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Toward a Dialogistic Competition Policy

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Introduction

The Japanese Antimonopoly Act, which was modeled on the U.S. anti-trust laws, has collected over 60 years of experience. The fact that our law was influenced by the U.S. antitrust laws in its initial transplant does not ensure that it has developed as impressively as its origin. Institutional differences between nations, stages of economic development, and other factors shape and influence how different jurisdictions develop their law over time. This paper focuses on a specific element that discourages the development of the antimonopoly policy in Japan: the poor mutual understanding and diversity-averse “dialogue” within the antitrust community, which includes economists and lawyers.²

Disagreement arises in any legal disputes or policy debates. Disagreement has its own merits. There is no progress without criticism. However, the current exchanges of opinions surrounding the Japanese antimonopoly law are not productive debates: they preach one view but ignore others. Such random throws guide us nowhere.³ Even in the best

² Throughout this paper, I use the words “competition law/policy” and “antitrust law/policy” interchangeably, and will only use “antimonopoly law/policy” when I wish to limit my argument to the context specific to the Japanese law.

³ Disagreement could turn to hostility, which distorts productive discussions between sincere minds. When we perceive others who disagree with us as biased, the preference for an aggressive response is increased. See Kathleen Kennedy & Emily Pronin, *When Disagreement Gets Ugly: Perceptions of Bias and the Escalation of Conflict*, 34 *Pers. Soc. Psychol. Bull.* 833 (2008). This perception of bias is asymmetric, in that we perceive dissenters as biased but perceive ourselves as objective. Asymmetric perception is mediated by naïve realism, introspection illusion, and self-enhancement. See Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 *Trends Cogn. Sci.* 37 (2006).

Hostility can ultimately turn members of minorities into activists, who eschew deliberation with people wielding power or with people who they believe will perpetuate structural injustice. Instead, activists take other actions that they find more effective in conveying their criticism, such as picketing, leafleting, and boycotts. See Iris Young, *Activist Challenges to Deliberative Democracy*, 29 *Polit. Theory* 670, 673 (2001). As Young argues, “processes of engaged and responsible

networks, I personally have experienced this type of poor communication and bad dialogue between professors of law and professors of economics.

My aim in this paper is twofold. First, I will specify the ways in which we can better understand others who disagree with us on the same issue or the same piece of information. If we speak with someone who has a different theory from ours, it is difficult to understand what she or he says without knowing her or his underlying theory. If we do not understand what the other person says, his or her opinion is easily neglected and the exchange of opinions will stop, thus undermining further debate and interaction; this is particularly damaging for academic progress. Though this answer may be intuitive, there is a structural problem installed in our perceptions and reasoning. Different people sometimes generate different hypotheses from the same set of information. Through selective information processing, people sometimes examine hypotheses inadequately. Secondly, focusing on the dialogue between antitrust lawyers and economists, I will suggest an interpretative manipulation that would make it easier for them to engage in a more interactive dialogue⁴ despite disciplinary differences.

The types of disagreement this paper covers are those between the majority and the dissenting judges in a judicial panel, between lawyers and economists, between a competition agency and the reviewing courts, and between majority and minority scholars. On the other hand, I will not discuss disagreements between the legislature and other branches, be-

democratic communication include street demonstrations and sit-ins ...” Id. at 688.

⁴ I define an interactive dialogue as one which advances the accumulated knowledge for at least some participants through the exchange of diverse and new opinions. In other words, a dialogue that improves the knowledge of some participants will qualify as interactive. New opinions include new learning for some members (e.g., for people from different disciplines) and may not have to be historically novel. This definition may diverge from common notions because it only requires a one-way influence and an improvement of the knowledge as a whole. However, a mutually improving dialogue is too restrictive to be expected in practice.

cause legislative acts are not fully analyzed in the framework developed in this essay.⁵ In other words, topics of antitrust enforcement such as sanctions and institutional design are largely out of my focus, because legislatures have much more to say about these topics than about substantive standards, on which they need expertise to advocate legislative change.

Part I introduces a framework for understanding the processes of legal decision making. Based on the well-known concept of “theory-laden” and related psychological studies on motivated reasoning and confirmation bias, I will sketch a psychological framework to explore how different people reason differently even when they face the same set of information. Part II extends the analysis of these psychological mechanisms, by clarifying their common character and by describing the most intractable kind of disagreements. Given that different ways of selective information processing are used in different disciplines, Part III proposes a method to encourage a more interactive dialogue when we see interdisciplinary disagreements between lawyers and economists.

I. Understanding Others Who Disagree with Us

Suppose you are uncomfortable with a specific Competition Authority’s decision, a judgment of an antitrust court, commentators’ criticism of a decision with which you agree, or commentators’ endorsement of a specific conclusion with which you disagree. How could you better understand the opinions of others who disagree with you? Better understanding here does not mean that you would change your mind, but it means that you would realize where they diverged from your reasoning.

⁵ Decision making processes in the legislature are affected by confounding factors other than inter-branch disagreements, and therefore need different kinds of materials if their mechanisms are to be examined. For a careful analysis of law-making in the U.S. Congress, see Jeffrey Rachlinski & Cynthia Farina, *Cognitive Psychology and Optimal Government Design*, 87 *Cornell L. Rev.* 549 (2002). I will therefore only mention legislative acts in passing. See *infra* note 36.

A natural way to understand the basis of disagreement is to learn how people process information and come to their conclusions in legal decision making.

Here I focus on three types of mechanism that lead to different conclusions for different people facing the same legal issue and information. First, people who have different theories or policy preferences on anti-trust will process information differently and will come to different conclusions. This is the lesson of theory-ladenness. The other two types are psychological. Motivated reasoning and confirmation bias could lead agencies, courts and lawyers to generate different factual stories about a case and to test factual and legal hypotheses differently, thus causing disagreements between them.⁶

A. Theory-Ladenness and Different Underlying Theories

Theory-ladenness is an idea about our observation. Our observation (we see x), or our understanding of what we observe (we see that x is a human being) is determined by our underlying theory.⁷ As Norwood Hanson put it, "...seeing is a 'theory-laden' undertaking. Observation of x is shaped by prior knowledge of x."⁸

William Berwer and Bruce Lambert provided a clear picture of the

⁶ I do not intend to draw a comprehensive picture of how legal decisions are made. For example, I will not refer to group polarization where like-minded people go to extremes, which is obviously relevant for both administrative agencies and higher courts. See, e.g., Cass Sunstein & Thomas Miles, *Depoliticizing Administrative Law*, in *IDEOLOGY, PSYCHOLOGY, AND LAW* 729, 733-734 (Jon Hanson ed., 2012). Since my focus is on the decision output of a group rather than the intra-group process leading to the ultimate conclusion, I treat a group (or sub-groups within a larger group: the majority and the minority) as united with one voice. Basically, I will concentrate on the intrapersonal processes of legal decision making.

