textit{See} [Lawrence, Delgado, MacKinnon]. \textit{See also} Jeffrey Stake, \textit{A Memetic Approach to the First Amendment}, [CITE].
\item Though some scholars disagree about the centrality of economic thinking for Justice Holmes in his \textit{Abrams} dissent, \textit{see generally} Vincent Blasi, \textit{Holmes and the Marketplace of Ideas}, 2004 \textit{SUP. CT. REV.} 1 (2004), it seems uncontroversial to observe that the economic understanding has been the opinion’s main legacy.
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intricately bound up with assumptions about human decision-making and belief processes.26

This Article considers an emerging theory in cognitive psychology which posits that the function of reasoning is not – as in the classical view – to find the “right” or “true” or “best” answer; rather, the function of reason is to win arguments.27 According to the Argumentative Theory of Reasoning (ATR), “the primary function for which [reasoning] evolved is the production and evaluation of arguments in communication.”28 This theory has caused a stir among cognitive scientists29 in no small part because it purports – and many say it succeeds – to “make better sense of much of the experimental evidence” demonstrating cognitive biases and systematic irrationalities in human reason.30 Under this alternative view of reason, in fact, the “irrationalities” make perfect sense: if the function of reasoning is to win and evaluate arguments rather than to increase

26 See Horowitz, supra note 24, at 6 (“Much of our current free speech jurisprudence is based on the assumption that the government should not regulate speech because, in an unregulated marketplace, people will be perfectly capable of responding rationally to speech.”).
27 See Hugo Mercier & Dan Sperber, Why do Humans Reason? Arguments for an Argumentative Theory, 34 BEHAV. & BRAIN SCI. 57 (2011) (hereinafter “Argumentative Theory”). As one reflection of the theory’s impact, it was featured in a recent issue of Behavior and Brain Sciences – a leading peer reviewed Cambridge University Press journal in the fields of the behavioral sciences and neurosciences. In addition to the “target article” by Mercier and Sperber, the issue contained some 37 responses as well as a reply by the authors of the target article. See 34 BEHAV. & BRAIN SCI. xx-xx (2011).
28 Id. at 58.
29 For example, Steven Pinker/Jonathan Haidt/Malcolm Gladwell quotes. Also note New York Times article and other popular media attention.
30 Id.
knowledge per se, then many of the biases that have confounded scholars across various academic fields are not irrational after all.\textsuperscript{31}

The relationship of descriptive evidence about how (and why) people think and make decisions to grand First Amendment theory and to workable free speech doctrine is complex. Some will no doubt say that even if the ATR – or any other theory of human reason – is correct, it is irrelevant to the First Amendment.\textsuperscript{32} Yet much First Amendment jurisprudence is grounded firmly in empirical claims,\textsuperscript{33} though sometimes these claims are obscured by soaring rhetoric. Indeed, some of the most contested spaces within the free speech edifice contain the most profound empirical disagreements.\textsuperscript{34} It is now a commonplace that the cognitive revolution has had a profound influence on many fields of legal scholarship; the field that concerns itself most explicitly with communication, reasoning and decision-making arguably has the most to gain from a more robust understanding of how and why we reason and are persuaded to adopt one or another belief.

Part II of this Article lays out the Argumentative Theory of Reasoning as developed in a series of papers by cognitive scientists Dan Sperber and Hugo

\textsuperscript{31} Cites for the rationality debate in economics and in psychology.
\textsuperscript{32} Cites for this debate generally, in the context of the First Amendment; insert obligatory is-ought disclaimer.
\textsuperscript{33} See Paul Horwitz, \textit{The First Amendment’s Epistemological Problem}, 87 WASH. L. REV. 445, 462 (2012) (“This [judgment that the benefits of the First Amendment’s restrictions on government regulation of speech outweigh its costs] may be a key article of the American faith, but it is also an empirical question”).
\textsuperscript{34} For example, hate speech regulation and other regulation of extreme speech. See Snyder v. Phelps; United States v. Stevens; Brown v. EMA.
Mercier. In particular, it considers two distinctive features of the ATR that are especially relevant to First Amendment jurisprudence: First, the ATR illuminates and emphasizes the dialogic, social nature of human reason. According to this theory, the reasoning faculty evolved in the service of making and evaluating arguments in a deliberative context. Thus, people are more likely to gain epistemic benefits and to come to accurate or optimal decisions when they reason in such a context. Second, there is the related insight that when individuals alternatively take on the roles of either speaker or audience they have divergent interests and thus divergent strategies of reasoning. In the audience role, people exercise what the authors call “epistemic vigilance.” Thus, though increased knowledge is not the function of reason in the sense understood by the classical theory of reasoning (or of evolutionary theory), there remains the potential for increased knowledge and good decision-making – particularly when the communicative environment is “felicitous” (i.e. that it replicates the features under which reason evolved).

35 Dan Sperber first proposed a version of the Argumentative Theory in 2001. It has been developed over the past several years primarily by Sperber and Hugo Mercier, with contributions by other coauthors as well. See Dan Sperber, An Evolutionary Perspective on Testimony and Argumentation, 29 PHILOSOPHICAL TOPICS 401 (2001); Mercier & Sperber, Argumentative Theory, supra note 27; Dan Sperber et al., Epistemic Vigilance, 25 MIND & LANGUAGE 359 (2010); Mercier, Clarifications, supra note 5; Hugo Mercier, Using Evolutionary Thinking to Cut Across Disciplines: The Example of the Argumentative Theory of Reasoning, in T. ZENTALL & P. CROWLEY, EDS, COMPARATIVE DECISION MAKING (Oxford Univ. Press 20xx) (forthcoming), Hugo Mercier and Dan Sperber, Intuitive and Reflective Inferences, in [name of volume??]; Hugo Mercier, On the Universality of Argumentative Reasoning, xx J. OF COGNITION & CULTURE (20xx); Hugo Mercier & Helene Landemore, Reasoning is for Arguing: Understanding the Successes and Failures of Deliberation, xx J. OF POLITICAL PSYCHOLOGY (20xx), available at http://ssrn.com/abstract=1707029.

36 Dan Sperber et al., Epistemic Vigilance, 25 MIND & LANGUAGE 359 (2010).
After exploring these issues within the framework of cognitive psychology, I turn in Part III to the very lively debate among First Amendment scholars over the continued vitality of the marketplace of ideas metaphor and the related “search for truth” justification for the First Amendment’s freedom of speech protections. This Part considers the implications of the ATR to these questions and suggests that the ATR offers insights that are distinct from those of the standard theoretical and existing behavioral critiques of the marketplace model. I conclude by suggesting that, ironically, taking seriously the proposition that reason was made for argument, not for discovering truth, strengthens the case for the marketplace of ideas rationale and the truth-seeking, epistemic function of freedom of speech.

II. HOW (AND WHY) DO HUMANS REASON?

Descartes famously said, “I think, therefore I am.” By “think,” he meant “reason” as contrasted with the operation of animal instinct. In keeping with this Cartesian tradition, the classical view of reason in both philosophy and psychology sees reason as a path to knowledge and views the function of reason – the why – as enhancing individual cognition. Thus, “A long tradition has regarded human thinking as a solitary, if not solipsistic, exercise aimed at

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37 One legal scholar has already considered the implications of the ATR in the context of legal argumentation and decision-making, offering lessons for judges, moot court participants, and lawyers. Timothy P. O’Neill, Law and “The Argumentative Theory,” 90 OR. L. REV 837 (2012). The Essay contains an excellent summary of the Argumentative Theory and of some of the cognitive biases it seeks to explain. See id. at 837-43.

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facilitating behavior. This has privileged the assumption that reasoning is mainly for enabling individuals to seek the truth.”\textsuperscript{40} As described by Sperber, reason under this conception is typically viewed as first and foremost a property of the individual Cartesian thinker. Its function . . . is seen as that of allowing the individual to go beyond perception-based beliefs and to discover facts with which it happens not to have had perceptual acquaintance, and, more importantly, theoretical facts with which there is no way to be perceptually acquainted. On this view, reasoning is a higher-level form of individual cognition, a superior tool for the pursuit of knowledge.\textsuperscript{41}

Reason thus has generally been viewed as a tool for the individual to gain epistemic benefits.