⁷ James Ladyman, *UNDERSTANDING PHILOSOPHY OF SCIENCE* 110-114 (2002).

⁸ Norwood Hanson, *PATTERNS OF DISCOVERY* 19 (1958).

mechanism behind theory-ladenness.⁹ According to them, our perception is determined by the interaction between top-down theory of information and bottom-up sensory information. When bottom-up information is ambiguous, top-down information has a strong impact on our perception. On the other hand, when bottom-up information is strong, it will override top-down information.¹⁰

Let us take me, speaking in a conference room, as an example. It should be quite obvious to the audience that I, the subject making sounds before the audience, am a human being. No one would think that I am a Martian, an alien from Mars. In this case, the information which the audience receives from my external behavior and appearance is obvious enough. Then, think of another situation. Suppose that I come out from nowhere into a spacecraft, and say hello to the crew. In this situation, the information that the crew receives increases the ambiguity. How could a human being pop into a spaceship? However, if the crew somehow concludes that I am a human being, and if they justify their belief by the observation that I am not green, then that is a theory-laden inference.

Theory-ladenness has immediate applications in competition law. I will give two examples from U.S. antitrust practice. First, U.S. antitrust case law has developed a quick look rule of reason analysis towards horizontal agreements between competitors. A restriction on the number of college football games broadcast on TV was prohibited in the NCAA case.¹¹ In the Indiana Federation of Dentists case, dentists' refusal to submit X rays to dental insurers was held to be an unreasonable restraint

⁹ William Brewer & Bruce Lambert, *The Theory-Ladenness of Observation and the Theory-Ladenness of the Rest of the Scientific Process*, 68 *Philosophy of Science* 176 (2001).

¹⁰ *Id.* at 179-184. Recent research on person construal shares the basic framework in that ambiguity is the key situational factor mediating this mechanism. See Jonathan Freeman & Nalini Ambady, *A Dynamic Interactive Theory of Person Construal*, 118 *Psychol. Rev.* 247 (2011) (arguing that our higher-order social cognition dynamically interacts with lower-level perceptual processing in construing other people).

¹¹ *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

of trade because this information was desired by the insurers to determine whether a particular treatment was cost justified.¹² In these cases, the Supreme Court concluded that these practices violated antitrust laws (Section 1 of the Sherman Act and the corresponding Section 5 of the FTC Act) without a full analysis of market power.

As later clarified by the Supreme Court in the California Dental Association case,¹³ the quick look rule of reason analysis is justified when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”¹⁴ On the other hand, the Court declined to apply this quick look rule of reason analysis to the instant case, because “there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects”¹⁵ These holdings make it clear that theories and observations (record evidence and findings of fact) are correlated in just the way taught by theory-ladenness. Compared to the quick look rule of reason analysis, *per se* illegal rules seem to be more theory-laden.

The other example can be found in the 2010 Horizontal Merger Guidelines, where five types of evidence of adverse competitive effects (which are referred to as enhancing market power) are classified in paragraph 2.1.¹⁶ Of these five types of evidence, the first two types (actual observed price effects in the relevant market or similar markets) are information with relatively little ambiguity, as long as their methodological ambiguity is cleared by having internal validity. On the other hand, the remaining three types (market shares and concentration; substantial head-to-head competition; disruptive role of a merging party) need theories in order to understand that they have something to say about adverse competitive effects. The approach of these Guidelines shows that the

¹² *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

¹³ *California Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

¹⁴ *Id.* at 770.

¹⁵ *Id.* at 775 n.12.

¹⁶ Dep’t of Justice & FTC, *Horizontal Merger Guidelines* (2010).

agencies apply different analytical tools to reflect different levels of ambiguity in the available evidence.

If theory-ladenness holds true in the antitrust setting, it is easy to see how we can better understand others who disagree with us. The key is the different underlying theories held by others. I define theories very broadly as “propositions for understanding (affirmatively or negatively) the world and phenomena around us.” As this loose definition shows, underlying theories, unlike scientific theories, need not require predictions and their empirical testing. Otherwise, normative theories like specific policy preferences, theories of justice, or religion will fall out from my analysis, even though these are frequently at work beneath deep disagreements.

1. Articulated Underlying Theories

Disciplines have different underlying theories for analyzing and understanding different aspects of the world. Different underlying theories of law and economics can usefully be explained by Daniel Kahneman’s two concepts of utility. Kahneman distinguishes four types of utility, but two of them concern my analysis here: “decision utility” and “experienced utility”. Decision utility means the weight assigned to the desirability of a decision, which is inferred from observed choices.¹⁷ On the other hand, experienced utility refers to the measure of the hedonic experience of an outcome. Lawyers typically starts their analyses by observing experienced disutility, whereas economists typically assign utility by inferring it from observed choices such as prices and quantities transacted. How lawyers and economists identify “bad” results or situations that should be addressed depends on their different underlying theories of

¹⁷ See Daniel Kahneman et al., *Back to Bentham? Explorations of Experienced Utility*, 112 Q. J. Econ. 375 (1997). Decision utility is a revealed preference notion. Daniel Kahneman & Richard Thaler, *Economic Analysis and the Psychology of Utility: Applications to Compensation Policy*, 81 Am. Econ. Rev. 341 (1991).

utility.