The problem, according to the ATR, is that reason is not very efficient at doing this job. The classical view of reasoning as a tool for individual cognition “to help people overcome the limits of intuition, acquire better grounded beliefs, particularly in areas beyond the reach of perception and spontaneous inference, and make good decisions” is at odds with “the massive evidence that human reasoning is not so good at fulfilling this alleged function.”\textsuperscript{42} In contrast, human intuition is relatively effective at performing many of these tasks.\textsuperscript{43} Reasoning, as an extremely energy intensive, high-cost tool is thus unlikely to have evolved “as a tool for individual cognition.”\textsuperscript{44}

\textsuperscript{40} Roy F. Baumeister et al., Arguing, Reasoning, and the Interpersonal (Cultural) Functions of Human Consciousness, 42 BEHAV. & BRAIN SCI. 74, 74 (2011).
\textsuperscript{41} Sperber (2001) at 159.
\textsuperscript{42} Id. at 378.
\textsuperscript{43} Id. See also MALCOLM GLADWELL, BLINK
\textsuperscript{44} Id. That is not to say that it cannot perform this function. Many adaptations are coopted in the service of functions distinct from those that seem to have driven their evolution – what in evolutionary biology is known as an “exaptation.”
The ATR, as formulated by Mercier and Sperber, sees the human ability to reason not as a means to enhance individual cognition but rather as a tool for “the production and evaluation of arguments in communication.”\textsuperscript{45} According to this conception, reasoning evolved and persisted in human populations because it was adaptive\textsuperscript{46} for both speakers and listeners: Speakers reason in order to persuade others so as to influence their behavior, and listeners reason in order to critically evaluate speakers’ arguments.\textsuperscript{47} The theory has gained much attention\textsuperscript{48} in large

\textsuperscript{45} M&S (2011) at 58.

\textsuperscript{46} Evolutionary biologists look at species-typical traits and consider how and why those traits would have been adaptive for the animals’ ancestors such that they came to be disproportionally selected and passed on through the process of Darwinian natural selection. The adaptive function of a particular trait – whether physical or behavioral – refers to the purpose that the trait evolved to serve in the organism. Of course, traits may also come to serve additional functions beyond those for which they originally were selected. \textit{See generally} Julie A. Seaman, \textit{Form and (Dys)Function in Sexual Harassment Law: Biology, Culture, and the Spandrels of Title VII}, 37 ARIZ. ST. L.J. 323, 340-47 (2005). See also M&S 2011 at 59: “a function of a trait is an effect of that trait that causally explains its having evolved and persisted in a population: Thanks to this effect, the trait has been contributing to the fitness of organisms endowed with it.”

\textsuperscript{47} As they point out, if the trait benefited only speakers at the expense of audiences, or vice versa, complex human communication would not have evolved. [CITE]. And, of course, speakers and listeners are the same individuals at different times and in different roles. [CITE].

\textsuperscript{48} For example, it has been discussed in the \textit{New York Times}, see Patricia Cohen, \textit{People Argue Just to Win, Scholars Assert}, June 15, 2011 p. C1, in \textit{Newsweek}, see Sharon Begley, \textit{The Limits of Reason: Why Evolution May Favor Irrationality}, NEWSWEEK, August 5, 2010, available at http://www.thedailybeast.com/newsweek/2010/08/05/the-limits-of-reason.html, and on numerous science blogs, e.g. [CITES]. The science website Edge.org, most well-known for its “annual question” series, summarized the excitement about the ATR as follows: “[Mercier and Sperber’s] Argumentative Theory has already generated much excitement in the academic community . . . The paper has created a storm of interest and controversy and has attracted attention well beyond academic circles . . . In addition, many leading thinkers have taken note.” The \textit{Argumentative Theory: A Conversation with Hugo Mercier},
part because it so elegantly makes sense of masses of experimental findings about cognitive biases that are much harder to explain under classical theories of reasoning.\textsuperscript{49}

To understand the ATR, some preliminary points are in order. First, given that this is a theory of reason and reasoning, it would do well to clarify what Mercier and Sperber mean when they use these terms. They offer the following definition of “reasoning” as used in their model: “Reasoning can be defined as the ability to produce and evaluate reasons.”\textsuperscript{50} Lest this appear to be a tautology, they elsewhere offer this more detailed definition:

\begin{quote}
Reasoning, as commonly understood, refers to a very special form of inference at the conceptual level, where not only is a new mental representation (or conclusion) consciously produced, but the previously held representations (or premises) that warrant it are also consciously entertained. The premises are seen as providing reasons to accept the conclusion. Most work in the psychology of reasoning is about reasoning so understood. Such reasoning is typically human.\textsuperscript{51}
\end{quote}

So understood, reasoning is roughly analogous to the so-called “System 2” in dual process models of cognition that currently dominate the cognitive and

\textsuperscript{49} As the authors point out, Mercier & Sperber, \textit{Reasoning as a Social Competence} 388, in H. Lanemore & J. Elster, \textit{Collective Wisdom: Principles and Mechanisms} (201x) (forthcoming).
\textsuperscript{50} Id.
\textsuperscript{51} M & S 2011 at 57 (emphasis in original).
social sciences. Dual process theories envision two distinct cognitive systems within the brain, typically referred to as System 1 and System 2. At the most general level, this two-system view “distinguishes intuition from reasoning.”

System 1 is characterized by fast, automatic, implicit thinking that is cognitively “cheap” (that is, requires relatively less cognitive energy). It is the system that we use the most throughout the day. For example, if you enter a courtroom and see a woman dressed in professional attire and holding a briefcase, System 1 allows you to quickly and automatically draw the conclusion that she is an attorney.

System 2, in contrast, is characterized by comparatively slow, effortful, deliberate, and analytical thinking, which requires a great deal of cognitive

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52 Mercier and Sperber distinguish between intuitive and reflective inferences (and also intuitive and reflective conclusions). They note that their idea of reflective inferences and conclusions is roughly analogous to System 2 in the sense that both “are characterised by control, effortfulness, explicitness and, (at least virtual) domain-generality.” M & S chapter 7 at 156. Though there are differences between their model and other dual process models, for purposes of this analysis it is probably not too misleading to think about “reasoning” in the ATR as roughly akin to a System 2 process. For a discussion of the disanalogies, see id. at 156-57. For one thing, though, Mercier and Sperber posit that some argumentation is intuitive: “We contend in particular that the arguments used in reasoning are the output of a mechanism of intuitive inference.” M & S (2011) at 58. [discuss this Q with HM]

53 The terms were originally used by Stanovich and West. See W. Stanovich & R. West, Individual Differences in Reasoning: Implications for the Rationality Debate?, 23 BEHAV. & BRAIN SCI. 645 (2000). They have subsequently become widespread and standard in the field. E.g., DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).


55 See Jonathan St. B.T. Evans, In Two Minds: Dual-Process Accounts of Reasoning, 7 TRENDS IN COGN. SCI. 454 (2003).

56 Note that System 1 is not typically viewed as a single system but as a complex set of cognitive subsystems that allow us to quickly process information about our environment using emotion, instincts, and previous learning. See Kahneman, supra note 53, at xx.
energy. System 2 is commonly thought to be a single, serially operating ability that allows us to do such things as process abstract concepts, deliberate, plan ahead, and consider and evaluate options. While System 1 may allow you to automatically and effortlessly identify opposing counsel when you enter a courtroom, it is System 2 that allows you to formulate the legal arguments you will use in court.58

Most dual process theories59 posit that System 2 monitors and corrects System 1 as needed.60 System 1 outputs, based on heuristics, are essentially “good enough” under most circumstances; under others, though, they may lead to suboptimal decisions.61 It is here that System 2 is thought to step up and override the initial judgment. According to Kahneman, “System 2 continuously monitors

\[57\] See id. at xx.
\[58\] Id. Note, too, that practice and expertise may convert what for most people is a System 2 process into a System 1 process. So, for example, [cite an example from Kahneman book].