The most salient example that shows different underlying theories of law and economics in antimonopoly law is found in the prohibition of the abuse of a superior bargaining position, which is defined in Article 2(9)(v) of the Antimonopoly Act.¹⁸ The 2009 Amendment to the Antimonopoly Act enhanced the sanctions against abuse of a superior bargaining position by making it subject to a mandatory surcharge, in addition to a traditional cease and desist order by the Japanese Fair Trade Commission (JFTC). The amount of the surcharge is fixed at one percent of the sale (or purchase) volume for a maximum of three years, and the sale/purchase amount is based on the transactions with those who were abused.¹⁹ Despite these statutory limitations, the amount of the surcharge will generally be enormous, and this is expected to be one of the most controversial areas in Japanese antimonopoly law practice.

It is not necessary for alleged abusers to have a dominant market position. If those alleged to have been abused are heavily dependent on the transactions with the alleged abuser, the latter's opportunistic conduct is prohibited. Typical examples of abusive conduct include demands by retailers that suppliers take retailers' inventory on-site or suppliers pay sponsorship money, when these demands contribute nothing to the suppliers' benefits, and demands that suppliers sell below cost.²⁰ Japanese lawyers generally favor prohibiting these practices (particularly those

¹⁸ Abuse of a superior bargaining position is prohibited by Article 19. An English version of the Japanese Antimonopoly Act can be accessed at the Japan Fair Trade Commission's website.

¹⁹ See Article 20-6.

²⁰ Purchasing below the supplier's cost is exploitative pricing by the buyer, and similar arguments about a seller's excessively high prices hold. For a balanced analysis of exploitative high prices, see Bruce Lyons, *The Paradox of the Exclusion of Exploitative Abuse*, in *THE PROS AND CONS OF HIGH PRICES* 65 (2007) (arguing that exploitative high prices should be reached when structural entry barriers or historically unchallenged exclusionary practices exist, with suggestions of multiple remedies). Note that concerns against regulating exploitative prices would not hold for non-price abuses in the text.

who are not antitrust specialists). Increasing support for this policy from the legislature is evidenced by the fact that the sanction against these abuses was increased most in the latest amendment. For economists, on the other hand, prohibiting such opportunistic behavior is hard to justify, since it is unreasonable to keep an abusive relationship in the first place, without expecting increased welfare for both sides in the future. Thus, economists and lawyers observe the alleged abuser's conduct differently, based on their different theories. Theory-ladenness also teaches that, for as long as lawyers assume that this practice is obviously bad conduct, a theoretical reexamination of the underlying theories will not be made, even though abuse is an ambiguous concept with inevitable line-drawing. One way for lawyers to start reexamining their underlying theories (assuming they wish to), is for them to rely more on empirical arguments showing that regulating the abuse of superior dominant positions would contribute to a more competitive environment.²¹

The above examples have identified different underlying theories of anticompetitive effects, law, and economics. The California Dental Asso-

²¹ Seeking even indirect evidence from existing research is difficult, as expected. Studies on relational governance have emphasized the role of relational norms (such as trust) in attenuating opportunism. See, e.g., Laura Poppo & Todd Zenger, Do Formal Contracts and Relational Governance Function as Substitutes or Complements?, 23 *Strat. Mgmt. J.* 707 (2002); Anandasivam Gopal & Balaji Koka, The Asymmetric Benefits of Relational Flexibility: Evidence from Software Development Outsourcing, 36 *MIS Quarterly* 553 (2012). Based on this line of research, we could treat inter-organizational trust as a proxy for reduced opportunistic behavior. One study surveyed transactions between manufacturers and suppliers, and analyzed the impact of interpersonal trust on lagged performance (that is, competitive advantage and joint profit performance, among other things, one year later). They argued that trust had a significant, positive effect when opportunism was low. See Sandy Jap & Erin Anderson, Safeguarding Interorganizational Performance and Continuity Under Ex Post Opportunism, 49 *Management Sci.* 1684 (2003). We can interpret this finding as suggesting that transactions with less abusive behavior will promote competition. Economists might be dissatisfied with the methodological aspects such as the seven-point Likert scale, but my point is that here is a valuable clue to start with and develop from.

ciation case cited above is an example of the majority and the dissent judges perceiving the level of ambiguity (or whether the case was an easy one or not) differently. That led them to put different weights on the underlying theories of anticompetitive effects, which ultimately separated their different underlying theories in depth and novelty.

2. Discovering Underlying Theories

A recent controversial monopolization case in Japan offers another example. In the JFTC case against the JASRAC (Japanese Society for Rights of Authors, Composers and Publishers),²² which continues to be a dominant collective rights organization in Japan, the JFTC reviewed and vacated its cease and desist order against the JASRAC. The JFTC had initially ordered the JASRAC to cease and desist from a specific way of collecting royalties (a way that does not reflect the proportion of works controlled by the JASRAC), because it discouraged competing collective organizations from entering or prospering in the market. After an administrative hearing, the JFTC vacated its order. The complaint counsel seemed to have believed that this was an easy exclusionary case with few or no confounding factors, whereas the majority of the Commission²³ thought otherwise and concluded that there was insubstantial evidence to support its claim, finding that the entrant's unpreparedness was the proximate cause of its marginalized position.

The complaint counsel's overconfidence was accompanied by a poor examination of its theory of exclusion. The complaint counsel argued that since the JASRAC had been the dominant collective organization with blanket licenses, broadcasters (licensees) would avoid paying extra royalties to competing entrants.²⁴ However, the problem with this proposi-

²² Shadan Hōjin Nihon Ongaku Chosakuken Kyōkai ni taisuru Ken (June 12, 2012).

²³ One Commissioner did not sign the decision.

²⁴ The interesting twist here is that another aspect of collecting fees for blanket licenses has been challenged as an exploitative abuse in Europe. *Kanal 5 v. STIM*.

tion is that we do not know the counterfactual competitive world, unless we first specify an alternative competitive way of collecting royalties.²⁵ In other words, we do not know the anticompetitive effect without first specifying the remedy to be imposed. On the other hand, the Commission spent little ink on articulating when specific conduct is exclusionary, thus failing to clarify its underlying theory. By keeping this obscure, the Commission in effect held (though implicitly) that only when entrants exited from the market, did the alleged conduct qualify as exclusionary conduct.

The lesson of the JFTC case, for the purpose of this essay, is that underlying theories are not always clarified or well developed, and thus we have to discover and analyze them so that we can better understand others' legal reasoning. In the next section, I will describe other mechanisms working behind disagreements that are different from, but still somewhat similar to, theory-ladenness.