Dual process models have come to dominate many related but distinct fields. “There is a wide variety of evidence that has converged on the conclusion that some type of dual-process notion is needed in a diverse set of specialty areas not limited to: cognitive psychology, social psychology, neuropsychology, naturalistic philosophy, decision theory, and clinical psychology. KEITH E. STANOVICH, RATIONALITY & THE REFLECTIVE MIND 16-17 (2011) (footnotes omitted). There are variations among these different dual process models, but they all make a basic distinction between what may be thought of as non-rational (System 1) and rational (System 2) processes. For a table comparing the various formulations, see id. at 18 (Table I.I).

Kahneman 2003. The following problem, drawn from a well-known experiment, is often used to illustrate the differences between System 1 and System 2 processes: If a bat and ball together cost $1.10, and the bat costs $1.00 more than the ball, how much does the ball cost? System 1 leads most people to intuit an answer of 10 cents, which is incorrect. System 2 is needed to recognize and “override” this error of intuition and to perform the analysis required to arrive at the correct solution of 5 cents ($1.05 + .05 = $1.10).

\[61\] For example . . .
the tentative judgments and intentions that System 1 produces.”

Thus understood, System 2 – reasoning proper – functions to correct mistakes that may arise through the heuristics of System 1 so that the individual can make “better” decisions.

The problem, as noted by countless sources, is that System 2 often fails to correct the errors of System 1; indeed, one might say that System 2 is host to its own suite of systematic biases and irrationalities that can often exacerbate these errors. As summarized by Mercier and Sperber, “[s]ince the 1960s, much work in the psychology of reason has suggested that, in fact, humans reason rather poorly, failing at simple logical tasks, committing egregious mistakes in probabilistic reasoning, and being subject to sundry irrational biases in decision making.”

According to Mercier and Sperber, it is difficult to uphold the notion that reason evolved to enhance epistemic outcomes when it in fact performs rather poorly at this function.

Experiments have by now revealed many systematic and widespread logical errors, reasoning flaws, and biases in human cognition. Some of the latter are implicit – non-conscious – biases that are more fruitfully understood as

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62 Kahneman 2003 at 710.
63 Note the Great Rationality Debate as described in Stanovich (2011) and the controversy between Meliorists and Panglossians over the normative evaluation of rationality.
64 M & S 2011 at 58 (citing sources).
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66 Note that some recent work has begun to focus on the minority of individuals who do not exhibit certain biases, or not to the same extent. There is some evidence that resistance to certain biases is correlated with general intelligence, [list factors]. Rachlinsky article and Stanovich book. See also Thomas Talhelm et al., Liberals Think More Analytically (More “WEIRD”) Than Conservatives, available at [ssrn cite].
belonging to System 1. Others, however, are biases and logical defects that infect conscious, explicit reasoning. In general, the experimental literature shows not only that “reasoning falls short of delivering rational beliefs and rational decisions reliably, but also that, in a variety of cases, it may even be detrimental to rationality.” Mercier and Sperber suggest that their theory predicts many of the most well documented cognitive biases and also that it “explains wide swaths of the psychological literature within a single overarching framework.”

In the main paper in which they lay out their theory, Mercier and Sperber address claims and findings in three main areas of experimental research: (1) logical and argumentative skills; (2) confirmation bias; and (3) motivated reasoning. Through a cross-disciplinary survey of the relevant experimental research in these areas, they attempt to demonstrate that an understanding of reasoning as having primarily an argumentative function most neatly explains the findings in each of these areas. Mercier asserts that “[t]he argumentative theory has been able to account for the reasoning performance reported by experiments

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68 M & S 2011 at 72.
69 Id.
in the psychology of reasoning and decision-making, developmental psychology, moral psychology, political psychology, and cross-cultural psychology.”

**Logical and Argumentative Skills**

Many studies have shown that individuals tend to make logical errors when solving relatively simple and straightforward problems. One early review of the literature found that 40% of participants incorrectly answered a problem based on the structure “if $p$ then $q$; not $q$, therefore not $p$.” In the well-known Wason selection task, which is another kind of basic logic problem, numerous studies over the past several decades have shown that many individuals perform quite poorly, even those who are highly educated.

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70 Hugo Mercier, *When Experts Argue: Explaining the Best and the Worst of Reasoning*, 25 ARGUMENTATION 313, 315 (citations omitted) (referencing several articles by Mercier, Sperber, and other cross-disciplinary scholars in these various fields).

71 This argument form is referred to in formal logic as *modus tollens*. *Id.* at 61 (citing JONATHAN ST. B.T. EVANS ET AL., HUMAN REASONING: THE PSYCHOLOGY OF DEDUCTION (1993); see also

72 *See* Peter C. Wason, *Reasoning*, in NEW HORIZONS IN PSYCHOLOGY (B.M. FOSS ED.) (1966). In the original version of this paradigm, “people were told that four cards each had a letter on one side and a number on the other and that the following rule applied to the cards: If there is a vowel on one side of the card then there is an even number on the other side of the card. The four cards displayed might have the values A (vowel), T (consonant), 4 (even number), and 7 (odd number) on their visible sides. The instruction was to choose only those cards that needed to be turned over in order to decide whether the rule was true or false.” The correct answer “is typically given by 10% or less of university students participating in such experiments.” Jonathan St. B.T. Evans, *Logic and Human Reasoning: An Assessment of the Deduction Paradigm*, 128 PSYCH. BULL. 978, 980 (2002).

73 Sperber and Girotto summarized the almost magnetic appeal to researchers of the Wason selection task thus: “Why has Wason’s selection task been, for almost 40 years, so extensively used in psychology of reasoning? Because, it has a simple, logically compelling solution, and yet, in most versions, most participants fail to solve it.” Dan Sperber & Vittorio Girotto, *Use or Misuse of the Selection Task? Rejoinder to Fiddick, Cosmides, and Tooby*, 85 COGNITION 277, 277
In recent years, however, there has been a movement within the field of psychology of reasoning to reevaluate the normative judgment that something must be wrong with human reasoning abilities if most of us cannot more accurately solve these abstract logical problems.\textsuperscript{74} In particular, research has repeatedly shown that contextualizing logical problems such that they become relevant to subjects’ experience often has a large effect on accuracy.\textsuperscript{75} Mercier and Sperber take this observation a step further to point out that an argumentative context dramatically increases performance on logic tasks. In addition, they note that when subjects are asked to produce arguments in such contexts, they frequently are able to come up with valid “if $p$ then $q$” type arguments.\textsuperscript{76}

Mercier and Sperber also address the related “idea that people are not very skilled arguers.”\textsuperscript{77} They acknowledge that if this common assumption were

\textsuperscript{74} See Evans 2002, supra note 72; [other CITES]. The challenge is to the assumption on the part of researchers that rationality is defined by logic, and therefore that logical errors are equivalent to irrationality. Evans refers to this question as “the Rationality Debate.” Id.

\textsuperscript{75} See, e.g., [CITES, including Tooby & Cosmides but also many others]. Evans, supra note 72, reviews this literature.

\textsuperscript{76} M & S 2011 at 61 (citing Pennington & Hastie, Reasoning in Explanation-Based Decision-Making, 49 COGNITION 123 (1993)).

\textsuperscript{77} Id.
accurate, “then the argumentative theory would be a nonstarter.” They address both the production of arguments and the evaluation of arguments, i.e., both sides of the speaker/listener equation. In terms of argument production, Mercier and Sperber review the existing studies with a view to how people would be expected to behave if they were trying to win an argument. From that perspective, they conclude that the studies support the proposition that people in fact are quite good at producing arguments.