B. Motivated Reasoning and Confirmation Bias

Let us delve a little deeper into the legal reasoning process. There are two mechanisms that have been adapted from psychology to explain legal reasoning: motivated reasoning and confirmation bias.²⁶ Motivated reasoning is reasoning in which people motivated to arrive at a particular conclusion will search their memories and construct beliefs that could

C52/07 [2008].

²⁵ I benefited from discussion with Ryoko Oki on this point.

²⁶ Motivated reasoning has frequently been referred to in research on legal decision making, but only one article, as far as I know, treats motivated reasoning and confirmation bias with equal weight. See Barbara Spellman & Frederick Schauer, Legal Reasoning, in *THE OXFORD HANDBOOK OF THINKING AND REASONING* 719, 720-721, 723 (Keith Holyoak & Robert Morrison eds., 2012) (referring to motivated reasoning and confirmation bias to explain a legal realist's view of judging). See also Antony Page, Unconscious Bias and the Limits of Director Independence, 2009 U. Ill. L. Rev. 237, 262-277 (2009) (modeling corporate directors' decision making).

support their desired conclusions.²⁷ This selective information processing, however, is constrained by prior knowledge and the plausibility of the given information.²⁸ People draw the desired conclusion only if they can muster up the evidence necessary to support it.²⁹ In other words, motivated reasoning is triggered to the extent that the subjects being judged have ambiguity and allow different criteria to be selected by different people.³⁰ Great similarity is detected between motivated reasoning and theory-ladenness. If people have different policy preferences as their desired goals (which are also classified as underlying theories), they could generate different factual beliefs, just as underlying theories have a great impact on observations.³¹ In such a situation, knowing others' policy preferences (directional goals) is important.

Confirmation bias is the phenomenon where people tend not to seek evidence contradicting the hypothesis which they are testing. It usually refers to "unwitting selectivity in the acquisition and use of evidence."³² Even when people have no material and personal stakes in the outcome, people "tend to look for and examine information that would fit the

²⁷ Ziva Kunda, *The Case for Motivated Reasoning*, 108 *Psychol. Bull.* 480, 483 (1990). I limit my treatment to reasoning driven by directional goals and do not mention accuracy-driven reasoning.

²⁸ *Id.* at 485-486, 490.

²⁹ *Id.* at 482-483.

³⁰ Daniel Molden & Tory Higgins, *Motivated Thinking*, in *THE OXFORD HANDBOOK OF THINKING AND REASONING* 390, 398 (Keith Holyoak & Robert Morrison eds., 2012). See also Joshua Furgeson & Linda Babcock, *Legal Interpretation and Intuitions of Public Policy*, in *IDEOLOGY, PSYCHOLOGY, AND LAW* 684, 689 (Jon Hanson ed., 2012)(arguing that there will be more latitude for motivated reasoning where there are legitimate arguments on both sides and multiple plausible interpretations – where the cases are hard cases).

³¹ Recent research on motivated reasoning in policy areas has put more emphasis on discrepancies in factual beliefs. See, e.g., Dan Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 *Harv. L. Rev.* 1, 24-25 (2011).

³² Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 *Rev. Gen. Psychol.* 175 (1998).

proposition being tested more than information that would contradict it.”³³ In this respect, confirmation bias is clearly distinguished from motivated reasoning. However, motivated reasoning and confirmation bias have frequently been taken to be similar phenomena, and the literature on one side has been cited as the empirical support for propositions on the other; I will explain the reason for this later. Despite this general tendency, I distinguish these two mechanisms, following those who emphasize the unwitting aspect of confirmation bias.

This essay imposes further classifications on these mechanisms: I characterize motivated reasoning as “motivated hypothesis generation,” and confirmation bias as “unmotivated/motivated hypothesis testing.” Hypotheses in this context include both factual and legal hypotheses – that is, hypotheses about causal relations or risks, as well as hypotheses that a specific mode of legal interpretation or legal reasoning is sound.³⁴ Since hypothesis generation usually precedes hypothesis testing, this distinction clarifies the different stages of legal decision making. Take, for example, decision making by the antitrust agencies with an adjudicative function. Factual hypotheses are generated gradually in the investigation stage, are tested in the administrative trial, and are further tested

³³ Thomas Gilovich & Dale Griffin, Judgment and Decision Making, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 542, 546 (Susan Fiske et al. eds., 5th ed. 2010). Testing a hypothesis about a target person’s extroversion/introversion is an example where participants have no personal or material stakes in the answer. See Mark Snyder & William Swann, Hypothesis-Testing Processes in Social Interaction, 36 J. Pers. Soc. Psychol. 1202 (1978).

³⁴ It has been argued that motivated reasoning influences the legal interpretation of statutory texts as well. That is, policy preferences (desired conclusions) form the bases of specific methods of interpretation. See Furgeson & Babcock, supra note 30 at 686-687. As Chemerinsky argued, a court’s decision to avoid judgment and defer to the political process is itself a value choice. See Erwin Chemerinsky, The Vanishing Constitution, 103 Harv. L. Rev. 43, 100 (1989). However, since there is currently little empirical evidence on motivated legal hypothesis generation when compared to the available evidence on motivated factual hypothesis generation, I focus my argument in this essay on factual hypothesis generation when referring to motivated reasoning.

by the reviewing courts.³⁵

1. Different Facets of Psychological Influence

Given this ammunition, we can now depict three patterns of legal decision making process where motivated reasoning and/or confirmation bias influence the ultimate conclusion.

(a) Factual Hypothesis Generation Precedes Policy Preference

In this case, a factual hypothesis is generated in an unmotivated way, but based on this new hypothesis, a policy preference is produced (or replaces an older one). For example, new learning about the competitive effects of certain practices, starting from the Chicago School antitrust to game theory, has changed the antitrust agencies' enforcement priority, by replacing the old factual hypotheses.³⁶ In the factual hypothesis generation stage, people are initially unmotivated, but once a specific policy preference is produced, this preference will lead to selective information processing when testing the hypothesis. Therefore, this case involves "motivated hypothesis testing." Factual hypothesis in this case can also form the conventional wisdom or a rule of thumb adopted by agencies and courts.