With respect to the listener side, the authors survey the research findings and conclude “that when they are motivated, participants are able to use reasoning to evaluate arguments accurately.” When evaluating the strength of arguments and spotting logical fallacies in others’ statements, again the literature seems to show that context is important, and furthermore that an argumentative context boosts performance significantly in these areas. In sum, Mercier and Sperber assert that the studies in diverse fields show that “people can be skilled arguers, producing and evaluating arguments felicitously. This good performance

78 Id. at 61-62.
79 For example, some researchers had found that their subjects in simulated debate scenarios failed to anticipate and respond to counterarguments. Mercer and Sperber point out that in these studies there was no back-and-forth between the two sides and therefore the participants had no occasion to address counterarguments but on the contrary were behaving appropriately if their goal was to convince others and win the argument. They point out that in other studies, in which participants were required to challenge others’ positions, participants were in fact very adept at finding counterarguments against a claim. See id. at 62.
80 Id. at 61(citing literature review and multiple sources) (emphasis in original).
81 Id. See also M & S Epistemic Vigilance.
stands in sharp contrast with the abysmal results found in other, nonargumentative settings.”

**Confirmation Bias**

The term “confirmation bias” generally refers to the tendency to look for, notice, and give undue weight to evidence that supports one’s prior positions. It is “extensive and strong and […] appears in many guises.”

Though it can be implicit or explicit – and is well documented in both contexts – the term more usually “connotes a less explicit, less consciously one-sided case-building process. It refers usually to unwitting selectivity in the acquisition and use of evidence.”

Under the classical view of reason, in which a solitary thinker uses her higher faculties to reach the epistemically superior conclusion, confirmation bias is clearly both backwards and counterproductive.

There is a great deal of empirical evidence of confirmation bias; furthermore, it is evident across diverse groups and – unlike illogical reasoning – does not appear to be correlated with general intelligence.

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82 Id. at 62.
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85 See id. at xx; see also Daniel B. Klein, *I Was Wrong, and So Are You*, The Atlantic (Dec. 2011), available at http://www.theatlantic.com/magazine/archive/2011/12/i-was-wrong-and-so-are-you/308713/. This article is libertarian economist Klein’s mea culpa for an earlier and widely-read Wall Street Journal op-ed in which he reported his experimental findings that progressives and liberals were not as smart as conservatives and libertarians when it came to understanding economic issues. As it turned out, when the study questions were re-written to reflect progressive values (though the logical problems were similar), conservatives bombed the test and progressives did much better. His conclusion: “The proper inference from our work is not that one group is more enlightened, or less. It’s that ‘myside bias’—the tendency to
argue that this tendency to search out, pay attention to, and give greater weight to facts that support one’s positions (and, on the flip side, to seek evidence that disconfirms those with opposing views) is precisely what one would expect if the primary function of reasoning is to win arguments. Furthermore, they note that the poor epistemic and policy outcomes that are often said to arise out of confirmation bias dynamics occur in situations that are not “felicitous” argumentative settings.\(^{86}\) In contrast, “when reasoning is used in a more felicitous context – that is, in arguments among people who disagree but have a common interest in the truth – the confirmation bias contributes to an efficient form of division of cognitive labor” and has much less tendency to lead to poor outcomes.\(^{87}\)

Motivated Reasoning

Motivated reasoning takes confirmation bias a step further: not only do we selectively notice and give disproportionate weight to evidence that tends to support our views, we also interpret evidence in a way that distorts it so that it tends to support our views. There are many sub-issues in the literature on judge a statement according to how conveniently it fits with one’s settled position—is pervasive among all of America’s political groups. The bias is seen in the data, and in my actions.” On the subject of politics and logic, see also Thomas Talhelm et al., *Liberals Think More Analytically (More “WEIRD”) Than Conservatives*, available at [CITE].

\(^{86}\) The relationship between the ATR and normative epistemic and behavioral outcomes is somewhat murky and is perhaps the weakest aspect of the theory. The theory of epistemic vigilance and the view of the epistemic benefits of reasoning under the ATR are discussed infra at TAN xx-xx. In terms of adaptive benefits and the evolutionary story, the explanation of the epistemic benefits of reason under their view seems to flirt with group selection theory, which is quite controversial. [CITES].

\(^{87}\) M & S 2011 at 65 (emphasis in original).
motivated reasoning, but at its core the idea is that “[w]e often ignore new contradictory information, actively argue against it or discount its source, all in an effort to maintain existing evaluations.” Indeed, recent neuroimaging experiments have shown that different regions of the brain are activated during motivated reasoning than during pure logical reasoning.89

[MORE on motivated reasoning.]

Epistemic Vigilance and the Dialectical Nature of Reasoning

In the model presented by the Argumentative Theory of Reason, the role of the reasoner and the social dynamics of the reasoning process are quite significant. Thus, a speaker attempting to persuade listeners to adopt her position should be expected to search for and prefer arguments that support her position – in other words, to exhibit a strong confirmation bias.90 Under this view, such a feature of reasoning is not a design flaw but rather is “a wonderfully designed


89 See Drew Westen [political fMRI studies – get papers and additional cites from Drew].

90 “If reasoning is designed for arguing, it can be expected to easily produce such arguments – reasoning should display a strong confirmation bias. And it does: the confirmation bias may be the most prevalent and robust bias ever evidenced by psychologists.” Hugo Mercier, When Experts Argue: Explaining the Best and the Worst of Reasoning, 25 Argumentation 313, 315 (2011).
argumentative device,”\(^9^1\) but only – or at least more so – when it is used within an appropriate argumentative context.

The listener, on the other hand, should be expected to exercise “epistemic vigilance.”\(^9^2\) Because speakers and listeners\(^9^3\) have divergent interests,\(^9^4\) their cognitive mechanisms and behaviors should operate differently depending on their respective roles in any particular exchange. Epistemic vigilance refers to “a suite of cognitive mechanisms, targeted at the risk of being misinformed by others.”\(^9^5\) These include two broad categories of vigilance mechanisms: those that involve vigilance toward the source of information (the speaker) and

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\(^9^3\) In a recent paper on the topic of expert reasoning, Mercier seems to distinguish the “audience” as listener from actors who are in active debate or conversation with the speaker. [More – seems potentially relevant in FA context]. See Hugo Mercier, *When Experts Argue* (2011).

\(^9^4\) As Sperber et al. explain, “While the interests of others often overlap with our own, they rarely coincide with ours exactly. In a variety of situations, their interests are best served by misleading or deceiving us. It is because of the risk of deception that epistemic vigilance may be not merely advantageous but indispensable if communication itself is to be advantageous.” Id. at 360. And, as Sperber et al point out, “interaction among epistemically vigilant agents is likely to generate not only psychological but also social vigilance mechanisms.” Id. at 361. The evidentiary doctrines of impeachment and credibility are an institutional instantiation of epistemic vigilance, as are peer review and other academic and scientific processes. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478-79 (2011) (arguing that standard First Amendment doctrine and the truth-finding theory of free speech are ill-suited to the actual creation of new knowledge because the creation of knowledge demands formalized “social structures that are actually dedicated to the creation of new knowledge,” such as the academic and scientific conventions and values that are expressed and enforced in university and scholarly settings). In a forthcoming work I consider evidentiary doctrines that regulate impeachment, credibility, and the admissibility of scientific evidence in light of the Argumentative Theory and the theory of epistemic vigilance.

\(^9^5\) *Epistemic Vigilance* at 359.
vigilance toward the *content* of information (its substance). With respect to the source of information, much of this evaluation appears to be implicit, with experimental data suggesting that people tend to make automatic and immediate—and frequently inaccurate—judgments about others’ general trustworthiness as well as their honesty in a specific instance based on appearance and certain behavioral cues.\(^96\) In addition, people rely strongly on reputation and other indications of “character” or “personality” to attribute traits such as trustworthiness to people so as to assess their behavior on a particular occasion.\(^97\) Social context is also relevant to judgments of trustworthiness—a person’s assessment of the “benevolence” of a speaker is affected by his or her relationship (biological or otherwise) to the speaker as well as an assessment of the competence of the speaker in both as a general matter and specifically on the subject on which she is speaking.\(^98\)

In terms of reasoning as understood by the ATR, however, that subset of epistemic vigilance mechanisms that focus on content are more central to

\(^{96}\) *Id.* at 369-70 (citing sources); see also [CITES]. There is much experimental (and real world) data showing that individuals are especially poor at detecting deception and, furthermore, that experts are no better than laypeople in doing so, though their confidence level is higher. *See generally* Julie A. Seaman, *Black Boxes*, 58 EMORY L. J. 427, 437 n. 36 (summarizing the research). Sperber et al acknowledge the questionable usefulness of such “split-second judgments of trustworthiness” but note that at the very least the literature shows “that looking for signs of trustworthiness is one of the first things we do when we see a new face,” Sperber et al. at 370, thus presumably providing strong support for the existence of vigilance as an important cognitive mechanism.

\(^{97}\) This emphasis on personality over situational factors in predicting and interpreting behavior is generally referred to as the “fundamental attribution error.” There is much evidence that situational factors have a much greater influence on behavior than people generally suppose. *See Seaman, Hate Speech, supra* note xx.

\(^{98}\) Sperber et al., *Epistemic Vigilance*, at 369-73.
explaining the process of reasoning on the listener side. Primary among these is coherence checking: the comparison of communicated information against one’s existing beliefs. As summarized by Sperber et al., inherent in the interpretation of a communication is a process of checking the new information against available relevant perceptions and beliefs. Sometimes this process will result in inconsistencies between the communicated information and the listener’s own sensory perceptions, his prior substantive beliefs, or his beliefs about the reliability of the source. “When such inconsistencies or incoherences occur, they trigger a procedure wholly dedicated to such assessment [of one’s own beliefs].”

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99 It appears that Mercier and Sperber consider some of the mechanisms of epistemic vigilance to be distinct from “reasoning” as they define it, because for them reasoning is a very particular exercise in producing and evaluating arguments, i.e. reasons to accept a particular position. Thus, in their model (and according to their definition) “[r]easoning is used when other mechanisms of epistemic vigilance would have led to the rejection of some communicated information.” Mercier, Experts, at 320; see also Hugo Mercier, Our Pigheaded Core: How We Became Smarter to Be Influenced by Other People, in B. Calcott et al., eds., Evolution, Cooperation, and Complexity (201x). In other passages, however, they refer to reasoning as “a tool for epistemic vigilance, and for communication with vigilant addressees.” Experts at 378.

100 Epistemic Vigilance at 374-76. In addition, the authors posit that listeners may monitor the coherence of the speaker’s statements with other statements the same speaker has made, though this checking is probably more usefully seen as a species of source vigilance rather than content vigilance. See Mercier, Experts, at xx.

101 Epistemic Vigilance at 376. According to cognitive dissonance theory, any incoherence that arises during this process will cause uneasiness, with the result that the person will attempt to decrease the dissonance by bringing the dissonant cognitions into consonance. See generally Julie A. Seaman, Cognitive Dissonance in the Classroom: Rationale and Rationalization in the Law of Evidence, 50 St. Louis Univ. L.J. 1097 (2006) (reviewing theory and research on cognitive dissonance).
This is where the dialectical nature\textsuperscript{102} of reasoning becomes crucial. In contrast to the classical image of the solitary reasoner parsing information and arguments to come to an epistemically superior conclusion, the Argumentative Theory imagines a dynamic social process that considers the mind and behavior of both (or all) parties to the transaction. From the speaker’s perspective, there is a desire to persuade the audience but also an understanding that the audience will exercise some degree of epistemic vigilance.\textsuperscript{103} If, in the speaker’s assessment, the audience is likely to be resistant to her message either for reasons of source or content vigilance, she is going to have to come up with arguments – reasons – that might persuade the resistant listener to accept her position.\textsuperscript{104} In so doing, as noted above, she should be expected to marshal the evidence in favor of her position rather than to be evenhanded – in other words, to exhibit confirmation bias.\textsuperscript{105} The listener, for her part, may then assume the role of speaker to muster

\textsuperscript{102} This is my own term; the authors use the terms “dialogic” and “deliberative,” but “dialectic” seems to me quite descriptive of the reasoning process as they describe it because the actors are employing theory of mind to imagine the desires, behaviors, and likely reactions of those with whom they are in dialogue, thus influencing their behavior in a recursive and dynamic way.

\textsuperscript{103} The type and degree of vigilance exercised will depend on factors such as the salience and relevance to the listener of the information, the relationship of the listener to the speaker, etc.

\textsuperscript{104} \textit{Epistemic Vigilance} at 376; \textit{Experts} at xx. As the authors point out, “from the communicator’s point of view, a vigilant addressee is better than one who rejects her testimony outright,” because at least there is the opportunity for persuasion if she is able to muster convincing arguments: “the addressee’s reliance on coherence as a criterion for accepting or rejecting her claim may offer the communicator an opportunity to get past his defences and convince him after all.” \textit{Id.}

\textsuperscript{105} In addition, the speaker can take advantage of the listener’s coherence checking by explicitly reminding listeners of beliefs they hold that are consistent with her position (or that are inconsistent with a contrary position). \textit{See Epistemic Vigilance} at xx.
arguments against the first speaker’s position and in favor of her own or, having exercised epistemic vigilance, may be persuaded to adopt the first speaker’s position. If there is, in addition to these two individuals, a group or other audience, this dynamic will take on additional features, as considered in the following section.  

**Group Decision-Making**

The findings of the experimental literature on the benefits of a group context for good decision-making are somewhat mixed. The epistemic benefits of so-called “crowd wisdom” have gained much attention in recent years; much of the literature supports a general “truth wins” conclusion. Sometimes,

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106 In *Experts*, Mercier distinguishes between the parties to a debate and the audience, i.e. between the “listener/addressee” as described in the text above and more diffuse listeners who do not actively participate in the discussion. *See Experts*, at xx.

107 *See* Hugo Mercier & Helene Landemore, *Reasoning Is for Arguing: Understanding the Successes and Failures of Deliberation*, J. POLIT. PSYCH. (in press, copy on file with author) (summarizing the state of the literature thus: “Group deliberation sometimes homogenizes attitudes and sometimes polarizes them. Taking part in discussions can increase or decrease engagement in political activity. Decisions made in groups will sometimes be better and sometimes worse than decisions made by individuals . . . ‘the general conclusion of surveys of the empirical research so far is that taken together the findings are mixed or inconclusive’”) (citations omitted) (quoting D. F. Thompson, *Deliberative Democratic Theory and Empirical Political Science*, 11 ANN. REV. POLIT. SCI. 497, 499-500 (2008)).