³⁵ In hard cases, it may be hard for some members of the agencies to generate factual hypotheses in the first instance. In such a case, minority members of the decision-making body may have to test a hypothesis given by the majority members.

³⁶ Legislative acts based on disagreements with other branches will most likely fit this pattern of decision making. For example, the backlash against the U.S. Supreme Court increased the policy preference for the constrained court, which was reflected in new state law provisions and two Federal laws (the Clayton Act and the Federal Trade Commission Act) that toughened antitrust policy. See Rudolph Peritz, *COMPETITION POLICY IN AMERICA*, 1888-1992 63-65 (1996). A recent salient example outside antitrust policy is the impact that the Fukushima nuclear accident in March 2011 had on the preferences for nuclear energy policy inside and outside Japan.

(b) Policy Preference Precedes Hypothesis Generation

People who have specific preferences about a desirable policy may generate factual hypotheses that are favorable to their desired goals, and tend not to seek evidence that would contradict these hypotheses when testing them. In this case, both “motivated hypothesis generation” and “motivated hypothesis testing” occur. We now see why motivated reasoning and confirmation bias have frequently been treated as intertwined phenomena. Motivated reasoning is likely to induce motivated confirmation bias, led by directional goals.

Let me give an example. In hard-core cartel cases, which are one of the priorities of antitrust enforcement, agencies led by this preference could generate self-serving factual hypotheses and examine these hypotheses self-servingly. In a 2011 bid-rigging case, the JFTC alleged that Ōmori Kōgyō joined the conspiracy later on, but the JFTC barely examined whether the evidence it produced could satisfy the statutory requirements. The JFTC knew that this case involved ambiguity because it cited numerous indirect evidence of communication, including evidence that core members of the conspiracy transmitted the price to be bid by Ōmori Kōgyō, though Ōmori Kōgyō never won a contract and just cooperated with the other conspirators. The JFTC concluded by finding that Ōmori Kōgyō joined the conspiracy, but lost its case in the Tokyo High Court.³⁷ This case is explained as one in which motivated reasoning led the agency to insufficient reasoning.

(c) Unmotivated Hypothesis Testing

Decision makers in this pattern do not generate factual or legal hypotheses nor do they hold specific policy preferences in advance. For example, generalist judges in the high courts will review JFTC decisions in Japan. In such a situation, even when these judges are free from prejudice, they may ignore evidence which contradicts the hypothesis being tested. This is what confirmation bias teaches.

³⁷ Ōmori Kōgyō v. JFTC, 2143 Hanrei Jihō 76 (Tokyo High Court, Jun. 24, 2011).

2. Limitations and Caveats

On the three patterns of legal decision making I described above, two caveats are in order. First, the descriptions of legal decision making given above do not comprehensively explain all kinds of legal decision making. Since my purpose is to understand those who disagree with us, I focus on the drivers of divergent factual determinations and conflicting legal perspectives. I identified these drivers as hypothesis generation and hypothesis testing, which are psychological factors reflected in external legal activities. These are the checkpoints to discover how other people reason differently from us.

The preceding research has devoted considerable effort to modeling judicial decision making.³⁸ However, too many studies have focused on the correlation between judges' political orientations (liberal or conservative) and the outcomes of cases.³⁹ The political orientations of judges are not always visible outside the U.S. context, nor are the views on every specific legal policy or every controversial case divided between those of conservatives and liberals. A more desirable empirical strategy is to choose a specific policy issue and examine whether the judges' intrapersonal preferences about this policy influence their judgments. This empirical strategy is undoubtedly difficult to implement, and there is only one empirical study in which judges participated, explained their

³⁸ Judge Posner classifies this research into nine theories. See Richard Posner, *HOW JUDGES THINK* 19-43 (2008). Other recent important books in this field include: Eileen Braman, *LAW, POLITICS, AND PERCEPTION* (2009); *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* (David Klein & Gregory Mitchell eds., 2010); Michael Bailey & Forrest Maltzman, *THE CONSTRAINED COURT* (2011); *IDEOLOGY, PSYCHOLOGY, AND LAW* (Jon Hanson ed., 2012); Lee Epstein et al., *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013). Of course, none of these contributions so much ends the discussion as invigorates it. Existing research has not benefitted from collaboration between professors of political science and professors of law.

³⁹ See Furgeson & Babcock, *supra* note 30, for a summary of the literature.

attitudes about the specific policy (the death penalty, in this study), and evaluated social science evidence (about the deterrent effect of capital punishment).⁴⁰ Other studies have relied instead on experiments, in which law school students or undergraduate students are participants.⁴¹ Criticizing empirical research on judicial behavior is easy, but as long as there is no adequate alternative for the better understanding of judicial behavior or legal decision making in controversial cases, I have to rely on the best available theories today: motivated reasoning and confirmation bias.

The second qualification I have to add is that I do not mean to argue that motivated reasoning and confirmation bias are evils in themselves. Both motivated reasoning and confirmation bias involve a biased reasoning process in the sense that people make judgements based on limited information. Agencies and courts sometimes make bad decisions mediated by motivated reasoning or confirmation bias, but they do not always fail, even when motivated by directional goals. All I want to argue is that when we encounter dissenters who are hard to agree with, we should think of their factual hypotheses and policy preferences so that we can try to understand them better. Moreover, the merit of motivated reasoning is obvious when we think of writing a paper ourselves or making a case for a client. Predicting criticism or deliberately taking the opposite position would refine our arguments and may even uncover neglected issues or new perspectives. Confirmation bias, on the other hand, will

⁴⁰ Richard Redding & Dickon Reppucci, Effects of Lawyers' Socio-political Attitudes on Their Judgments of Social Science in Legal Decision Making, 23 L. Hum. Behav. 31 (1999). Furgeson & Babcock, supra note 30, at 689-693 divides the judicial reasoning process into six mechanisms, which provides a testable hypothesis for future empirical testing.

⁴¹ See, e.g., Joshua Furgeson et al., Do a Law's Policy Implications Affect Beliefs About Its Constitutionality? An Experimental Test, 32 L. Hum. Behav. 219 (2008). On the difficulties of empirical analysis of judicial behavior and the justification of recruiting law school students as participants, see Eileen Braman, Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making, 68 J. Pol. 308, 311 (2006).

save our cognitive effort and make the efficient use of our cognitive resources possible.