109 However, certain conditions arguably must be satisfied for these benefits to accrue. *See* Helene Landemore, *Majority Rule and the Wisdom of Crowds: The Task-Specificity of Majority Rule as a Predictive Tool*, [CITE?] (outlining the theoretical conditions necessary under the Condorcet Jury Theorum, Mays Theorum, and other explanations for crowd wisdom); *but see* R. Scott Tindale, et al., *Good and Bad Group Performance: Same Process – Different Outcomes*, 15 GROUP PROC. & INTERGROUP RELS. (2012) (suggesting that the primary difference
however, groups small and large make much worse decisions than could have been made by their best individuals – lay or expert.\textsuperscript{110} They often succumb to dynamics of group polarization,\textsuperscript{111} cascade effects,\textsuperscript{112} and “group-think”\textsuperscript{113} that represent the opposite of the rational deliberation ideal. Indeed, these effects may be even worse when the group members are experts: Mercier remarks that “groups of experts are responsible for some of the worst decisions and the weirdest beliefs in history.”\textsuperscript{114}

Mercier and Sperber recognize these complexities. They propose, however, that the ATR fits very well with the observed results of the experimental data. First, with respect to problems that have a logical or mathematically correct answer, the research overwhelmingly demonstrates that groups working together perform much better than individuals in coming to a correct result, and furthermore that “debates are essential to any improvement of performance in group settings.”\textsuperscript{115}

\begin{flushleft}
\textsuperscript{110} Cass Sunstein has been a leading voice on this subject. \textit{See} CASS R. SUNSTEIN, \textit{WHY GROUPS GO TO EXTREMES} (2008); Cass R. Sunstein, \textit{Deliberative Trouble? Why Groups Go to Extremes}, 110 YALE L.J. 71 (2000); CASS R. SUNSTEIN, \textit{REPUBLIC 2.0} (2007); \textit{see also} [others].
\textsuperscript{114} \textit{Experts} at 320.
\textsuperscript{115} M&S 2011 at 63.
\end{flushleft}
One aspect of the experimental literature that is important to this discussion is the distinction between simple aggregation of individuals’ answers or predictions and answers reached following deliberation among group members. [Discuss distinction between crowd-sourcing and deliberation; note the hybrid case that seems to work very well; cite to Barb Mellers et al. recent studies].

On the other hand, when suboptimal outcomes emerge, they often are predicted and explained by the ATR. Group polarization, for example, is most extreme when discourse occurs within homogenous groups in which all members start out with the same belief. Under those circumstances, confirmation bias and motivated reasoning occur in an echo chamber. With nobody to exercise epistemic vigilance or to marshal arguments for contrary positions, the position of the group becomes more extreme. If it was incorrect or unwise to begin with, the process of group discussion will make it more extremely incorrect or unwise.

[MORE on group reasoning and deliberation – Landemore and Mullens papers; Mercier & Landemore]

III. RATIONAL ACTORS IN THE MARKETPLACE OF IDEAS

The rational actor model of decision making that has been undermined by the cognitive revolution is highly analogous to the model that embodies the central metaphor of the modern First Amendment: the marketplace of ideas. “The marketplace metaphor neatly encapsulates the assumptions of the rational audience ideal, and it remains the dominant metaphor of First Amendment
There has been much academic debate of late about the meaning and continued relevance of the marketplace metaphor, and indeed criticism of one stripe or another has been a consistent feature of free speech scholarship for decades. Yet the marketplace and closely related “search for truth” justifications of free speech protection remain firmly embedded in free speech doctrine and also in the public imagination as regards American free speech exceptionalism.

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116 Lidsky, supra note 24, at 802 n.8.
118 The classic treatment is Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L. J. 1 (arguing that “the present marketplace [of ideas] simply fine-tunes differences among elites while defusing pressure for change and fostering a myth of personal autonomy essential to the continued popular acceptance of a governing system biased toward the status quo.”). Professor Ingber anticipated many of the behavioral arguments about irrationality, but he rejected “as unworkable, dangerous, and inconsistent with the articulated purpose of the first amendment,” the idea that the solution, as in economic markets, was government regulation aimed at correcting these market flaws. Id. at 6.
119 A recent Westlaw search for “marketplace /3 ideas” in the Supreme Court database generated seventy-two separate cases, some with multiple mentions within opinions or across opinions, concurrences, and dissents. And this certainly undercounts instances of marketplace rhetoric, since the source of the theory, Justice Holmes’ Abrams dissent, itself would not have been captured by this search. See also Robert Post, Reconciling Theory and Doctrine in First Amendment Jurisprudence, 88 Cal. L. Rev. 2353 (2000) (arguing that the two primary theories of the First Amendment – the marketplace of ideas/search for truth theory and the democratic self-government theory – have given rise to conflicting doctrinal requirements and that the Court’s failure to specify the
Two recent articles have specifically considered the implications of cognitive psychology for the continued relevance of the marketplace metaphor and have come to opposite conclusions. In Nobody’s Fools: The Rational Audience as First Amendment Ideal, Professor Lyrissa Lidsky catalogues the Court’s extensive reliance on a “rational audience” model in First Amendment cases – which she equates with the marketplace of ideas model – and then considers whether the empirical case for audience irrationality counsels abandoning the model for one that is more realistic about the capabilities and behaviors of actual audiences. Though she makes a compelling case that the rational audience model is problematic as a descriptive matter, she ultimately

lexical primacy of one or the other of these theories accounts in large part for the “profoundly chaotic” state of First Amendment doctrine).

On American free speech exceptionalism, see, e.g., Robert C. Post, Community and the First Amendment, 29 ARIZ. ST. L. J. 473, 483-84 (1997) (“No other country allows such a breadth of defamatory, indecent, abusive, and outrageous utterances.”); [CITES].


Though his article is very much in the vein of those described in the text, I haven’t included it above because Professor Horwitz does not specifically address the question of the continued vitality or usefulness of the marketplace metaphor per se. Rather, his focus is on specific doctrines within the First Amendment and also on the potential for assigning decisions in particular areas to less biased institutional actors, depending on their relative susceptibility to particular cognitive biases that are likely to arise in these distinct types of first amendment cases.

See Lidsky, supra note 24.

Id. at 805-825.

Id. at 802 n. 8 (noting that “[t]he marketplace metaphor neatly encapsulates the assumptions of the rational audience ideal” and that she “[has] chosen to refer to the rational audience ideal, in addition to the more common marketplace metaphor, because this terminology brings out the often hidden or overlooked assumptions of the marketplace metaphor.”) (emphasis in original).
concludes that there are strong justifications for “clinging to what is clearly a flawed ideal.” 125 This conclusion is in stark contrast to that reached by Professor Derek Bambauer in *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas.* 126 After making a similarly strong case for the centrality of the marketplace of ideas metaphor in Free Speech jurisprudence, Professor Bambauer concludes: “we should discard the theory as an approach to communications regulation and adopt a more realistic approach that expressly considers why we value free discourse.” 127 After describing these two responses to the behavioral data as it relates to the marketplace of ideas model, this Part advances the alternative argument that – rather than retain the model despite its epistemic flaws or reject the model altogether – the ATR counsels retaining the marketplace model *because of* its value in furthering the search for truth.

Both Lidsky and Bambauer approach the question of the fit between Free Speech jurisprudence and human behavior through the lens of classical theories of reason, assuming that the goal is increased knowledge through the rational weighing of available facts. 128 According to the Argumentative Theory of Reason, however, epistemic benefits have a more indirect and rather complicated relationship to the practice of human reason. 129 If this alternative understanding

125 *Id.* at 835.
127 *Id.* at 709.
128 Both of these scholars assume that the behavioral critique is accurate in the sense that these various irrationalities actually do occur to some not insignificant degree. I also take this as a given and proceed to evaluate the resultant implications for free speech jurisprudence.
129 *See infra*, TAN xx-xx.
of reason is more accurate – at least as a descriptive matter – then the critique of
the marketplace metaphor takes on a different character. This Part sets out the
existing critiques and solutions and then considers two questions: (1) does the
cognitive/behavioral critique support retaining the prevailing First Amendment
assumption of rationality, as Professor Lidsky argues, or rejecting the marketplace
model, as Professor Bambauer argues? 130 And (2) If the latter, might the
argumentative theory of reasoning suggest an alternative way of understanding
the marketplace metaphor than those implied by the existing behavioral critique?

As noted above, Professor Lidsky argues that despite the significant
inaccuracies of the marketplace model’s assumption of a rational audience
comprised of individuals able to make sense of information and reason to optimal
decisions, First Amendment jurisprudence should continue to “cling[] to an
admittedly flawed ideal of audience rationality”131 for three main reasons. First,
democratic theory demands a certain level of public discourse, 132 and the rational
audience ideal is “important as an aspirational norm” that will potentially
encourage citizens to raise the level of public discourse and, at the very least,

130 Of course, another option would be to tweak the marketplace model rather than
rejecting it. This course is more akin to earlier critiques, which often analogized
the speech market to literal economic markets and argued for regulation to
manage the flaws that resulted from market failures such as externalities or
monopolization. E.g., [articles on externalities of pornographic expression;
monopoly power].
131 Lidsky, supra note 24, at 804.
132 Lidsky asserts that “if citizens are incapable of rational decision making
through participation in public discourse, they are equally incapable of self-
governance, the hallmark of democracy.” Id. at 805 n.23. [This is a very strong
claim – even stronger later in the paper. But other democracies function quite
well with much less speech protection – indeed, the U.S. stands alone in elevating
speech protection above (almost) all other values – cites.]
won’t penalize speakers for targeting their speech toward the more sophisticated members of the audience.\(^{133}\) In addition, the rational audience assumption – and the consequent difficulty of punishing speakers for arguably dangerous or harmful speech – “serve[] as a check on government’s increasingly powerful attempts to use its agenda-setting power to manipulate public discourse.”\(^ {134}\) And third, the rational audience assumption is consistent with respect for citizen autonomy, “an autonomy upon which a self-governing democracy demands.”\(^ {135}\)

In essence, then, hers is a thesis grounded in autonomy, self-governance, and checking rationales for retaining the marketplace of ideas model, with its attendant rational audience and more-is-better assumptions. Of course, these various free speech justifications are generally advanced as alternative theories of the First Amendment rather than as arguments in favor of the marketplace of ideas theory.\(^ {136}\) Marshaling these powerful “philosophical and pragmatic

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\(^{133}\) For example, in Cohen v. California, an assumption that audience members were not rational might have led the Court to hold that punishing Mr. Cohen for wearing his “Fuck the Draft” jacket to the courthouse was permitted under the fighting words doctrine. See id. at 807-09 (discussing Cohen as an example of the application of the “implied audience construct” of literary theory to First Amendment law); Cohen v. California, 403 U.S. 15 (1971).

\(^{134}\) Id. at 805.

\(^{135}\) Id. Professor Lidsky also mentions a fourth justification for the rational audience assumption, that of judicial economy. As she notes, the Court has relied on this rationale to reject the “actual effect of speech on real audiences,” reasoning that the necessary “expert-driven inquiry” would be burdensome and indeterminate and would chill a substantial amount of protected speech. Id. at 803 (discussing FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 469-70 (2007)). In her view, however, this justification standing alone “is an insufficient explanation for why First Amendment jurisprudence should continue to indulge the rational audience assumption and the more-is-better assumption.” Id. at 803.

\(^{136}\) As professor Lidsky notes: “[b]oth autonomy and democratic self-governance are pillars of First Amendment theory, though they are offered to justify the protection of expression generally, rather than the embrace of rationalism and the
justifications”¹³⁷ in favor of retaining the fiction of audience rationality, Professor Lidsky suggests that the rejection of the rational audience and more-is-better pillars would ultimately bring down the entire edifice: “To reject the possibility of a rational citizenry, therefore, is to reject the democratic ideal.”¹³⁸ Quite clearly, this is not an argument to retain the marketplace model in the service of epistemic benefits.

More specifically, the claim is that audience rationality must be presumed because the First Amendment audience is composed of the sovereign citizenry, and democratic theory must presume citizens rational. Otherwise, “[if a majority of citizens make policy choices based on lies, half-truths, or propaganda, sovereignty lies not with the people but with the purveyors of disinformation. If this is the case, democracy is both impossible and undesirable.”¹³⁹

The problem with this argument as a general matter is that it proves too little: The behavioral critique does not require – nor necessarily even assume – that most audience irrationalities are based on lies, propaganda, or disinformation. Some of the most startling findings of the cognitive revolution demonstrate that

¹³⁷ Id. at 838.
¹³⁸ Id. at 839.
¹³⁹ Id.
people often twist even accurate information to rationalize their prior positions, or that framing of options influences outcomes even where neither option could be said to have been inherently misleading. The argument condemning a democracy based on “lies, half-truths, and propaganda” thus cannot bear the weight of the audience rationality assumption from the perspective of the empirical findings of the behavioral critique itself.

More centrally, though, the main idea seems to be that the cure would be worse than the disease. Although audiences are demonstrably irrational and sometimes (often?) can be expected to make sub-optimal choices, the alternative of allowing government to dictate which choices are “rational” would endanger democracy. However, a rational audience assumption is neither required to

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140 In Tversky and Kahneman’s classic paper on framing effects, for example, they describe an experiment in which subjects were presented with the following problem:

Imagine that the United States is preparing for the outbreak of an unusual Asian disease, which is expected to kill 600 people. Two alternative programs to combat the disease have been proposed. Assume that the exact scientific estimates of the consequences of the programs are as follows: If Program A is adopted, 200 people will be saved. If Program B is adopted, there is a one-third probability that 600 people will be saved and a two-thirds probability that no people will be saved. Which one of the two programs would you favor?

A substantial majority of the subjects given this question chose Program A, which Kahneman and Tversky interpret as risk aversion – most people will choose the sure bet of saving 200 people over the less likely chance of saving all 600 people. However, a second version of the problem was presented to another group of subjects: “If Program A’ is adopted, 400 people will die. If Program B’ is adopted, there is a one-third probability that nobody will die and a two-thirds probability that 600 people will die.” Under this version of the question, which is logically identical to the first version, a majority of subjects choose Program B’. Kahneman 2003, at 702 (discussing A. Tversky & D. Kahneman, The Framing of Decisions and the Psychology of Choice, 211 SCIENCE 453 (1981)).
support this government distrust justification for a strong free speech principle, nor is it necessarily desirable. If government is to be disabled from enforcing its views of truth or from censoring advocacy of bad ideas, it might be better for citizens to be aware that they speak, listen, and decide at their peril rather than pretend or assume that their choices are rational.142

Professor Bambauer, in contrast, argues that the behavioral critique counsels abandonment of the marketplace metaphor in free speech jurisprudence. Because “[t]he marketplace of ideas does not describe how humans behave,” it “should . . . be discarded as a framework for decisions about regulating communications.”143 In his view, the marketplace model functions as a reflexive, misleading heuristic that may stand in for a host of legitimate and applicable reasons to limit speech regulation in particular contexts. Thus, notions of citizen autonomy, self-government, individual self-expression, distrust of government, and harm inherent in certain types of speech underlie actual decisions but are masked by the rhetoric of truth and rationality as embodied in the marketplace metaphor. “In a sense, the legal system itself suffers from a cognitive bias: it reflexively invokes the concept of the marketplace of ideas when ruling on

142 Cf. debiasing research – there is some evidence that making people aware of their unconscious biases can cause them to control for (at least some of) them. Evidence for the effectiveness of education and training as debiasing techniques for cognitive errors of judgment is mixed. For a discussion, see Jeffrey J. Rachlinski, Cognitive Errors, Individual Differences, and Paternalism, 73 U. Chi. L. Rev. 207, 219-24 (2006).
143 Bambauer, supra note xx, at 696.
communications regulation, rather than undertaking a more thorough and thoughtful analysis of the issues at hand.\textsuperscript{144}

There is much to commend this view.\textsuperscript{145} Surely in that institution that is supposed to epitomize decision based on reasons, preferring true reasons to empty rhetoric makes a great deal of sense. On the other hand, autonomy, self-realization, democracy, and distrust are enormously broad and malleable concepts; it is hard to imagine that they could do much work, even if contextualized, to decide concrete cases.\textsuperscript{146} Though people indeed often believe patently false ideas, commit logical errors, selectively rely on information that confirms their prior intuitions and beliefs, exhibit hindsight bias, believe that others are hypocrites while they escape this trap, follow the crowd though it may be wrong, and a engage in a host of other cognitive behaviors that don’t