II. Selectivity of Information Processing

I have argued that there are three kinds of mechanisms that allow us to have a better understanding of others who disagree with us: theory-ladenness, motivated reasoning and confirmation bias. What is common among these mechanisms is the selectivity of information processing. We do not have the ability to process all the information at the same time. Different disciplines focus on different aspects of the world and the phenomena around us. Selective information processing is inevitable. Then, how could we have a better, interactive dialogue with those who oppose us based on different subsets of information? Before embarking on this arduous journey, I will examine the nature of selectivity and narrow the focus of my analysis.

A. Problematic Selectivity

As I mentioned earlier, motivated reasoning and confirmation bias could produce inadequate legal reasoning and bad decisions in certain situations. It is natural to rely on institutional design to prevent such failures. In the reform of EU merger control, devil's advocate panels were set up in the DG Competition to challenge teams who have investigated cases.⁴² Given my analysis in Part I that underlying theories (or policy preferences) have a great impact on observations and hypothesis generation/testing, it is suggested that respected experts on theoretical antitrust

⁴² Jeremy Grant & Damien Neven, *The Attempted Merger Between General Electric and Honeywell: A Case Study of Transatlantic Conflict*, 1 *J. Competition L. & Econ.* 595, 630-631 (2005). Note that this is only one among the multiple institutional and substantive changes introduced. On devil's advocates in general, see Cass Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 *N.Y.U. L. Rev.* 962, 1015-1016 (2005).

economics would be the best candidates for devil's advocates.

B. Selectivity Installed in Each Discipline

Different disciplines select different sets of information to gather and analyze when trying to understand the world. We do not usually think that such selectivity is in itself problematic or inadequate. Professors teach their students to think like an economist or think like a lawyer. However, if we wish to encourage interdisciplinary dialogue, we can no longer take installed selectivity as a given. We saw in Part I that lawyers and economists have different underlying theories for identifying bad results or situations that the law should address. Beneath these differences lie different value judgments.⁴³ If this is the case, interdisciplinary disagreements between economists and lawyers are no different in principle from political controversies over abortion, climate change, or gun control.

I have described two different levels of selective information processing. One is mediated by psychological influences and the other is mediated by disciplines. In practice, both are likely to operate at the same time. Appointing an economist as a devil's advocate, by itself, might not assure an interactive dialogue within the agency. The reason is that the selectivities installed in different disciplines are more intractable than those mediated by psychological mechanisms, and need a more fundamental treatment. Therefore, I will focus my argument on interdisciplinary dialogues in the remaining part of this essay.

Seeing that interdisciplinary disagreements are just like other clashes of values, lawyers might rely on the literature on deliberative democracy for clues to a better dialogue. For example, Deliberative Polling (DP) offers at least a hope for a more interactive dialogue in situations where there are deep divides.⁴⁴ The processes of DP are as follows. Randomly

⁴³ See also *infra* note 53.

⁴⁴ By "deep divides," I mean those disagreements caused by established values, beliefs or theories that underlie specific policy preferences. When lawyers and

sampled people are asked to participate in deliberative polling. The people who accepted are given carefully balanced briefing materials laying out the major arguments for and against given policy proposals, and they discuss these issues in a small group and ask questions in sessions with experts. Answers to questionnaires before and after this deliberation will show the net (average) change and gross (individual) change in their opinions.⁴⁵ Fishkin claims that in divided societies where communities are divided over integration or separation, deliberative treatment changed the participants' minds.⁴⁶ DP encourages an interactive dialogue as I defined it above.⁴⁷ However, it is implausible that their model, without any adjustments, is useful for deep disagreements between experts.

Before moving to my proposal for encouraging an interactive dialogue between lawyers and economists, I cannot help quoting the admonition of Iris Young. As she put it, "The mirroring evoked by the ideas of symmetry and reversibility suggests that we are able to understand one another because we are able to see ourselves reflected in the other people, and find that they see themselves reflected in us. But such images of reflection and substitutability, I suggest, support a conceptual projection of sameness among people and perspectives at the expense of their differ-

economists disagree on antitrust policy, such disagreements are likely to be deep divides.

⁴⁵ James Fishkin & Robert Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 *Acta Politica* 284, 288 (2005); Robert Luskin & James Fishkin, *Deliberation and 'Better Citizens,' Working Paper 5* (2002). Deliberative Poll is meant to create a hypothetical public or a counterfactual, in that it sets the participants to deliberating more intensively than most of them ever do in real life. Robert Luskin et al., *Considered Opinions: Deliberative Polling in Britain*, 32 *B. J. Pol. S.* 455, 458 (2002). Fishkin explicitly distances himself from consensus, which makes his model more appealing to situations with deep divides. James Fishkin, *WHEN THE PEOPLE SPEAK* 39 (2009) (arguing that a deliberative design requiring a consensus "verdict" may yield results that depart from the conscientious judgments of the deliberators).

⁴⁶ Fishkin, *id.* at 161-168.

⁴⁷ See *supra* note 4.

ences.”⁴⁸ Interactive dialogues are impossible without diversity-seeking and attentive minds so that each can detect his or her own misunderstanding of others. Could everyone have such a noble mind in encountering aggressive dissenters? If that is not the case, shouldn't we take a bold step to prevent us from widening the gaps? The next part gives my answer.

III. Beyond Consumer Welfare

The goals of antitrust law, or the appropriate standard for specifying anticompetitive conduct have been a recurring topic in the U.S. since the 1960s.⁴⁹ Some have argued that the total welfare (social welfare) standard should govern,⁵⁰ while others argue that consumer surplus should,⁵¹ and still others adopt a more nuanced approach.⁵² Note that recent arguments are more sensitive to contexts in one way or another and I have had to sacrifice accuracy in classifying them.

A. Limitations of Both Standards

Given the two established disciplines of law and economics, it should be obvious that choosing either total welfare or consumer surplus as the

⁴⁸ Iris Young, *Asymmetrical Reciprocity: On Moral Respect, Wonder, and Enlarged Thought*, 3 *Constellations* 340, 346 (1997).