\textsuperscript{144} Id. at 708.
\textsuperscript{145} I have advanced a similar argument in favor of analyzing the structural, law-making role of the jury rather than hiding behind the “black box” of the-jury-as-fact-finder rhetoric. \textit{See} Julie A. Seaman, \textit{Black Boxes}, 58 Emory L.J. 427, 487 (2008) (noting that “one way of understanding the metaphor of the black box is that it is grounded in faith that the “correct” or “true” answer will magically emerge though no reason must or even can be given” – this conception is remarkably similar to the invisible hand of the market).
\textsuperscript{146} As Professor Robert Post has argued, because there are several animating values that underlying American free speech jurisprudence, when they collide in a particular case it is necessary to have some idea of their lexical ordering so as to be able to decide the case in a principled fashion. \textit{See} Post, \textit{supra} note xx, at xx. \textit{But see} Seana Valentine Shiffrin, \textit{A Thinker-Based Approach to Freedom of Speech}, 27 Const. Comment. 283, 285 (2011) (taking as a starting point that “a decent regime of freedom of speech must provide a strong form of protection for political speech and, in particular, for incendiary speech and other forms of dissent, for religious speech, for fiction, art . . . and music, for diaries and other forms of discourse meant primarily for self-consumption, and for that private speech and discourse . . . crucial to developing, pursuing, and maintaining personal relationships” and arguing that “there should not be a lexical hierarchy of value between them”).
necessarily represent our best selves, we also can sometimes do a remarkably good job at making decisions. What might a First Amendment doctrine look like that supported - even nudged\textsuperscript{147} – people toward the latter while discouraging the former set of behaviors?

A. Truthiness\textsuperscript{148}

One of the most serious criticisms advanced against the marketplace of ideas metaphor in current free speech doctrine is what has been called “the First Amendment’s epistemological problem.”\textsuperscript{149} The central, defining trope of the marketplace of ideas metaphor is its faith that, in the end, truth will out. That true counsels are the remedy for false ones. That our democracy demands that we have faith that people will ultimately sift truth from falsehood, good ideas from bad. A fundamental premise of the behavioral critique of the marketplace metaphor and free speech jurisprudence rests on the assertion that these basic assumptions are simply wrong as an empirical matter.

It is discouragingly easy to compile a long list of patently false propositions – some silly and some quite consequential – that are embraced by large numbers of people. So, for example,

President Obama was not born in Kenya. President Bush did not have advance notice of the September 11 attacks. The predictions of astrology have neither scientific basis nor the capacity to forecast the future. AIDS was not created by white physicians and multinational pharmaceutical companies in order to reduce the size


\textsuperscript{148} Comedian Stephen Colbert famously coined the term in a segment that aired in October 2005.

\textsuperscript{149} Paul Horwitz, The First Amendment’s Epistemological Problem, 87 Wash. L. Rev. 445 (2012).
of African and African American populations. The Holocaust is not a myth fabricated by Zionists and their supporters.\textsuperscript{150}

And yet too many people believe all of these incorrect assertions.\textsuperscript{151} Part of the “epistemological problem” noted by Professor Horwitz is the Supreme Court’s failure to offer a consistent account of the relationship between truth, knowledge, and the First Amendment.\textsuperscript{152} Despite the prevalence of truth rhetoric in First Amendment jurisprudence, “an extremely important social issue about the proliferation of demonstrable factual falsity in public debate is one as to which the venerable and inspiring history of freedom of expression has virtually nothing to say.”\textsuperscript{153}

It has been recently noted that this truth-finding, marketplace rationale for protecting freedom of speech has become much less prominent in the scholarly literature.\textsuperscript{154} Frederick Shauer suggests that the decline of the marketplace theory in academic scholarship and the rise of alternative theories such as autonomy and democratic deliberation is the result of the bankruptcy of the conceptual and empirical claims of the marketplace metaphor.\textsuperscript{155} Nonetheless, it can still be said

\textsuperscript{150} Frederick Shauer, \textit{Facts and the First Amendment}, 57 UCLA L. REV. 897, 898 (2010).
\textsuperscript{151} It may be worth noting that compiling such a list is probably an exercise in the availability heuristic, and that there is certainly a much longer list of true facts that many or most people believe.
\textsuperscript{152} Horwitz, \textit{First Amendment’s Epistemological Problem}, at 453.
\textsuperscript{153} Shauer, \textit{Facts}, at 908.
\textsuperscript{154} Horwitz at 453; Shauer at 909-10.
\textsuperscript{155} Shauer, \textit{Facts}, at 908-09. There is no small irony in the fact that while scholars treat the marketplace of ideas model “as a relic that has not survived exposure to modern science,” in the public mass market people are extremely bullish on the idea. \textit{Id.} at 910.
by one of the most respected First Amendment theorists, in a book published just this year:

That the point of First Amendment doctrine is to ‘advance knowledge and the search for truth by fostering a free marketplace of ideas and an ‘uninhibited, robust, wide-open debate on public issues’” has become more or less a constitutional commonplace.156

Whereas Professor Bambauer explicitly advocates rejection of the marketplace metaphor in free speech jurisprudence, others scholars have conveyed their scorn through silence, or faint praise.157

The Argumentative Theory provides an alternative perspective on the relationship between the marketplace model and the epistemological problem. As described above, it predicts that people will be more likely to reason to factually correct answers under certain “felicitous” conditions, namely where they are able to engage in deliberation with others of diverse opinion, and where arguments in support of the correct answer are sufficiently accessible.158 This is a version of the marketplace of ideas, but it is a very particular version in which the market resembles more a bazaar than a supermarket, in which buyers and sellers actively negotiate in a dynamic and rough and tumble manner before ultimately coming to terms.

It is also an account that tends to reconcile the marketplace and deliberative democracy rationales for free speech protection, because it explains –

157 I would count Professor Lidsky in the “faint praise” category.
158 Where reasons can’t be marshaled in support of a position, individuals often take the position that is publicly supportable, even if it is not correct. This is known as “reason-based choice.”
and predicts – the conditions under which deliberation is most likely to lead to optimal epistemic outcomes.

[Discussion of ATR’s predictions for epistemic success of reasoning and explanation of how this ties deliberative democracy theories of free speech to marketplace/truth theories.]

IV. IMPLICATIONS FOR DOCTRINE

V. CONCLUSION

Two central insights emerge from an argumentative account of reasoning, both relevant to our thinking about the doctrine and theory of freedom of speech. First, the marketplace model, to the extent that it continues to be relevant, should be reframed so as to incorporate the notion that certain behaviors heretofore viewed as irrational are instead predictable features of human reason and its argumentative nature. Second – and more significant – the ATR emphasizes that reason is a social practice. Perhaps it goes without saying that the First Amendment, in regulating government intrusion upon communication, is primarily concerned with a social practice. But highlighting its social character and the importance of deliberation to normative outcomes may provide a window into some of the more opaque doctrinal problems.

Ironically, at the very moment that many First Amendment scholars, as well as many political scientists, have abandoned epistemic rationales, the Argumentative Theory of Reason offers good cause to give truth another look as a
basis for protecting freedom of speech. Examined through the lens of the Argumentative Theory, the conflicting behavioral data on individual and group decision-making supports the view that the ideal epistemic context is deliberation\textsuperscript{159} between or among cognitively diverse\textsuperscript{160} individuals, with dissent protected and indeed promoted in the service of better decisions. The marketplace of ideas may indeed be a place where truth is better realized, so long as these conditions are protected and promoted.

\textsuperscript{159} Deliberation here is understood in classic terms as “an exchange of arguments for or against something.” Mercier & Landemore at 8 (\textit{quoting} ARISTOTLE, I RHETORIC 2).

\textsuperscript{160} The notion of cognitive diversity has been elaborated by Hong and Page. \textit{See} [CITES]. It refers to “the fact that people make predictions based on different models of the way the world works or should be interpreted.” Helene Landemore, Majority Rule and the Wisdom of Crowds: The Task-Specificity of Majority Rule as a Predictive Tool, at 15.