⁴⁹ A sample of recent research includes *THE GOALS OF COMPETITION LAW* (Daniel Zimmer ed. 2012; Abraham Wickelgren, *Issues in Antitrust Enforcement*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW* 267, 272-276 (Einer Elhauge ed., 2012); Roger Blair & Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 *Antitrust L.J.* 471 (2012).

⁵⁰ See, e.g., Robert Bork, *THE ANTITRUST PARADOX* 81 & 427 (1993) (1978); Richard Posner, *ANTITRUST LAW* ix & 23-27 (2d ed. 2001).

⁵¹ See, e.g., Jonathan Baker, *Competition Policy as a Political Bargain*, 73 *Antitrust L.J.* 483, 521-22 (2006).

⁵² Wickelgren, *supra* note 49.

only goal of antitrust is likely to discourage an interdisciplinary dialogue. Such a strategy will aggravate current deep divides between lawyers and economists in Japan. Moreover, both total welfare and consumer surplus are imperfect as the only goal to pursue.

Total welfare is the aggregate sum of the welfare of all participants who trade in a market. Total welfare presupposes a trade-off between different individuals' utilities.⁵³ Japan has experienced two hard-core cartel cases which are difficult to explain using the total welfare standard.

(a) Monopsony Cartel with Inelastic Upstream Supply

In a 2008 bid-rigging case⁵⁴ there were three buyers who used a certain category of metal to manufacture raw materials; the relevant product was molten metal, which was discharged from waste disposal plants and sold by local governments to be used as the input for these buyers. Would such a cartel reduce the output of the metal sold by the local governments that ran these plants, if the price was decreased due to collusion? Since the relevant product was a by-product of waste, the supply function of the molten metal was likely to be inelastic: a vertical line insensitive to price change.⁵⁵ Output reduction might not be likely even in the long run when it is costly for local governments to reduce supply.

⁵³ Aggregating different individuals' well-being into a single measure of social welfare involves value judgments. See Louis Kaplow & Steven Shavell, *FAIRNESS VERSUS WELFARE* 26 (2002).

⁵⁴ Mitsubishi Materials Co. hoka Niken ni kansuru Ken, 55 Sinketsushū 692 (Oct. 17, 2008).

⁵⁵ Roger Blair & Jeffrey Harrison, *MONOPSONY IN LAW AND ECONOMICS* 81-82 (2010) argue that in the context of inelastic supply, producers may reduce supply in the future. The supply function in this case may have become elastic if the local governments could easily have increased their upstream charges for waste disposal services. However, such a policy change would be unlikely. Moreover, even stockpiling the metals would not be costless and therefore allows room for a conspiracy.

(b) Collusion Producing Higher Value with Lower Costs

For conspirators in bid-rigging, it is the most profitable to let the least cost builder win the bid and the contract. The other conspirators will share the profit with the least cost builder. A hypothetical public procurement could be thought of, in which the same conspirators have no chance to meet again, thus the collusive rule to rotate the winner is impractical. Suppose further that the lowest cost winner built a high-value-added stadium or building which is more valuable than that could have been accomplished with competition. In other words, collusion produced more value with lower costs than competition, which would have produced a less valuable product with moderate costs. Such a hypothetical situation might be realized in unjust enrichment lawsuits where the relevant product is one-of-a-kind for a special order.

How would courts decide on such a hypothetical case? We can get a clue from a Japanese district court case in 2011.⁵⁶ Since this was an unjust enrichment case, the court had to set off the collusive price against the value of the product. In calculating the product's value, the average total cost and the competitive margin were added together. What this decision suggests is that in our hypothetical case, the additional value added by the lowest cost conspirator would not be legally recognized.

Consumer surplus, on the other hand, would explain these cases but would raise questions as well. Consumer surplus is not necessarily the same as consumer interest, in that the former presupposes aggregating the gains (winners) and the losses (losers). For example, sellers tying products or using resale price maintenance could face heterogeneous consumers: some consumers are willing to accept tying or presale promotional services, but others decline them. How do we evaluate consumer surplus in such situations? The answer seems obvious, but it is not necessarily so for lawyers. Those consumers with a larger surplus in the aggregate, who are not necessarily the majority in number, would decide the consumer voice. As long as we aggregate the utilities and disutilities

⁵⁶ Japan v. FDK Co., (Tokyo District Court, June 23, 2010).

of heterogeneous consumers, we have to make decisions without the relevant consumers' participation or representation in the process.

B. Manipulating Policy Preference as Dialogue Support

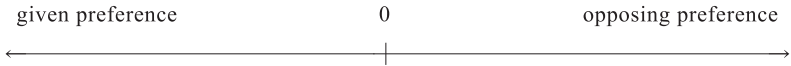
If we accept the progress that have been made in law and in economics within their disciplines, it is difficult to concentrate on just one perspective and ignore or discard the other. Underlying theories, which have been emphasized in this essay, have been offered by the contributions of economics to antitrust law. It is unthinkable that antitrust policy would continue to develop without more help from economics. On the other hand, it is likewise unthinkable that antitrust law will be fully explained by the jargon of economics. Law should be something comprehensible to nonprofessionals as well. If the autonomy within one discipline is too influential, antitrust policy will lose public support.⁵⁷

We have to devise a prescription that encourages interdisciplinary dialogue without significantly changing the methodological merits of each discipline. This is more easily said than done, but my proposal is to manipulate different policy preferences. My proposal has three steps to follow.

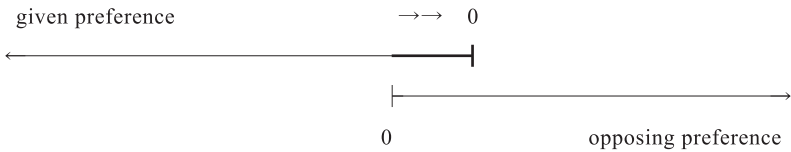
(1) Imagine a situation where there are two policy preferences that are antagonistic to each other. Let us start by choosing either one as a

⁵⁷ On the relationship between the public and the autonomy in science, see Heather Douglas, *SCIENCE, POLICY AND THE VALUE-FREE IDEAL* 7, 96-97, 137-148 (2009) (arguing that the translation of scientific uncertainty to policy needs case-specific considerations of social, economic, and ethical values, so long as these values play an indirect role in evaluating the level of uncertainty); Bernard Rollin, *Animal Research, Animal Welfare, and the Three R's*, 10 *J. Philos. Sci & L.* 1 (Apr. 5, 2010). On the influence of forensic evidence on the autonomy of science, see Ioannis Lianos, 'Judging' Economists: Economic Expertise in Competition Law Litigation: A European View, in *THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES* 230-233 (Ioannis Lianos & Ioannis Kokkoris eds., 2010).

given preference.

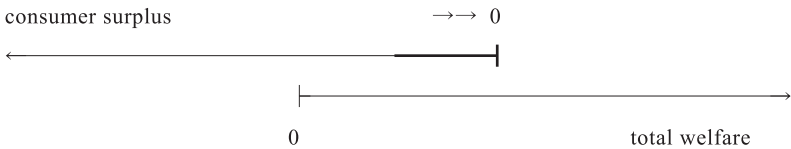


(2) We move the given preference a little bit in the direction of the opposing preference so that a narrow overlapping area arises. This area is secured by working out convergent cases where people with the given preference would come to the same policy preference as people having the opposing preference. Such convergent cases may be hypothetical or special cases. As the convergent area is narrower, we can marginalize the extent of manipulating the given preference.



(3) Focusing on these convergent cases, we reformulate the given preference so that these convergent cases are also explained by the reformulated given preference. Reformulation could be achieved by broadening the given preference, using abstraction or superordinate concepts.

What happens when we apply these steps to disagreements over anti-trust goals (total welfare vs. consumer surplus)?



Starting from total welfare, it is readily clear that reformulating total welfare is difficult or even impossible, because this is the same as subverting welfare economics itself. As I said at the outset of this section, I will preserve the methodological merits of the disciplines. Then, we start instead from consumer surplus. We have to work out convergent cases for which people who prefer consumer surplus would support the same

conclusion as those who use the total welfare standard. For example, aggressive price competition between homogenous sellers will ultimately lead to a stalemate where no more efforts could cut price. If a seller with market power could invest in innovation and introduce new products, there could be a situation where the utilities for some consumers and the total welfare would increase, while consumer surplus in the aggregate would decrease.⁵⁸ However, a mixture of price and quality competition may be preferable to total price competition even though the consumer surplus for consumers with a higher willingness to pay is reduced. If this case is correctly a convergent case, reformulating the consumer surplus standard is necessary to incorporate such a case.

After reformulation, I would argue that “preserving sellers’ abilities and incentives to serve buyers’ needs (or buyers’ abilities and incentives to switch to different sellers based on their identities) in the aggregate” should be the goal of antitrust policy. In other words, antitrust should protect the flexibility to serve buyers’ needs in the aggregate (flexibility standard). The qualification “in the aggregate” means that we should evaluate the flexibility of sellers (or of buyers when purchasing) in the overall market.

There are two implications to be drawn from the reformulated goal of antitrust. First, this reformulation makes us realize that we still have poor understandings of consumer choice or consumer needs in predicting competitive effects, even though consumers have been thought to be the beneficiaries of competition law. Secondly, the flexibility standard provides a perspective for reexamining the rationale of regulating the abuse of a superior bargaining position. From the flexibility standard, what we should examine is the impact that these abuses would have on the aggregate flexibility of the abuser and the abused.⁵⁹ This is quite similar to examining a vertical joint venture (or a failure of one). We will ask which party could better determine the efficient use of the abused parties’ employees or money to serve the buyers’ needs. The flexibility approach

⁵⁸ What is in my mind is a kinked demand curve with two prices.

⁵⁹ As I mentioned, flexibility should be evaluated in the aggregate.

also raises a question of whether all kinds of abuses should be equally subject to mandatory surcharges as provided in Article 20-6.

Conclusion

This essay argued that our failure to understand those who disagree with us comes from selective information processing. Such selectivity is not easily avoided even with sincere and hard thinking. The reasons are two-fold: one is that selectivity is installed in our disciplines and the other is that our minds are at times fallible due to motivated reasoning and confirmation bias. I proposed manipulating policy preferences to support an interactive dialogue. Such a manipulative strategy is not the conclusion, but is an aid to uncover new perspectives in order to encourage better understanding of each other and to encourage interactive dialogue. Although I focused on the interdisciplinary manipulation of policy preferences, I believe that the same strategy is generally effective when there are deep disagreements. I also proposed the flexibility standard as the goal of antitrust. In this sense, I am imposing a third value, theory, or preference, but this is justified as long as it encourages interactive dialogue within the antitrust community.

Readers may have felt that I am too pessimistic about the success of dialogues between antitrust lawyers and economists. Successful precedents exist in the U.S. and Europe. However, the antitrust community in Japan is not comparable in its context to that of the U.S. where economic analysis of law is prevalent, or to that of Europe where reforms in antitrust practice have been carried out.

This project started from the institutional design of competition policy but ended up focusing on the legal reasoning process at the intrapersonal level. My point is that even when situated in a good institutional design, the three mechanisms analyzed in this essay could produce bad decisions. Future directions of research include institutional design, where research on groupthink is quite important. Another topic which I did not fully analyze in this essay is the system of sanctions. The difficulty in examining sanctions lies in the fact that the guiding principles or

underlying theories of sanctions are not necessarily clear.⁶⁰ The legal decision making process described in this essay provides a basic framework, based on which we can examine the relationships between economic theory, empirical evidence, and rules of thumb. My proposal is tentative and has to be tested in numerous specific contexts. The effectiveness of my proposal could be further evaluated by consulting the literature on debiasing/rebiasing⁶¹ and conflict resolution. This essay is the first step towards these rich areas of development.

⁶⁰ See Ioannis Lianos, Competition Law Remedies: In Search of a Theory, in THE GLOBAL LIMITS OF COMPETITION POLICY 177 (Ioannis Lianos & Daniel Sokol eds., 2012).

⁶¹ My proposal for manipulating preferences as dialogue support is a strategy to counter motivated reasoning or biases which are taken as given. Jolls & Sunstein call such a strategy an insulating strategy. Christine Jolls & Cass Sunstein, Debiasing through Law, 35 J. Legal Stud. 199, 225 (2006).